My first experience with copyright law came nearly twenty-five years ago when I selected it as an elective course in my second year of law school. I ashamedly now admit that I signed up for it because it yielded two desperately needed credits and met only once a week on Tuesdays, thus permitting me to have a lighter schedule for the next term (and a three-day weekend for the current one). It turned out to be a wonderful decision for reasons far apart from credits or scheduling and consequently influenced my career in ways I could not then foresee. The class was taught by Professor Benjamin Kaplan, a soft-spoken gentleman of immense standing in the Harvard Law School community and a renowned expert in both federal civil procedure and copyright law. His brilliance, wit, and ability to combine theory with real-world examples would help shed a beam of light onto a maze of mysterious new terms and concepts.

I recall being initially intrigued by one of the major premises of copyright—that certain mental exercises such as expression of thoughts could be “owned” while others, like ideas, could not. Also compelling to me were the competing (and somewhat contradictory) objectives that the Copyright Act was always attempting to balance—promoting the creation of new works while compensating authors for old ones, and encouraging the public to experience and build on someone’s creations while simultaneously limiting their use. These tensions and inherent conflicts in the law were the subject of many spirited discussions among Professor Kaplan and my classmates. These same types of issues continue to be debated today over innovations such as the Internet, DVDs, and iPods—things none of us could even imagine back in the early 1980s.

Professor Kaplan’s course was also my initial encounter with what was then the relatively new field of “intellectual property,” a discipline attempting to apply long-held ownership concepts for static tangibles (e.g., land, tools, buildings) to technological innovations and advances that were in a continuous state of evolution. Theory would give way to practicality only a few years later when I began my legal career. One day I was asked by a senior partner at my firm to assist a university client who wanted to
establish a fiber-optic link to a local high school. The purpose of the connection was to permit high school seniors to participate via a live audio and video feed in a freshman English class being offered at the college. My initial task of negotiating and drafting an agreement with the local public utility providing the cable link soon grew more complex and became my first foray into something called “distance learning.”

Soon after the contract between the university and utility company was signed, a dean from the college called me to pose what appeared a rather simple question. It seemed the professor teaching the new distance learning course always liked to show a movie version of *Macbeth* to his lecture hall students when covering the works of Shakespeare. The instructor wanted to know whether there was any copyright problem in doing the same for his remote-site students since he was now “broadcasting” the film. In other words, would transmitting the lesson electronically alter the wide latitude teachers were normally afforded in performing and displaying copyrighted works as part of their lessons? My initial (but unexpressed) reaction was no, how could it? What rationale would there be for imposing one set of rules for traditional classroom lectures and another for students sitting in front of a monitor only a few miles away? The professor himself would be doing nothing different. The only change would be the use of a television camera to carry his words and image to a separate, yet equally interested and deserving audience.

While I was still relatively new to the practice of law, I had already learned the cardinal rule of never expressing an opinion on a subject one knows little, if anything, about. I told the dean I would get back to him with an answer shortly, hung up the telephone, and began making some inquiries around the office. This initial strategy proved rather fruitless, however, as none of my colleagues knew anything about this very narrow field of copyright law. As one of them courteously advised, I now had to make myself the expert in the area in order to effectively service our college and university clients. I managed to locate my old lecture notes from Professor Kaplan’s course and discovered that indeed there were separate provisions in the Copyright Act covering face-to-face versus “transmitted” classes. Thus began my new and primarily self-taught education concerning the interrelationship between distance learning and copyright.

As I began delving into the statutes, regulations, and court cases involving federal copyright law, I discovered, much to my surprise, that often what was permissible in face-to-face teaching constituted copyright infringement when used in a distance learning setting. Specifically, I found that while the English professor at the local college could show
the movie *Macbeth* to his lecture hall class, transmitting it to the local high school constituted a violation of the then existing Copyright Act. I promptly informed the dean regarding the results of my research (but not about my initial assumption being dead wrong). The key reason for this separate (and arguably unfair) treatment for distance students was congressional concern that transmitted broadcasts containing copyrighted material (even in a nonprofit educational setting) could be intercepted and viewed by interlopers. As such, these individuals could then forgo purchasing an original of the copyrighted work and thus deprive its creator of revenue, something Congress strongly wanted to discourage.

These concerns ultimately led to unequal treatment for distance learning students finding its way into the 1976 amendments to the Copyright Act, which at the time constituted the most significant revamping of the federal statute in close to seventy years. Concern was also fomented because the most prevalent form of distance education at that time was over-the-air television and radio broadcasts. These media were by their nature particularly vulnerable to unwanted interception as universities lacked the technology currently available to either scramble or “close-circuit” their transmissions. Differences in the type and format of performances and displays of copyrighted material that distance rather than traditional students may receive continues to this day, although the gaps were somewhat narrowed by enactment of the TEACH Act in late 2002. (But more on that in Chapter Six.)

Regardless of the policy considerations behind the 1976 Act amendments, the result led to one set of rules for face-to-face instructors using copyrighted works and another (much more restrictive) one for distance educators. Not surprisingly, the existence of this dichotomy was, and is still, not well known or understood among educators. For these reasons, about ten years ago I started offering seminars to teachers and administrators affiliated with local colleges and school systems with the goal of alerting them to the pitfalls of potential copyright infringement when offering a distance learning course. In August 2000, I was asked to conduct a half-day workshop on this topic at the 16th Annual Distance Teaching & Learning Conference sponsored by the University of Wisconsin at Madison.

While I expected a dozen people, at most, to attend a three-hour presentation on as esoteric a topic as “Distance Learning and Copyright,” I was presently surprised to have over sixty educators sign up for my class. This experience proved informative and enlightening in many ways. To begin with, I discovered what I perceived to be a dearth of knowledge of basic copyright principles among teachers at all levels. While I realized
that my audience did not have the benefit of a law degree, I had assumed most educational institutions would attempt to give their faculty and staff at least a grounding in copyright basics. Since almost every instructor has to reference and use the works of others in his or her teaching, I envisioned many schools would offer such training for no other reason than to avoid unnecessary and unwanted infringement liability. In discussing this topic with several participants at the Madison conference, I discovered my assumption to be incorrect. While I found that some universities, particularly larger ones, either conducted copyright compliance courses for their faculty or distributed written materials to them outlining copyright law, most did neither. Training at the K–12 level was even more wanting.

Indeed, many of the comments I received in response to my seminar regarded the need to go into more detail on the basics of copyright law as well as its application to the burgeoning field of distance education. Many respondents suggested a full-day course as a more appropriate method to present the material. Based on those suggestions, I subsequently developed a six-hour workshop on the topic, which I began offering in 2001. The seminar was given in several major cities over the next few years and continues to be offered nationally today. Each program was well attended, and the questions I fielded both during and after the sessions further elucidated for me the many common misperceptions about copyright law held by members of the educational community.

One major area of confusion concerned the doctrine of “fair use” and its applicability to nonprofit, educational settings. Many seminar participants labored under the false notion that any use of a copyrighted work in a school environment constituted fair use. Nothing, of course, could be further from the truth. Others misunderstood the concept of “public domain” and assumed that anything placed on the Internet, because it was made available to the public, lost copyright protection. Again, a faulty and quite dangerous assumption. Several attendees believed that as long as the author or creator of a work was clearly identified, any use of his or her work was permitted for scholarly purposes. As I always liked to say in answer to that question, “Congratulations; you may not be a plagiarizer, but you are still a copyright infringer.”

Attendees often inquired about the various copyright “guidelines” their institutions occasionally distributed to them. Many were confused about what guidelines actually emanated from the Copyright Act and which of them served as mere suggestions. Others wanted to know more about the operation of the Digital Millennium Copyright Act and its applicability to colleges and local school systems. Several participants sought informa-
tion about the most efficient way of determining whether a work was still protected by copyright. A large number expressed frustration over dealing with copyright owners and/or their agents in obtaining permission or licenses to use their works. School administrators often asked whether their institutions could be held liable for the acts of their faculty and students, and wanted to know what policies, if any, could be implemented to prevent such exposure.

It was in response to these and many other questions posed in my workshops that I first decided to write this book. I also perceived a need for educators and attorneys who represent colleges and school systems to have essential copyright information available to them in one convenient resource rather than having to search for answers in a plethora of government and commercial publications. A great deal of information about copyright law is available from the U.S. Copyright Office and other agencies of the federal government. In fact, several portions of this book were prepared by using this material (which is not protected by copyright) as a base and then editing, supplementing, updating, and refining it to conform to the remainder of the text. As such, I express my gratitude to a host of unknown (and underappreciated) federal employees who provided a valuable starting point for several sections contained herein.

The Copyright Act and international treaties concerning it are also available on the Internet or can be ordered from the United States Government Printing office. However, as in the case of the Digital Millennium Copyright Act, only portions of many lengthy and detailed statutes have applicability to educational institutions. An explanation of which provisions are germane to educators and how these laws relate to one another is much more difficult, if not impossible, to locate online or by more traditional means. Many “copyright guidelines” for instructors are also available on the World Wide Web if one knows where to search. What is not generally available, however, is any cogent discussion of who created these guidelines, what authority they had to do so, how the guidelines work together, and what weight, if any, they are accorded legally.

Giving this complex and enormously important area greater coherence for educators and lawyers practicing in the field was thus another major aim of this work. The book is divided into six chapters. Chapter One defines distance education and presents an overview of how it is offered and who is using it in today’s world. Chapter Two is essentially a primer on copyright law and covers the basics every educator (and most lawyers) should know. Chapter Three discusses the fair use doctrine by exploring its role in both the commercial and nonprofit sector and analyzing fair use
guidelines for various educational activities (e.g., classroom photocopying, music, library reserves, multimedia presentations, etc.).

Chapter Four focuses on effective ways of locating copyright owners, with particular emphasis on understanding and negotiating licensing agreements with them. Chapter Five concerns the growing interrelationship between the Internet and distance learning with a section dedicated to clarifying how the Digital Millennium Copyright Act affects schools, their faculty, and students. Chapter Six explores the evolving rules governing the performances and displays of copyrighted works in traditional and distance classrooms. Much of the chapter is devoted to an analysis of the history, scope, and operation of the recently enacted TEACH Act.

As mentioned above, this book was designed for both educators involved with and lawyers needing more information about distance learning and copyright. Writing for such a diverse audience presented a difficult challenge in itself. While this text is intended to be a practical guide to copyright law for those with little to no training in the area, I also wanted it to serve as a resource for those seeking a greater understanding of the discipline’s legal nuances. In striking this balance, I attempted to draft the main body of material with as little “legalese” as possible, instead placing the bulk of applicable case law and legislative history in the accompanying footnotes. As such, readers can get a generous “layman’s” explanation of the topics by reading the principal text alone. Those conducting research or seeking specific legal authority should be aided by the footnote material. How successful I was in accomplishing this dual objective, I leave to the readers to decide.

A few notes about the organization of this book. First, all footnotes are listed at the bottom of the page, are numbered consecutively for each chapter (not the entire book), and conform to the Harvard Bluebook citation format. Second, books, printed government publications, printed journal and newspaper articles, and titles of materials found on the Internet are cited using the Bluebook “Bluepages” style (used for materials that are neither law reviews nor journal articles). For Internet materials, a URL is also given for the site where the work was posted and located during my research, although its current availability cannot be guaranteed. Third, I have attempted to be consistently gender neutral in the use of pronouns (e.g., “his or her” course), but at times use only the masculine or feminine case where style or word economy considerations come into play.

Lastly, like most authors, I envisioned my book would be read from beginning to end. However, I recognize that many people may choose to use this work as a reference or spend time on only those chapters of most relevance to them or their field of study. In that regard, it was necessary
at times to repeat certain concepts or citations in order to give a section more cogency and provide the reader with the needed framework to better comprehend the material. These repetitions are minimal, however, and should not hinder or unduly delay anyone reading the text in its entirety.

After practicing law for over twenty years now, I can honestly say my greatest satisfaction still remains in taking a complex set of facts and legal doctrine and communicating it in a precise, yet highly understandable, fashion to nonlawyers (as most of my clients remain). Perhaps it is a buried or latent teaching instinct in me attempting to surface. Regardless, it was with that goal primarily in mind that I undertook to write this book. I can only hope that its audience derives even a portion of the same intellectual satisfaction and learning experience in reading its pages that I gained from writing them.

S.A.A.