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Workshop: Freedom of Information Law CLE Credit - Distance Education and Intellectual Property

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DISTANCE EDUCATION AND INTELLECTUAL PROPERTY

The world of higher learning is in the midst of accelerating and sometimes turbulent change. Much of that change is driven by technologies that only a few years ago would have seemed fantastic, yet we can expect ever-newer technologies to permeate and reconfigure higher education in the coming years. These modes of communication are profoundly affecting the work of faculty members; they are reshaping the processes of teaching and learning, redefining the roles and authority of faculty members in organizing and overseeing the curriculum, and altering the bases for evaluating student—and faculty—performance. The implications of these developments extend far beyond teaching and learning, for the new technologies are penetrating many, if not all, major facets of higher education, deeply influencing its organization, governance, and finances. Still further, the emergence of new developers and "brokers" of educational content, often from outside the academy, coupled with arguably looser standards for regional and specialized accreditation, adds considerable complexity to the challenges with which "traditional" higher education must grapple.

Within this context, the roles of faculty members—their authority and responsibilities—are in flux. The situation calls for a close reexamination of the respective rights of faculty members, of the institutions of higher education for which they work, and of third parties who may engage faculty members for specific purposes in this volatile, sometimes highly entrepreneurial environment.

This vital intersection of emergent technologies and the traditional interests of faculty members in their own intellectual products requires scrutiny and the formulation of policies that address the former while preserving the latter. Toward this end, the Council of the American Association of University Professors established in June 1998 a Special Committee on Distance Education and Intellectual Property Issues. Its mandate was to report back to the Council with proposed policy statements in these areas.

The committee prepared two policy statements, the first on distance education and the second on copyright. These statements follow. In both of them, the committee refers to "teacher," "faculty," and "faculty member." The terms refer to members of a college or university faculty in either a teaching or a research role.

Statement on Distance Education

The statement that follows was approved in March 1999 by the Association's Special Committee on Distance Education and Intellectual Property Issues. It was adopted by the Association's Council and endorsed by the Eighty-fifth Annual Meeting in June 1999.

Preamble

In distance education (or distance learning) the teacher and the student are separated geographically so that face-to-face communication is absent; communication is accomplished instead by one or more technological media, most often electronic (interactive television, satellite television, computers, and the like).[1] The geographic separation between teacher and student may be considerable (for example, in a course offered over the World Wide Web), or the distance may be slight (for example, from the teacher's computer to the student's in a nearby campus building). Hence distance education may apply to both on- and off-campus courses and programs. For the most part, this statement's focus is on programs and courses offered for credit. It does not, however, exclude noncredit courses, programs of general cultural enrichment, or other programs that support the educational objectives of the institution.

Distance education in its contemporary forms invariably presents administrative, technical, and legal problems usually not encountered in traditional classroom settings. For example, questions arise regarding copyright for materials adapted from traditional classroom settings or created expressly for distance education. In addition, systems of interactive television, satellite television, or computer-based courses and programs are technologically more complex and expensive than traditional classroom instruction, and require a greater investment of institutional resources and more elaborate organizational patterns. These issues not only make more difficult the question who is entitled to claim ownership of materials designed for distance education; they also raise questions about the appropriate distribution of authority and responsibility between the general administration of the college or university, on the one hand, and the separate academic departments or units within a given institution, on the other. The technical and administrative support units responsible for maintaining and operating the means of delivering distance-education courses and programs are usually separate from particular academic departments or units that offer those courses and programs.

More important, the development of distance-education technologies has created conditions seldom, if ever, seen in academic life—conditions that raise basic questions about standards for teaching and scholarship. For example, in distance education the teacher does not have the usual face-to-face contact with the student that exists in traditional classroom settings. Thus, special means must be devised for assigning, guiding, and evaluating the student's work. In order to communicate with the student, the teacher frequently utilizes sophisticated and expensive technological devices that are not under the teacher's exclusive control and that often require special technical knowledge that the teacher may not fully possess. The teacher's syllabus, lectures, examinations, and other course materials may be copied or recorded and reused without the teacher's presence. The teacher's academic and legal rights may not be fully or accurately understood or may be in dispute in this new environment. Also in potential dispute are issues regarding the faculty's overall authority in determining appropriate policies and procedures for the use of these new technologies. Finally, the nature of teacher-student interaction and the preparation and teaching of distance-education classes often require significantly more time than that needed for courses offered in traditional classroom settings; consequently, the teacher should receive commensurate compensation.

It is imperative, therefore, that colleges and universities now using or planning to use the new technologies of distance education consider the educational functions these new media are intended to perform and the specific problems they raise. Traditional academic principles and

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procedures will usually apply to these new media, either directly or by extension, but they will not be applicable in all circumstances. When they are not, new principles and procedures will need to be developed so that the new media will effectively serve the institution's basic educational objectives. The principal purpose of this statement is to offer guidelines to that end.

Principles

1. *General.* The use of new technologies in teaching and scholarship should be for the purpose of advancing the basic functions of colleges and universities to preserve, augment, and transmit knowledge and to foster the abilities of students to learn. The development of appropriate institutional policies concerning these new technologies as instruments of teaching and scholarship is therefore the responsibility of the academic community.
2. *Areas of Responsibility.* The governing board, administration, faculty, and students all have a continuing concern in determining the desirability and feasibility of utilizing new media as instruments of education. Institutional policies on distance education should define the responsibilities for each group in terms of the group's particular competence. Indeed, a principal role of these groups in devising policies is to find those uses that enhance the institution's performance of its basic functions. These uses will vary depending on (a) the size and complexity of the institution, (b) its academic mission, (c) the potential of the new technological media for scholarship and the delivery of instruction, and (d) the variety and possible combinations of technologies to be employed for education and research.

   As with all other curricular matters, the faculty should have primary responsibility for determining the policies and practices of the institution in regard to distance education. The rules governing distance education and its technologies should be approved by vote of the faculty concerned or of a representative faculty body, officially adopted by the appropriate authorities, and published and distributed to all concerned.

   The applicable academic unit—usually a department or program—should determine the extent to which the new technologies of distance education will be utilized, and the form and manner of their use. These determinations should conform with established institutional policies.

   Before they are offered, all programs and courses for academic credit that utilize distance-education technologies should be considered and approved by the faculties of the department, division, school, college, or university, or by representatives of those bodies that govern curricular matters generally. The procedures for approval should apply to all such courses and programs, including those recorded in some way and thus not requiring the teacher's active presence on a regular basis. The faculty should determine the amount of credit toward a degree that a student may earn in courses utilizing the technologies of distance education.

   The faculty of the college or university should establish general rules and procedures for the granting of teaching-load credit in the preparation and the delivery of programs and courses utilizing distance-education technologies, for required outside-of-class student contact (office hours), and for the allocation of necessary supporting resources. Within the general provisions of these governing regulations, specific arrangements should be made within the applicable academic unit (usually the department) for courses offered by its members.

   Adequate preparation for a distance-education course, whether one that requires the regular, active presence of the instructor, or one that has been recorded, requires considerable time and effort for the creation or adaptation of materials for the new media, and for the planning of assignments, evaluations, and other course materials and their distribution. The instructor will therefore need to have adequate time to prepare such materials and to become sufficiently familiar with the technologies of instruction prior to delivery of the course. Such preparation—depending on the teacher's training or experience, the extent of the use of these technologies in the course, their complexity and the complexity of the materials to be created or adapted—will usually require significant release time from teaching during an academic term prior to the offering of the new course.

To enable them to carry out their instructional responsibilities, teachers assigned to these courses should be given support in the form of academic, clerical, and technical assistance, as well as means of communicating and conferring with students. Sufficient library resources must also be provided to the students to enable them to benefit from the teaching. Since instruction by distance-education technologies does not allow for the same degree of interaction between students and teacher that is possible in a traditional classroom setting, provision should be made for the students to confer personally with the teacher at designated times.

If the institution prepares courses or programs for use by entities outside the institution, whether for academic credit or not, whether recorded or requiring the regular, active presence of the teacher, the faculty should ensure that the same standards obtain as in courses and programs prepared for use in their own institution.

3. *Teaching Appointments.* The precise terms and conditions of every appointment should be stated in writing and be in the possession of the faculty member and the institution before the faculty member is assigned to utilize distance-education technologies in the delivery of instructional material in a course for academic credit. No member of the faculty should be required to participate in distance-education courses or programs without adequate preparation and training, and without prior approval of such courses and programs by the appropriate faculty bodies.
4. *Academic Freedom.* A faculty member engaged in distance education is entitled to academic freedom as a teacher, researcher, and citizen in full accordance with the provisions of the 1940 *Statement of Principles on Academic Freedom and Tenure,* jointly developed by the Association of American Colleges (now the Association of American Colleges and Universities) and the American Association of University Professors and endorsed by more than 200 educational and professional organizations.
5. *Selection of Materials.* Teachers should have the same responsibility for selecting and presenting materials in courses offered through distance-education technologies as they have in those offered in traditional classroom settings. For team-taught or interdisciplinary courses and programs, the faculty involved should share this responsibility.
6. *Technical Considerations.* The institution is responsible for the technological delivery of the course. Faculty members who teach through distance-education technologies are responsible for making certain that they have sufficient technical skills to present their subject matter and related material effectively, and, when necessary, should have access to and consult with technical support personnel. The teacher, nevertheless, has the final responsibility for the content and presentation of the course.
7. *Proprietary Rights and Educational Policies.* The institution should establish policies and procedures to protect its educational objectives and the interests of both those who create new material and those who adapt material from traditional courses for use in distance education. The administration should publish these policies and procedures and distribute them, along with requisite information about copyright law, to all concerned persons. The policies should include provisions for compensating those who create new course materials or who adapt course materials originally prepared for traditional classroom usage, including any use or reuse of recorded material.

   Provision should also be made for the original teacher-creator, the teacher-adapter, or an appropriate faculty body to exercise control over the future use and distribution of recorded instructional material and to determine whether the material should be revised or withdrawn from use.

   A teacher's course presentation should not be recorded without the teacher's prior knowledge and consent. Recordings of course material are academic documents, and thus, as with other works of scholarship, should have their author or creator cited accordingly.

Note

1. For a more comprehensive definition and explanation, see the report, "Distance Learning," *Academe: Bulletin of the AAUP* 84 (May–June 1998): 30–38.