“Cyberspace law”, which as recently as just a few years ago consisted of a small handful of mostly arcane cases that left us searching for guidance, has since exploded — a development perhaps best explained by the following observation from University Business magazine: “In the information age, the whole planet is just a click away. So, unfortunately, are all the lawyers.” Today, much like the internet itself, cyberspace law seems to have engulfed almost everything in its path.

In past sessions at this conference, when such a thing was still possible, we attempted to cover the entire body of cyberspace law. See, e.g., Steven J. McDonald, “An Overview of Internet Law” (2001 National Conference on Law and Higher Education). This year, recognizing the enormity of such a task and the limits of your interest and patience, we focus only on the most significant recent developments:

I. Copyright

Until recently — in fact, until the internet — copyright was itself a frequently overlooked and relatively sleepy area of the law. Now, however, with the ubiquity of computers, the ready availability of broadband internet access, and the ease of digitization, the stakes have become extraordinarily high, and copyright law has assumed an extraordinary prominence and importance in all of our lives and work. Some of the current battlegrounds, including one major victory and one major loss, are:

A. The TEACH Act

More than a quarter of a century ago, Congress authorized educators to make extensive use of copyrighted materials in “distance education” without first seeking permission. Unfortunately, however, the relevant statute, 17 U.S.C. § 110(2), was
drafted specifically in terms of the technology of the day – live satellite broadcasts from one classroom to another – and remained frozen in that time.

As the disjunction between law and technology became increasingly problematic for educators, Congress, as part of the Digital Millennium Copyright Act of 1998, directed the Register of Copyrights to consult “with representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives” and then to “submit . . . recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works”. Digital Millennium Copyright Act, § 403(a), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (uncodified provision). Following extensive hearings, the Register submitted her report, which called for a significant update and expansion of existing § 110(2) to meet modern realities. Report on Copyright and Digital Distance Education (1999), available online at <http://www.copyright.gov/reports/de_rprt.pdf>. In particular, the Register noted that existing law embodies “a policy determination that performances or displays of copyrighted works in the course of systematic instruction should be permitted without the need to obtain a license or rely on fair use”, but that, “[w]ithout an amendment to accommodate . . . new technologies, the policy behind the law will be increasingly diminished”. Id. at xv.

Although the content-owner community opposed the Register’s initial recommendations, further negotiations among the relevant stakeholders ultimately resulted in legislation – the Technology, Education, and Copyright Harmonization Act (the “TEACH Act”) – that was widely supported by educational institutions, libraries, and content owners alike. Signed into law on November 2, 2002, the TEACH Act now provides specific, extensive, and even relatively clear guidelines for the use of copyrighted materials in internet-based education. Those guidelines are summarized in the following chart:
### A COMPARISON OF PRIOR AND CURRENT LAW GOVERNING THE USE OF COPYRIGHTED MATERIALS IN INSTRUCTIONAL ACTIVITIES

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Applies to nonprofit educational institutions</td>
<td>Applies to nonprofit educational institutions</td>
<td>Applies to accredited nonprofit educational institutions</td>
</tr>
<tr>
<td>Permits the display of any work</td>
<td>Permits the display of any work</td>
<td>Permits the display of any work in an amount comparable to that which is typically displayed in the course of a live classroom session</td>
</tr>
<tr>
<td>Permits the performance of any work</td>
<td>Permits the performance of non-dramatic literary and musical works</td>
<td>Permits the performance of non-dramatic literary and musical works and reasonable and limited portions of any other works</td>
</tr>
<tr>
<td>(No similar provision)</td>
<td>(No similar provision)</td>
<td>Excludes the performance and display of works produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks</td>
</tr>
<tr>
<td>The performance or display of a motion picture or other audiovisual work cannot be made by means of a copy that was made unlawfully if the person responsible for the performance or display knows or has reason to believe that the copy was made unlawfully</td>
<td>(No similar provision)</td>
<td>The performance or display cannot be made by means of a copy that was made or acquired unlawfully if the institution knows or has reason to believe that the copy was made or acquired unlawfully</td>
</tr>
<tr>
<td>The performance or display must be</td>
<td>The performance or display must be</td>
<td>The performance or display must be</td>
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<tr>
<td>Made in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction</td>
<td>By or in the course of a transmission made primarily for reception in classrooms or similar places normally devoted to instruction</td>
<td>Or in the course of a transmission made solely for, and to the extent technologically feasible reception of which is limited to, students officially enrolled in the course for which the transmission is made</td>
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<tr>
<td>The performance or display must be made by an instructor or pupil</td>
<td>(No similar provision)</td>
<td>The performance or display must be made by, at the direction of, or under the actual supervision of an instructor</td>
</tr>
</tbody>
</table>
| (No similar provision) | The performance or display must be:  
  - directly related and of material assistance to the teaching content of the transmission  
  - a regular part of the systematic instructional activities of the institution | The performance or display must be:  
  - directly related and of material assistance to the teaching content of the transmission  
  - an integral part of a class session offered as a regular part of the systematic mediated instructional activities of the institution |
| (No similar provision) | (No similar provision) | The transmitting institution must:  
  - institute policies regarding copyright  
  - provide faculty, students, and relevant staff with informational materials that accurately describe and promote compliance with copyright law  
  - provide notice to students that materials used in connection with the course may be subject to copyright |
In the case of digital transmissions, the transmitting institution:

- must employ technological measures that reasonably prevent recipients from retaining the work in accessible form for longer than the class session and further disseminating the work to others without authorization
- must not interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination

* The term “mediated instructional activities” means activities that are an integral part of the class experience, that are controlled by or under the actual supervision of the instructor, and that are analogous to the type of activities that would take place in a live classroom setting, other than activities that use works such as textbooks, course packs, and similar materials in any media that typically are purchased by students for their independent use and retention.
As with all new laws, the TEACH Act will require a “break-in” period, with two provisions in particular needing further development: First, what “policies regarding copyright” must we “institute”, and, second, what “technological measures” must we employ to prevent further, unauthorized use? Unfortunately, Congress provided little guidance on these two requirements other than the statutory language, although it did direct the Undersecretary of Commerce for Intellectual Property to study what “technological measures” are, or are likely to become, available and to make a report within 180 days of the enactment of the statute. That process is already well underway. See 67 Fed. Reg. 72920 (Dec. 9, 2002). In addition, EDUCAUSE and the American Library Association are working together to provide guidance on that issue as well.

For further information on the TEACH Act, the following resources are particularly helpful:

Georgia Harper, *The Teach Act Finally Becomes Law*  
http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm

Kenneth D. Crews, *The Teach Act*  
http://www.ala.org/washoff/teach.html

B. **Eldred v. Ashcroft**

In 1998, Congress enacted, and President Clinton signed, the Sonny Bono Copyright Term Extension Act, which extended the term of all existing and future copyrights by 20 years – and thereby effectively created a 20-year moratorium on the passage of existing works into the public domain – purportedly as an “incentive” to “spur” the creation of new works. Many objected to what they viewed as a “copyright grab” by a powerful movie, music, and publishing lobby and, in particular, wondered why long-deceased authors, or even the living authors of already-existing works, might need a retroactive incentive with respect to their works.

Among other things, the new law prevented Eric Eldred, the creator of a then-obscure web site devoted to classic literary works in the public domain (http://www.eldritchpress.org), from posting Robert Frost’s “Stopping by Woods on a Snowy Evening”, which had first been published in 1923. With the assistance of a volunteer legal “dream team”, Eldred challenged the constitutionality of the statute in
Eldred v. Ashcroft, 2003 U.S. Lexis 751, a case that has just been decided by the Supreme Court. Unfortunately, the Court rejected Eldred’s arguments and upheld the extension. Acknowledging that the extension might well be “very bad policy”, id. at *62, the Court held that it is “not at liberty to second-guess congressional determinations and policy judgments” about the appropriate length of copyright protection, id. at *40.

While the facts of the case may seem amusing and the issues may seem esoteric, they are anything but. As a result of the decision, not only will the growth of the public domain “library” be deferred for an entire generation, but the precedent has been set for more such extensions. Indeed, when informed that the Constitution clearly does prohibit Congress from extending copyrights forever, Jack Valenti, the head of the Motion Picture Association of America, reportedly replied that he would settle for “forever minus a day”.

For further information on the Eldred case and on the public domain generally, see the following:

Eldred v. Ashcroft Web Page
http://eldred.cc

Eldred v. Ashcroft: A Primer
http://www.washingtonpost.com/wp-srv/technology/articles/eldredprimer_100902.htm

Lawrence Lessig, From the Front Line

Laura N. Gasaway, When Works Pass Into the Public Domain
http://www.unc.edu/~uncing/public-d.htm

C. Digital Millennium Copyright Act

Initially hailed for its resolution of the issue of ISP liability for copyright infringement, the Digital Millennium Copyright Act is now increasingly being criticized for the effects of its “anti-circumvention” provisions. Intended to enable copyright owners to use technical means to protect their digital works from unauthorized use, those provisions are now also frequently being used in efforts to prevent legal uses of those works, such as uses that would constitute “fair use” under copyright law. Most notably,
the Recording Industry Association of America threatened to sue Princeton University professor Edward Felten if he published a research paper merely discussing technical security measures designed to prevent the copying of CDs.

While the law is not as draconian as the numerous “lawyer letters” invoking it insist, it does tip the balance considerably and is sufficiently unclear to intimidate those who would rather not spend their time and money in court. Fortunately, some relief may be on the way. As required by the DMCA itself, the U.S. Copyright Office is currently considering whether to create exemptions to the anti-circumvention restrictions, and several bills have been introduced in Congress to modify or eliminate those restrictions altogether.

For further detail on these developments, see the following:

U.S. Copyright Office, *Summary of the DMCA*

EDUCAUSE, *Digital Millennium Copyright Act Resources*
http://www.educause.edu/issues/dmca.html

Electronic Frontier Foundation, *Unintended Consequences*
http://www.eff.org/IP/DMCA/20030103_dmca_consequences.pdf

U.S. Copyright Office, *Rulemaking on Anti-Circumvention*
http://www.copyright.gov/1201

American Library Association, *What’s New?*
http://www.ala.org/washoff/copyright.html

Chilling Effects Clearinghouse
http://www.chillingeffects.org

**D. Copyright and MP3 Files**

Recent months have seen a renewed push on the part of the recording industry to crack down on the use of peer-to-peer file-sharing programs to trade copyrighted music. While the DMCA grants educational institutions relatively broad immunity from liability for infringements their students may commit through their networks, such file sharing is nevertheless a significant concern for several reasons. First, as a condition
of that immunity, the DMCA requires institutions to respond to notices of claimed copyright infringement, and the recording industry plans to increase the already-substantial number of notices it has been issuing. See Scott Carlson, “Recording Industry Plans to Accelerate Complaints About Illegal File Sharing”, Chronicle of Higher Education (Jan. 3, 2003) at A38. Second, even though the institutions themselves may be immune from suit, their students are not, and the recording industry appears to be poised to “set an example”. See Declan McCullagh, “RIAA Wins Battle to ID Kazaa User”, <http://news.com.com/2100-1023-981449.html>. Third, and most practically, the growth of file-sharing is threatening to overwhelm our systems and available bandwidth.

In an effort to address these issues, and perhaps find common ground, a “Joint Committee of the Higher Education and Entertainment Communities” was recently formed. The higher education representatives on that committee, led by Graham Spanier, have issued a statement setting forth the higher education perspective. The statement emphasizes that the committee must “seek ways to reduce the inappropriate use of P2P technology without restricting free speech and expression, invading privacy, or limiting the legitimate uses of P2P”, and it concludes that “[t]he systematic implementation of thoughtful programs of education on copyright rights and responsibilities and appropriate and inappropriate uses of P2P technologies should be a central component of such actions”. See <http://chronicle.com/weekly/documents/v49/i17/4917statement.htm>.

A sample letter to system users as part of such an educational campaign is included at the end of this outline. Another perspective on the recording industry’s efforts is available at <http://www.epic.org/privacy/student/p2pletter.html>.

II. Privacy

In past conferences, we have discussed the use of privacy policies and user notifications to cut through the many ambiguities and uncertainties inherent in privacy law. See, e.g., Steven J. McDonald, “An Overview of Internet Law” (2001 National Conference on Law and Higher Education). A number of recent cases highlight the importance of having such policies. In U.S. v. Simons, 206 F.3d 392 (4th Cir. 2000), for
example, an employee of the CIA's Foreign Bureau of Information Services was charged with having viewed and stored child pornography on "his" office computer. The court rejected his motion to suppress the results of a search of that computer, relying on an FBIS policy that expressly authorized such searches:

Simons did not have a legitimate expectation of privacy with regard to the record or fruits of his Internet use in light of the FBIS Internet policy. The policy clearly stated that FBIS would "audit, inspect, and/or monitor" employees' use of the Internet, including all file transfers, all websites visited, and all e-mail messages, "as deemed appropriate." This policy placed employees on notice that they could not reasonably expect that their Internet activity would be private. Therefore, regardless of whether Simons subjectively believed that the files he transferred from the Internet were private, such a belief was not objectively reasonable after FBIS notified him that it would be overseeing his Internet use.

Id. at 398 (footnotes and citations omitted).

Similarly, on virtually identical facts, the 10th Circuit Court of Appeals rejected an Oklahoma State University professor's attempt to suppress evidence of child pornography found on "his" university computer:

Oklahoma State University policies and procedures prevent its employees from reasonably expecting privacy in data downloaded from the Internet onto University computers. The University computer-use policy reserved the right to randomly audit Internet use and to monitor specific individuals suspected of misusing University computers. The policy explicitly cautions computer users that information flowing through the University network is not confidential either in transit or in storage on a University computer. Under this policy, reasonable Oklahoma State University computer users should have been aware network administrators and others were free to view data downloaded from the Internet.

U.S. v. Angevine, 281 F.3d 1130 (10th Cir.), cert. denied, 123 S. Ct. 182 (2002). See also Muick v. Glenayre Electronics, 280 F.3d 741 (7th Cir. 2002) ("Muick had no right of privacy in the computer that Glenayre had lent him for use in the workplace. Not that there can't be a right of privacy . . . in employer-owned equipment furnished to an employee for use in his place of employment. If the employer equips the employee's office with a safe or file cabinet or other receptacle in which to keep his private papers, he can assume that the contents of the safe are private. But Glenayre had announced that it could inspect the
laptops that it furnished for the use of its employees, and this destroyed any reasonable expectation of privacy that Muick might have had and so scotches his claim.”) (citations omitted).

Other recent cases demonstrate the problems that can arise in the absence of a clear policy on privacy. See, e.g., U.S. v. Slanina, 283 F.3d 670 (5th Cir.), vacated and remanded on other grounds, 123 S. Ct. 69 (2002) (“[G]iven the absence of a city policy placing Slanina on notice that his computer usage would be monitored and the lack of any indication that other employees had routine access to his computer, we hold that Slanina's expectation of privacy was reasonable.”); Leventhal v. Knapek, 266 F.3d 64, 74 (2d Cir. 2001) (holding that a state employee had a Fourth Amendment expectation of privacy in a computer assigned exclusively to him when his department had not “placed [him] on notice that he should have no expectation of privacy in the contents of his office computer” and did not have “a general practice of routinely conducting searches of office computers”); Adams v. City of Battle Creek, 250 F.3d 980, rehearing denied, 2001 U.S. App. Lexis 16099 (6th Cir. 2001) (holding that a “general policy of the [police] department that department-issued equipment . . . was not to be 'converted to personal use' cannot provide the necessary notice” to make an expectation of privacy unreasonable). But see U.S. v. Butler, 151 F. Supp. 2d 82 (D. Maine 2001) (finding no expectation of privacy in a shared computer in a public computing lab in the absence of a privacy policy).

To take advantage of these cases, a college or university need not necessarily adopt a policy granting itself free range to monitor anything and everything on its system in its sole and absolute discretion. Rather, the point is that institutions should decide upon privacy policies appropriate to their own particular missions, values, and needs; express those policies clearly; and make sure their users are aware of them. Such policies might, for example, limit the circumstances in which monitoring can occur and the persons who can authorize and conduct it. See, e.g., Ohio State University Policy on Responsible Use of University Computing Resources, available online at <http://www.cio.ohio-state.edu/policies/use_policy.html>.
To all faculty, staff, and students:

As you may be aware, the Recording Industry Association of America, the Motion Picture Association of America, and other such organizations have long campaigned against the use of peer-to-peer file-sharing programs such as KaZaA, Grokster, Morpheus, and Gnutella to trade music and movies over the Internet. These organizations are now focusing particularly on college campuses, where much of that activity takes place, and, in a recent letter to college and university presidents, they have urged us “to bring this piracy under control”. Moreover, while they so far have limited their legal attacks to the creators of those programs (most notably in the lawsuit that resulted in the demise of Napster), they have intimated that they will soon begin to go after individual users if their broader efforts are unsuccessful.

While the tactics these organizations have chosen to employ may seem heavy-handed, they are correct that much of the file-trading that occurs through the use of these programs constitutes copyright infringement. While it generally is accepted that ripping an MP3 from a CD you already own for your own personal use is “fair use”, it generally is not legal to then share that MP3 indiscriminately over the Internet. Neither the fact that the technology makes it easy to do, nor the fact that you do it for free, nor the fact that you are “publicizing” the artist in the process is a viable defense to a copyright infringement suit. We ask you also to note that the use of RISD computer resources to engage in copyright infringement is a violation of our computer use policy.

At an institution devoted to the creation of art, we should be especially mindful of these issues. Artists’ livelihoods are dependent in large part on the creation of, and the respect of others for, copyrights. Just as you would wish to protect the economic value of your own copyrights, so, too, do the musicians, filmmakers, and other fellow artists whose work is being traded over the Internet without appropriate compensation.

If you are interested in learning more about the law in this area and copyright law generally, you can find good discussions at the following web sites:

© Primer
[http://www.umuc.edu/distance/odell/cip/primer.html]
Fair Use FAQ
[http://www.eff.org/IP/eff_fair_use_faq.html]
Ten Big Myths About Copyright Explained
[http://www.templetons.com/brad/copymyths.html]
Signal or Noise? The Future of Music on the Net
[http://cyber.law.harvard.edu/events/netmusic_brbook.html]

Additional information is available at the General Counsel’s web page [http://intranet.risd.edu/departments/default.asp?department=General_Counsel] on the RISD intranet.

We appreciate your consideration of this information.