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Legally Speaking-Copyright and Distance Education

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you get mousetrapped into a nightmare of ads from which there is no escape except shutting off your computer.

Wholesalers became such a national problem, that Congress passed the **Anticybersquatting Consumer Protection Act** making it illegal to register in bad faith a domain name "identical or confusingly similar" to that of another person or company. 15 U.S.C. § 1125(d)(Supp. 2000). Statutory damages may be awarded from \$1,000 to \$100,000 per domain name. 15 U.S.C. § 1117(d) (Supp. 2000).

Zuccarini had bracketed joecartoon.com with multiple variations like joecarton.com. Shields sent cease and desist letters to Zuccarini who promptly labeled his sites as a protest against animal mutilation. Naturally he was doing it "for the children".

On the District Court level, Shields got a summary judgment \$10,000 for each domain name plus \$39,000 and change for attorneys' fees.

On appeal, the court noted that the ACPA was designed to combat "cybersquatting" — profiting from the goodwill associated with trademarks of others.

Not to mention infuriating the oafs who can't spell Britnee Spears or Pamela Amberson properly.

The first two elements of the ACPA claim were easily met. "Joe Cartoon" is a distinctive mark, and Zuccarini's domain names were confusingly close. Joe Cartoon had been around for fifteen years and the web site for five. The *NY Times* had run a page one story on Joe Cartoon. See Andrew Pollack, "Show Business Embraces the Web, But Cautiously," *N.Y. Times*, Nov. 9, 1999, at A1.

I'm just guessing from this, but it looks like he started out with only a single cartoon image of a frog in a blender. Only eight years later did he animate it. Do you realize the money we could make off squashing various critters with a steam roller? We were raised on Wile E. Coyote, by gosh! While we were wasting our time in grad school, Shields was pushing the envelope.

Shields had numerous emails of complaint from his army of fans who had blundered into mousetraps. Zuccarni even admitted to his personal amazement at the number of folks who mistype.

Zuccarini argued the act only outlawed grabbing a site using a famous name, then selling it back to the celebrity — and not "typosquatting" as he persisted in calling it. The court read him the language of the act (*presumably slowly*) and noted the legislative history of cybersquatting which included kiddies typing in

"dosney.com" and finding hardcore pornography.

You can go to Explorer and find 'dosney' later on. Settle down and let's get through this.

The final requirement was to find that Zuccarini acted in bad faith. Zuccarini had never used his sites to sell goods or services or as trademarks. Thus he had no intellectual property rights in the names. § 1125 (B)(i)(I)(II).

Zuccarini had knowingly registered thousands of confusing names for commercial gain. And he admitted to it. Hence bad faith. See *Northern Light Tech., Inc. v. Northern Lights Club*, 236 F.3d 57, 65 (1st Cir. 2001).

Zuccarini claimed he was protesting ger-

bil micro-zapping and he had a First Amendment right to take this needed stand. The district court called his defense a "spurious explanation cooked up purely for this suit." *Shields*, 89 F. Supp. 2d at 640. The Third Circuit agreed and pointed out he had only gone into a protest mode a few hours after been served with the lawsuit.

O.K. I did it. I paused in finishing this in-depth case analysis and checked out joecartoon.com.

It exceeded my expectations.

Twisted-tubbies. Stump the three-legged dog. Beaver Ranger with puns about ... well, you can see for yourself.

All proudly advertised by famous airlines and credit cards. 🐾

Legally Speaking — Copyright and Distance Education

by **Bryan M. Carson, J.D., M.I.L.S.** (Coordinator of Reference and Instructional Services, Western Kentucky University, Bowling Green, KY 42101; Phone: 270-745-5007; Fax: 270-745-2275) <bryan.carson@wku.edu>

The thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun.¹

Is the Internet "different?" Does the Internet change everything? Or is the Internet merely a new delivery technique for existing resources? These are fundamental questions that go beyond the delivery of library services, creating legal questions and touching the social fabric of our lives.² Today it is possible to obtain a Ph.D. from a regionally accredited institution without ever setting foot on the university's campus.³ Internet-based distance education raises many issues, including a number of legal issues that have implications for librarians and for publishers.

The idea of distance education is not really new. Correspondence courses first became popular in the early years of the twentieth century. The University of South Africa has been a leader in the field, even granting a law degree to **Nelson Mandela** while he was in prison. However, the new delivery format of the Internet has popularized distance education and made it much more common.

The problem of copyright is one of the issues connected with distance education. The current copyright law contains exceptions for the educational use of

materials, but the mode of delivery of distance education raises new issues.

Let's begin by reviewing the status of copyright law in traditional on-campus education. If you are teaching a class on campus, copyright law allows you to make copies of articles for your students. You can show movies in class. You can play music. This is all perfectly legal because of the fair use provisions under section 107 of the copyright law,⁴ and the educational performance exceptions listed in section 110.⁵

I have discussed fair use before in this column, so I will just give a brief summary. According to §107, "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."⁶ Even though the author of the work has the exclusive right to control what is done with his or her work, it is our First Amendment right to criticize, critique, or parody that work. According to **Duke University** law professor **David L. Lange**, the fair use provisions give copyright "breathing space" so that our First Amendment freedom of speech rights are not infringed upon by the copyright laws.⁷

Section 110(1) allows "performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruc-

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tion. . .⁸ Because of section 110, a professor may show a movie or play a recording in class. The concept of a "similar place devoted to instruction" includes libraries, auditoriums, etc., provided that the performance comes from a legal copy, and any copies are legally made. However, remember that the instruction must be "face-to-face." In other words, section 110(1) does not provide an exception for distance education.

Section 110(2) does allow non-profit educational institutions to transmit a performance of a nondramatic literary or musical work.⁹ However, this exception only applies if the transmission is received in "classrooms or similar places normally devoted to instruction," or if the transmission is received by a handicapped person who is unable to attend in a classroom.¹⁰ In effect, section 110(2) allows educational broadcasts of copyrighted materials to remote classrooms, but not to homes, offices, and other places where distance education students may be located. This restriction has many implications for distance education programs.

For example, suppose that you are teaching a music appreciation class. One section meets on campus, and one section is taught via distance education on the Web. In the classroom, you may play any recording that you want. This is a performance, but copyright is not a factor because of section 110(1).

On the other hand, if you are teaching a class via the Web, you are transmitting the performance. The current language of section 110(2) only allows you to transmit a performance if the transmission is received in "classrooms or similar places normally devoted to instruction." Under the doctrine of fair use, you are still allowed to play excerpts of the recording for your distance education class. "Fair use still applies to distance education if you use reasonable and limited portions of a copy which has been legally obtained and the copies are lawfully made."¹¹ However, fair use still does not solve the problem of performance in distance education. In order to obtain a license to play this recording for an Internet class, you would have to pay royalties to the owner of the copyright. The legal status of educational copies and educational performances is one of the biggest problems that is faced by the budding Internet distance education market.

The issues raised by section 110(2) have been the subject of a great deal of discussion lately. In April, the Senate Judiciary Committee (the committee in the Senate that works with Intellectual Property issues) took up the issue of the section 110(2) educational performance exception. The bill (Senate Bill 487) was jointly sponsored by Senators Hatch and Leahy, and is called the "Technology, Education and Copyright Harmonization Act

of 2001," or the "TEACH Act."¹² This act was passed in the Senate, as amended, on June 7, and introduced in the House, where it was referred to the Judiciary Committee. On July 11, 2001, the House Subcommittee on Courts, the Internet, and Intellectual Property approved the TEACH Act for full committee action.¹³

Copyright issues are difficult. Educators have one perspective; publishers have another. Librarians are generally caught in the middle. **MaryBeth Peters**, the Registrar of Copyrights, decided to do something about the problem. **Ms. Peters**, with the cooperation of **Senators Hatch and Leahy** and their staffs, convened a summit meeting for those

who were interested in the TEACH Act. This meeting included representatives from publishing, education, and libraries. The participants worked together on the bill to develop language for the bill which would satisfy everyone. On May 4, 2001, the participants came to a joint agreement on what the provisions of this bill should be.¹⁴

The main thing that the TEACH Act does is to amend Section 110(2) to eliminate the "face-to-face" requirement of the educational performance exception. The new exception would be available only to accredited, non-profit educational institutions, and the performance must only be received exclusively

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by students enrolled in that course. The Senate version did not include performances by non-profit libraries. At one point the House version did include performances by non-profit libraries; however, that language was removed from the bill during committee markup. For-profit institutions, even if accredited, must pay royalties for a license.

The TEACH Act also amends section 106 to allow digital transmissions to be made to members of the class. Section 106 states that the author has the exclusive right to control copies of his or her work. However, every time you create a digital version of a document or performance, you are making a copy. The TEACH Act allows educators to make a

copy in order to transmit the work to their distance education students.¹⁵ In order to claim the protections of the TEACH Act, the non-profit accredited educational institution must be distributing the document or performance for educational purposes. The transmission must be only to those students who are enrolled in the class, so Websites should be password protected. Finally, to the extent possible, the institutions should attempt to make sure that the materials are not transmitted any further by the students. This provision would be satisfied by providing the students with Web pages which may be viewed but not printed or downloaded.

If passed, the TEACH Act would allow accredited¹⁶ non-profit educational institutions to do in their distance education programs what they can do in their on-campus

instruction. Rather than being a new type of education, the Internet will indeed be simply a new transmission method for traditional education.

Educators are becoming less bound by distance, and the TEACH Act helps to ease the restrictions. Publishers and authors will know that their work is being distributed only to students in accredited non-profit educational institutions for educational purposes. Educators will be able to transmit some performances for their distance education classes, and students will be able to obtain a quality education via the Internet. By working together on the language of the TEACH Act, everybody wins. And as Ecclesiastes states, there truly is nothing new under the sun.

*All original content copyright 2001
Bryan M. Carson.*

Endnotes

1. Ecclesiastes 1:9. King James Bible. **Thomas Nelson**, 1990.
2. In a previous article (December 2000), I stated that the advent of the Internet has created as big a change in society as the invention of the printing press. However, it is not the Internet itself that has created this change, it is the social changes that accompany the use of the Internet.
3. For example, Touro International University, the distance education section of Touro College in New York, provides Ph.D. degrees in Business Administration and Health Sciences which do not require any residency. This program is fully accredited by The Commission on Higher Education of the Middle States Association of Colleges and Schools. See Touro's Website at <http://www.touro.edu/>.
4. 17 U.S.C. §107.
5. 17 U.S.C. §110.
6. 17 U.S.C. §107.
7. **David L. Lange**. "Theory and Practice in Copyright." Presentation at *Intellectual Property in the Digital Age*, Madison, Wisconsin, May 8, 2001.
8. 17 U.S.C. §110(1).
9. 17 U.S.C. §110(2).
10. *id.*
11. **MaryBeth Peters**. Keynote address at *Intellectual Property in the Digital Age*, Madison, Wisconsin, May 7, 2001.
12. "Technology, Education and Copyright Harmonization Act of 2001." 107 S. 487.
13. 147 Cong Rec D 688.
14. I attended the conference *Intellectual Property in the Digital Age* in Madison, Wisconsin, on May 6-9, 2001. The conference began two days after the joint agreement was negotiated. Many of the negotiators were participants at this conference, and the agreement was reported at that time.
15. "Technology, Education and Copyright Harmonization Act of 2001." 107 Markup S. 487.
16. According to the TEACH Act, accreditation for post-secondary institutions "shall be as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education; and with respect to an institution providing elementary or secondary education, shall be as recognized by the applicable state certification or licensing procedures." 107 Markup S. 487.

Questions & Answers — Copyright Column

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QUESTION: *A special education teacher in my school has asked whether she can audiotape a book being studied in class for a child with learning disabilities. The library wants to purchase the tape, but a thorough search has not revealed any source from which it is available. Since it is unavailable for purchase, may the library and school make its own audiotape for this child?*

ANSWER: Under section 108 (the library section) of the Copyright Act, the answer is no, but under the Americans with Disabilities Act, the answer is yes. In the legislative history that accompanied the Act, specifically in the House Report, in the discussion on fair use under section 107, there is a statement about making copies of works in special forms for blind persons. The House Report mentions the Library of Congress program for making such copies but also states that making a single copy for blind persons would properly be a fair use under section 107. By analogy, making an audiotape for the one child should also be fair use. Such tapes should not then be added to the library collection without permission, however.

QUESTION: *When a library creates a Website, is the HTML code protected by copyright? There appears to be some disagreement among the experts on this matter.*

ANSWER: No, it is not. The underlying work is what is protected, for example,

the literary work, musical work, audiovisual work, etc., but not the HTML code. Section 102(a) of the Copyright Act details the eight categories of works that may be protected by copyright; while it is possible that other types of works might also be protected, a judgment would be made based on the originality/creativity requirement of the Act. Although HTML code is very useful, the code underlying a Webpage is not copyrightable although the page itself is as an audiovisual work if it meets the requirements of originality/creativity, etc.

QUESTION: *As an academic medical library, we are often asked to provide access to full-text journals to other libraries located in federal buildings on our campus. The full-text journals are free to the library with print subscriptions. Would this be a copyright violation?*

ANSWER: Not a copyright violation, but whether there is some type of liability for the library depends on the license. License agreements are contracts governed by state contract law instead of federal copyright. If a license for the online journals says restricted to the school's students, faculty and staff, then it violates the contract to allow the federal employees to use the materials. If not, then it is permissible, but each license agreement would have to be consulted for that title or group of titles.

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