CHAPTER 1

Overview of Distance Learning

This chapter provides an overview of the burgeoning field of distance education. Section 1.1 defines some key terms and explores the levels of classes, technologies, and related school resources associated with providing distance education. It also examines the characteristics of those persons and organizations who, respectively, take and provide distance learning courses. Section 1.2 discusses distance education's future, while Section 1.3 explains how the concepts underlying the relationship between distance learning and copyright will be analyzed in this work.

1.1 THE NATURE OF DISTANCE EDUCATION TODAY

[1] What Is Distance Education?

In 1998, as part of its directive from Congress under Section 403 of the Digital Millennium Copyright Act,1 the United States Copyright Office sought comment from interested persons on what constituted “distance education” in America at that time. The Office began with these basic questions:

How may distance education be defined? In what sense does it differ from traditional face-to-face education? To what extent does it utilize digital technologies? In what sense does it differ from the general use of electronic communications in educational settings?2

A consensus emerged on the most fundamental definition: distance education is a form of learning in which students are separated from their instructors by time and/or space. This characteristic is central to all variants of the field.

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Various terminology is used in discussing distance education, most notably the corresponding terms “distance learning,” “distributed learning,” and “distributed education.” Some use these terms interchangeably, while others employ them to refer to different activities. Despite the lack of standard definitions, “distance education” generally involves the delivery of instruction with a teacher active in determining pace and content, but normally removed from his or her students by time, space, or both. As such, it is differentiated from unstructured learning using resource materials.

Distance learning is not necessarily separate and distinct from on-campus education, however. An individual course may contain both classroom and distance components. Some online courses require brief periods of on-campus instruction; conversely, classroom courses often use digital technology for directed research or to deliver resource materials. In other instances, a student in a regular classroom may periodically receive live or delayed instruction from a teacher in another part of the country or even the world. All of these examples constitute distance learning.

The distance education courses available today are many and varied. They are geared toward all levels of students, from kindergartners through retirees, and take advantage of a wide range of technologies to enrich and expand the educational experience. Distance programs have become integrated into most educational institutions. In connection with their distance learning activities, these schools are also drawing upon their library resources, employing new technology, promulgating copyright compliance policies, and participating in the accreditation process. These activities are discussed below.

[2] Levels of Courses
Distance learning is now utilized at every stage of the educational spectrum. It takes various forms at different levels, however. Currently, its most extensive use as a substitute for the classroom experience occurs in higher education, but distance education has applicability to the K–12 environment as well. Elementary and secondary school students are using computers in increasing numbers. According to the United States Department of Education (DOE), 91% of students in grades K through 12 had used computers, and 59% had “surf ed” the Internet. Such use begins quite early; 80% of children in kindergarten had used computers, while almost one-third (32%) had experience with the Internet.3 Computer use at the elementary level, however, does not generally involve remote course deliv-

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Ery. Rather, education here tends to focus on software and Internet visits used to supplement classroom instruction.4

At the secondary level, distance education activities are more extensive. Distance learning programs across the country provide high school students with the opportunity to take classes not otherwise available to them, such as advanced placement or college equivalency courses. A third of public school divisions nationwide had students enrolled in distance learning during the 2002–2003 school year, the most recent year for which data is available, according to a report from the National Center for Educational Statistics.5 Currently, about half the states allow for online charter schools, while fourteen have state-sanctioned cyber-schools, including Florida, which has more than 10,000 students enrolled in its Florida Virtual School.6 As of September 2006, thirty-eight states had either state-led online learning programs and/or significant policies regulating the field.7 A recent study indicates that 40 percent of K–12 distance learning programs saw their enrollments increase by at least 25 percent in 2006.8

Postsecondary distance education is the fastest-growing field of all.9 Courses are available at most colleges and universities, at both the undergraduate and postgraduate level, and for post-professional development and training. Community colleges, with their history of serving local and continuing education needs, have been particularly active in the field.10 In a recent survey, it was reported that online enrollments at community colleges had increased by 15 percent on average in 2006, while total enrollment at such institutions was only up 2 percent for the same period.11

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4. See Program for Copyright Office Demonstrations of Distance Education Programs Using Digital Technologies, available as Appendix D to U.S. Copyright Office, Report on Copyright and Digital Distance Education (1999) (hereinafter DDE Report).
5. See Program for Copyright Office Demonstrations of Distance Education Programs Using Digital Technologies, available as Appendix D to U.S. Copyright Office, Report on Copyright and Digital Distance Education (1999) (hereinafter DDE Report).
7. See Program for Copyright Office Demonstrations of Distance Education Programs Using Digital Technologies, available as Appendix D to U.S. Copyright Office, Report on Copyright and Digital Distance Education (1999) (hereinafter DDE Report).
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[3] Technologies

Today's distance education courses use digital technology extensively for multiple purposes. Adding these technologies has produced new models of learning, resulting in a richer and more interactive classroom environment.

[a] Evolution

Radio was the favored medium for distance education in the first part of the twentieth century, with television supplanting it in the 1950s. Telecourses produced by educators and distributed by the Public Broadcasting System (PBS), for example, garnered large audiences for decades. Such programs are still widely used, and they are expanding their services in both the analog and digital environment.

The 1990s saw the advent of computer networks and multimedia technologies as powerful new tools for distance education. According to a DOE study conducted in 1995, over 70 percent of higher education institutions were planning to start or increase offering courses using online or other computer-based technologies. This growth has continued unabated.


13. Many states have active distance education telecourse programs, often distributed through state educational networks. Examples include the Education Network in Maine, BadgerNet in Wisconsin, and the Utah Education Network. See National Center for Education Statistics, Distance Education in Higher Education Institutions 1 (1997). The role of the Public Broadcasting System (PBS) in this area has diminished significantly, however. On February 10, 2005, PBS announced plans to cease operations of its Adult Learning Service effective September 30, 2005. See PBS Announcement at http://www.pbs.org/als/transition.html. In 1996, there were 400,000 students enrolled in PBS courses, as compared to only 180,000 in 2004 and 153,000 in 2005. See S. Behrens, PBS Drops its Middleman Role in College Courses, current.org (April 25, 2005), http://www.current.org/education/ed0507adult.shtml.

14. Students and educators fueled the vigorous growth of distance education in the 1990s by capitalizing on these opportunities. Educational computer use increased rapidly in traditional classroom courses as well as in distance education. According to the 1998 Campus Computing Project, which surveyed 571 technology officials at two- and four-year colleges nationwide, 44% of on-campus courses used e-mail in some way, growing from 32.8% in 1997 and only 8% in 1994. The project further reported that 16% of courses used computers for simulations of exercises and 15% to launch CD-ROMs. As of 1996, more than 7 million college students and faculty were routinely using the Internet and the World Wide Web as part of their daily and weekly activities. See Mendels, Survey Shows a Sharp Rise in Net-Savvy Academics, N.Y. Times, Nov. 4, 1998.

over the last decade. American colleges and universities spent over $5.2 billion on information technology in 2003, reflecting a 5 percent increase over the prior year.\(^\text{16}\)

Currently, distance programs use combinations of technologies in varied ways. These involve e-mail among teachers and students, class chat rooms, links to resources on the World Wide Web, incorporation of preexisting content into reading materials, mediated instruction from a distance, and the delivery of supplemental materials in electronic form. The use of older technologies, like videoconferencing, is also prevalent, particularly in rural schools. Even in courses delivered entirely through digital media, however, students continue to use textbooks.\(^\text{17}\)

Determining the appropriate technology to use in a distance course is generally based on the availability and cost thereof and on satisfying the intended audience. Older working adults, for example, may require fewer multimedia “bells and whistles” than the average college student. Unfortunately, such choices may not be available for rural or foreign students, who generally have less access to sophisticated equipment and software.

**[b] New Characteristics**

One significant manner in which distance education has evolved is a shift from one-way to interactive communication. The original model for distance learning was one-way transmission of instruction from teacher to remote students, with communication among them often limited to telephone lines or correspondence. The advent of digital technologies has enabled more teacher-to-student and student-to-student interaction. E-mail and chat rooms, for example, allow continuous discourse among participants separated by distance. As a result of these advances, distance programs may now offer experiences more closely paralleling face-to-face teaching.\(^\text{18}\)

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\(^{17}\) See, e.g., I. Hinds, *Marketplace for Licensing in Digital Distance Education* 8–9 (1998), available as Appendix E to DDE Report.

\(^{18}\) Cassidy et al., *supra* note 12, at 12: “During most of this century, distance learning has provided important educational opportunities, which bridged differences in location or time, with interactivity limited to the particular form of communications being used. With the advent of electronic technologies and their use in distance education, the emergence of school reform efforts and the support of the Federal government, new models of distance and distributed education have emerged to allow us to envision more highly interactive, global, distance-distributed models for learning in the 21st century.”
New technologies have also made distance courses more convenient and better suited to student needs. Historically, distance learning has been divided into synchronous and asynchronous programs. Synchronous programs are usually delivered by broadcast and closed-circuit technologies, set in real time, allowing the student to participate from afar but imposing scheduling constraints. Asynchronous programs are exemplified by correspondence, videotape, and computer network courses, and allow for a time lapse between the delivery of material and its reception by a student.

With the advent of interoperable digital media, distance education has increasingly incorporated both synchronous and asynchronous tools into the same course. Asynchronous technologies, such as e-mail, threaded discussion, “stored” lessons, and self-paced testing, are often used in conjunction with synchronous elements such as chat rooms and streaming video. The same material may be delivered by both methods. For example, a lecture may be given in real time by streaming audio or video and then archived on a server to be made available to students for later viewing or review.

[4] Library Resources
In the course of providing distance programs, educational institutions draw on their library resources in several ways. Often, they rely on librarians for negotiating and obtaining licenses, since many times these professionals have the requisite experience. Libraries also provide facilities and support staff for developing online courses, preparing digital materials, and advising on copyright law. Frequently, distance educators provide their classes with selected library resources in digital form. These materials are designated as electronic reserves, or “e-reserves,” and are similar to textual works set aside on campus by an instructor for outside reading. These and other electronic resources are often made available to both on-campus and remote-site students pursuant to institutional licenses obtained through the library’s efforts.

[5] Copyright Policies
Many educational institutions are now making efforts to adopt and implement appropriate policies on copyright issues involved with distance learning. These endeavors include promulgating written policies, conducting training for faculty and staff, and educating students about copyright law. Copyright policies usually take one of two forms. The first involves allocating ownership rights between the institution and its faculty for works created as part of the educational experience.
A second type of document educates faculty, staff, and students about the principles of copyright law and is often called a “copyright compliance manual.” While the preparation of such policies and the training of faculty, staff, and students has always been sound policy, such acts are now required by both the Digital Millennium Copyright Act (DMCA) and the Technology, Education, and Copyright Harmonization Act of 2002, more commonly known as the “TEACH Act.”

[6] Accreditation

As distance education becomes increasingly incorporated into mainstream curricula, more focus has been paid to the issue of accreditation. For distance education to gain true public acceptance, it must be viewed as comparable in quality to classroom instruction. This is an important issue both for students, who must choose among available programs, and for educators who must assess the knowledge imparted by those classes. Formal accreditation has traditionally provided that assurance of quality.

The Higher Education Act, among other items, focuses on accreditation, a task undertaken by outside bodies, as the main tool for ensuring quality in postsecondary education. Under the act, accreditation may only be granted by one of 62 agencies specifically “recognized” by the DOE. Some agencies, such as the Middle States Association of Colleges and Schools, accredit entire institutions falling under their geographic or other purview. Others, such as the American Bar Association, Council of

19. In a recent survey conducted by the Recording Industry Association of America, of the top fifty-five doctoral institutions as ranked by U.S. News and World Report, it was discovered that less than three-quarters of the institutions had online-accessible institutional policies containing more than a cursory treatment of copyright law, and only one-fourth had policies treating the issue in depth. See Education Task Force of the Joint Committee of the Higher Education and Entertainment Communities, University Policies and Practices Addressing Improper Peer-to-Peer File Sharing (April 2004), http://www.acenet.edu.


22. In general, there are two main types of accrediting agencies—regional and national. National accrediting agencies review institutions in a region of the United States that includes at least three states that are reasonably close to one another. National accrediting agencies review programs or specialized institutions, such as acupuncture or business schools, on a national basis.

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the Section of Legal Education, and Admissions to the Bar, accredit specific programs or departments. Collectively, accrediting agencies cover public and private two- and four-year colleges, for-profit vocational schools, and nondegree training programs. Thirty-nine agencies are permitted to accredit schools for participation in federal student aid programs. DOE is required to recognize or re-recognize these agencies every five years.

To achieve DOE recognition, accrediting agencies must, in addition to meeting basic criteria, establish standards addressing ten broad areas of institutional quality, including student support services, facilities and equipment, and success with respect to student achievement. While these standards must be consistently applied to an institution's programs of study, including distance education courses, the law grants agencies flexibility in determining the requirements under each area. This flexibility includes whether and how to assess distance education as part of the review process. Ongoing accreditation is being carried out against a backdrop of holding schools more accountable for student learning results. For example, concerns have been expressed about the following:

- Program completion—the percentage of full-time students who graduate with a 4-year post-secondary degree within six years of initial enrollment was about 52 percent in 2000.
- Unprepared workforce—business leaders and educators have expressed concern over gaps between many students' problem-solving, communications, and analytical thinking skills and what the workplace actually requires.

To address these issues, an increased interest has developed in using "outcomes" to ensure quality in distance and campus-based education. The Council for Higher Education Accreditation, a national association representing accreditors, has issued guidelines on distance education and on-campus programs that, among other things, call for greater attention to student learning outcomes. Additionally, in May 2003, the U.S. Gen-

28. See Council for Higher Education Accreditation, Statement of Mutual Responsibilities for Student Learning Outcomes: Accreditation, Institutions, and Programs (Sept. 2003). Also, in May 2003, the Council identified six areas for accreditation and accountability reform, including expanding the use of student learning outcomes in accreditation reviews, offering more information to the public on the findings of these reviews, and reviewing any distance learning providers or offerings that may become eligible for federal student aid programs.
eral Accounting Office (GAO) reported eighteen states were promoting accountability by publishing the performance measures of their colleges and universities, including retention and graduation rates. At the national level, DOE announced in its 2004 Annual Plan that it would propose to hold institutions more accountable for results, such as ensuring that a higher percentage of students complete their programs on schedule.

The congressionally appointed Web-based Education Commission has also called for greater attention to student outcomes. The commission has reported that "quality assurance has too often measured educational inputs (e.g., number of books in the library, etc.) rather than student outcomes." Finally, the Business Higher Education Forum, an organization representing business executives and leaders in postsecondary education, has reported improvements are needed in adapting objectives to specific outcomes and certifiable job skills.

In this same vein, GAO recently examined how accrediting agencies evaluate distance education programs. The office focused on the policies of seven such agencies collectively responsible for more than two-thirds of all distance education programs. It specifically evaluated the extent to which these bodies assess student learning outcomes using criteria GAO

31. Congress established the Web-based Education Commission to prepare a report to the President and Congress containing recommendations for legislation and administrative actions, including those pertaining to the appropriate federal rule in determining the quality of educational software products. Members of the Commission included senators, representatives, and leaders from postsecondary institutions.
33. See supra note 27.
34. The seven agencies are (1) Middle States Association of Colleges and Schools, (2) Western Association of Schools and Colleges–Accrediting Commission for Community and Junior Colleges, (3) New England Association of Schools and Colleges, (4) North Central Association of Colleges and Schools, (5) Northwest Association of Schools and Colleges, (6) Southern Association of Colleges and Schools, and (7) the Accrediting Council for Independent Colleges and Schools. In December 2004, the United States Distance Learning Association (USDLA) announced the formation of the Distance Learning Association Board (DLAB). The DLAB was formed to review and accredit distance learning institutions and distance education components of degree-granting institutions in the United States and abroad. DLAB accreditation will be based on the institution's successful completion of a detailed self-study and on-site visit by a peer-review team. A complete version of the USDLA Release is available at http://www.usdla.org/html/resources/accreditation.htm.
had developed in past work. GAO conducted its work between October 2002 and February 2004 in accordance with generally accepted government auditing standards.

The agencies reviewed by GAO all had standards for evaluating distance education programs. The Higher Education Act does not specify how these programs should be reviewed, but instead directs agencies to cover key subject areas, such as student achievement, curricula, and faculty. The act also does not specify what the appropriate standards are. Interestingly, all seven agencies used the same standards to assess a school's distance education program as they did to evaluate its campus-based curricula. The six regional accrediting agencies within the group have all adopted supplemental guidelines to help schools assess their own distance education programs.

In reviewing these standards, however, GAO found significant variations among the agencies. Five of the seven agencies required schools to demonstrate comparability between distance education programs and campus-based ones. For example, one agency required each school to evaluate “the educational effectiveness of its distance education programs (including assessments of student learning outcomes, student retention, and student satisfaction) to ensure comparability to campus-based programs.” Another agency required the successful completion of distance programs to be similar to campus-based courses. The remaining two agencies did not require schools to demonstrate comparability in any tangible way.

A second area of variation was the threshold for deciding when to review a distance education program. While accrediting agencies generally review schools on a multiyear cycle, federal regulations provide that they

36. GAO Report at 5.
37. Id. at 18.
38. Id. at 19.
39. The “Best Practices for Electronically Offered Degree and Certificate Programs” was drafted by the Western Cooperative for Educational Telecommunications in Colorado. The executive directors of the eight regional accrediting agencies (including six covered in GAO’s review) requested the study on best practices to assist institutions in planning distance education activities and to provide a self-assessment framework for those already involved. According to the “best practices,” overall program effectiveness is determined by such measures as student retention rates and student competence in fundamental skills such as communication, comprehension, and analysis.
40. Four of six regional accrediting agencies GAO reviewed also had additional standards or policies that applied to schools with a distance education program.
41. GAO Report at 19.
42. Id.
must also approve any “substantive changes” to an institution’s educational mission or program.\textsuperscript{43} The regulations prescribe seven types of events an agency must include in this definition. For example, beginning a distance education program might be considered a substantive change. However, the seven agencies vary in their definition of “substantive.” Three of the seven choose to review distance education programs only when at least half of all courses in a program are offered in such manner.\textsuperscript{44} A fourth agency reviews only when 25 percent or more of a degree or certificate program is offered through distance learning. The remaining three have still other polices in place.\textsuperscript{45}

These differences likely result from the statutory latitude provided agencies in carrying out their roles. While such variations do not necessarily lead to significant gradations in educational quality, they potentially increase the odds of some schools being held to higher standards than others.\textsuperscript{46} A growing awareness has arisen in the postsecondary education community that additional steps may be needed to evaluate and ensure the quality of distance education. As such, several agencies have taken significant steps toward applying an outcome-based, results-oriented approach to their accreditation process for distance learning.\textsuperscript{47}

\textbf{[7] Who Is Taking the Courses?}

\textbf{[a] In General}

Distance education helps individuals overcome such barriers as full-time work, geographic inaccessibility, obtaining timely child or elder care, and physical disabilities. It further provides the advantages of convenience and flexibility. With digital technologies allowing courses to reach and appeal to wider audiences, interest in distance education has grown exponentially.\textsuperscript{48} While almost all segments of the population may now access distance education, the college audience is increasing at the highest rate. Surveys predicted the number of college students enrolled in distance courses would reach 2.2 million by 2003, up from 710,000 in 1998.\textsuperscript{49} Distance

\begin{itemize}
  \item \textsuperscript{43} 34 C.F.R. §§ 602.22(a)(2)(i)--(vii).
  \item \textsuperscript{44}  \textit{GAO Report} at 20.
  \item \textsuperscript{45}  \textit{Id}.
  \item \textsuperscript{46}  \textit{Id}.
  \item \textsuperscript{47}  \textit{GAO Report} at 25.
  \item \textsuperscript{49}  \textit{Id}. By the fall of 2006, close to 3.5 million college students were enrolled in at least one online course. See M. Cawvey, \textit{Community Colleges Lead Online Demand}, Washington times .com (April 15, 2008).
\end{itemize}
education owes much of its explosive growth to being able to respond to
the needs of older, nontraditional students. The average distance student
is thirty-four, employed full-time and with previous college experience.\textsuperscript{50} More than half are female.\textsuperscript{51}

Many persons drawn to distance education are professionals with jobs
preventing them from attending on-campus classes. Even prestigious pri-
ivate universities such as Harvard, Stanford, and Duke, known for their
traditional degree programs, are developing distance courses for working
adults.\textsuperscript{52} Retirees often take advantage of distance education opportunities
too. More disposable income and/or greater leisure leads older students
to enroll in courses for life-enhancing reasons, rather than academic or
professional advancement. Senior citizens often take courses online due to
restricted mobility or a desire to study privately.

\textbf{[b] Current Trends}

More and more students are being exposed to distance learning in their
local school systems. About 36 percent of public school districts offered
online courses in 2002–2003, enrolling more than 328,000 students.\textsuperscript{53}
Slightly over 19 percent of the 1.1 million students being homeschooled in
2003 also took an online course according to a 2006 report by the National
Center for Education Statistics.\textsuperscript{54} In the year 2000, about 1 in every 13 post-
secondary students enrolled in at least one distance education course. By
the fall of 2006, that number had risen to one in five.\textsuperscript{55}

Students taking primarily distance learning courses in college differ
from their postsecondary counterparts in several respects. First, they tend
to be older and are more likely to be employed full-time. They also have
higher incomes and are more likely to be married. Most students take dis-
tance classes at public institutions, with more matriculating at two-year

\begin{footnotesize}
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\item 51. \textit{Id.}
\item 54. \textit{Id.}
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rather than four-year schools. The Internet is the most common mode of
delivery for them in receiving distance education.56

[8] Who Is Providing Distance Education?
The expansion of distance education has led to significant changes among
its providers. Although many distance programs are offered by established
public and private colleges, the traditional model of nonprofit, K–12, and
postsecondary education is no longer as predominant. Distance courses
are now offered by both nonprofit and for-profit entities and through vari-
ous partnerships involving educational institutions, government bodies,
and private corporations.

[a] Providers in General
Distance education providers cover a broad spectrum and exist at the K–12
level, among community colleges, at public and private universities, in
continuing education, and through educational publishers. Some providers
are engaged exclusively in the offering of distance courses and are called
“virtual” universities. With greater technological capabilities available and
increasing technical sophistication among teachers, the number of institu-
tions offering digital distance education has correspondingly increased.
It was predicted that by 2002, 85% of two-year colleges would be offer-
ing these courses, up from 58% in 1998; and 84% of four-year institutions
would be doing so, up from 62% in 1998.57 Some large traditional schools,
such as Stanford and the University of Illinois, are already offering entire
degree programs online.58

Numerous consortia have also been formed to pool resources and offer
classes from multiple institutions. For example, Colorado Community Col-
lege Online offers 35 courses from 12 different accredited institutions.59

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56. This data comes from the National Postsecondary Student Aid Study (NPSAS), a
DOE database covering more than 19 million postsecondary students. The NPSAS is con-
ducted approximately every three to four years by the National Center for Education Sta-
tistics in the Department of Education. It is a nationwide survey designed to collect demo-
graphic information on postsecondary students, as well as information on how such students
fund their education. The most recent NPSAS covers students attending over 6,000 Title IV
eligible institutions during the 1999–2000 school year. NPSAS defines distance education as
courses delivered off-campus using live, interactive television or audio; prerecorded tele-
vision or video; CD-ROM; or a computer-based system such as the Internet, e-mail, or chat
rooms. NPSAS does not cover correspondence students.


58. Mendels, Online University Set to Open Its (Virtual) Doors, N.Y. Times, Mar. 4, 1998;

The Southern Regional Electronic Campus offers approximately 1,500 credit courses and 60 degree programs from 175 different colleges. Western Governors University (WGU), an online “virtual university,” was the brainchild of then governor Michael Leavitt of the State of Utah and began offering courses in 1998 with the support of 19 Western state governors and several corporations. WGU offers courses from over 30 institutions and has over 1,200 enrolled students.

**[b] Postsecondary Statistics**

Many postsecondary schools have added or expanded electronically based programs, so that distance education is now relatively common at this level. In addition to the demographics of distance students, the National Postsecondary Student Aid Study (or NPSAS) also provides information on the modes of distance education delivery and the types of schools offering such courses.

**[i] Public Institutions Enrolled the Most Distance Education Students**

For undergraduates, public institutions enrolled more distance students than either private or proprietary schools. Of undergraduates taking at least one distance education class, 85% did so at a public institution (79% of all undergraduates attend public institutions), 12% did so at private non-profit institutions (16% of all undergraduates attend private nonprofit institutions), and 3% did so at proprietary schools (5% of all undergraduates attend proprietary schools). For graduate students, public institutions...
also enrolled more—63.5%—distance students than did private nonprofit or proprietary schools (32% and 4.5%, respectively). Approximately 58%, 40%, and 2% of all graduate students attended public institutions, private nonprofit institutions, and proprietary schools, respectively.

[ii] Institutions Predominantly Use the Internet to Deliver Distance Education
Postsecondary institutions used the Internet more than any other mode of communication to deliver distance education. At the three main types of institutions, over half the undergraduates taking at least one distance course did so over the Internet. Fifty-eight percent of undergraduate distance students at public institutions used the Internet; over 70% did so at both private nonprofit and proprietary schools. Institutions offering graduate programs also used the Internet as the primary means of delivery. For graduate students taking at least one distance education class, 65% of those at public colleges used the Internet, compared with 69% at private nonprofit schools and 94% at proprietary institutions.

[iii] Institutions Enrolled the Most Distance Education Students in Subjects Related to Business, Humanities, and Education
For undergraduates, 21% of those taking their entire program through distance education studied business, while 13% enrolled in humanities. Traditional students show similar patterns with 18% studying business and 15% humanities. For graduate students, 24% of those taking their entire program through distance education enrolled in education courses, while 19% majored in business. Again, this pattern is similar to that for traditional classroom graduate students, of whom 23% studied education while 17% pursued a business degree.

[c] Nonprofit versus For-Profit Education
In the United States, academic and professional education became a business earning $100 billion per year plus in the 1990s. The increasing public appetite for distance learning has significantly affected the role played by providers. Once a primarily nonprofit activity, distance education has proven a lucrative commercial venture for some. While nonprofit schools continue to offer the vast majority of distance courses, new for-profit educational institutions have also entered the field. In addition, some nonprofit institutions have begun to engage in for-profit distance learning activities.

The predominant distance learning model remains a nonprofit one as schools at all levels continue to produce distance offerings. The tuition paid for distance courses at these institutions is typically the same as charged for on-campus classes, with supplemental fees occasionally added to cover technology costs. However, for-profit entities are now playing a larger role; the University of Phoenix (UOP) became the best known example. As the largest for-profit university in the country, the UOP online campus has granted over 171,000 degrees since 1976.68 UOP has increased its enrollment dramatically since its inception and primarily serves older, adult learners.69

A hybrid category of provider consists of nonprofit educational institutions launching for-profit divisions. New York University (NYU), for example, created a wholly owned, for-profit subsidiary in 1998 to offer online courses separate from those given by its traditional college. These courses were marketed to corporations, other colleges and universities, and individual students. The subsidiary was intended to enable NYU to raise money through an eventual stock offering or sale of partnership interests.70

NYU’s program, “NYUOnline,” was closed in 2002, however, because of financial difficulties. The venture lost nearly $25 million of its parent’s money before ceasing operations.71 A similar for-profit venture, initiated in 2001 by Columbia University and called “Fathom,” was dissolved in January 2003 after posting significant losses. Strikingly, Columbia contributed nearly $15 million to Fathom only to see a mere $700,000 in revenue.72 Temple University’s “Virtual Temple” program also closed its doors in 2001 after failing to meet expectations.73 More recently, the University of Illinois announced its for-profit “Global Campus” initiative would be replaced with a nonprofit model under academic control of the faculty.74

Several for-profit subsidiaries of nonprofit schools continue to demonstrate viability, however, including the University of Maryland’s “UMUC-
Online,” Pennsylvania State University’s “World Campus,” and the University of Massachusetts’s “UMassOnline.” The latter recently announced that online program education revenues grew 32% for the 2005–2006 academic year, while enrollment increased 23% for the same period. This compares to an increase of 39% for revenues in fiscal 2004 and an enrollment surge in such programs of 32% for that period.

**[d] Partnerships**

Several distinct varieties of partnership have emerged from the growth of distance education, including collaborations between nonprofit and commercial entities, otherwise unaffiliated educational institutions, and even foreign governments. Recognizing the value of the educational market, and the need for classes tailored to accommodate busy corporate schedules, companies have partnered with universities to design, produce, and transmit distance courses. The synergies associated with these arrangements are obvious. Educational institutions can shift the costs of expensive distance education technologies to the private sector, while their corporate partners “acquire an invaluable ‘laboratory’ for application of their technology in educational environments, and often gain access to the latest research of leading academics...”

AT&T, for example, designed a Learning Network Virtual Academy, in partnership with several colleges, that offers a range of professional development options for educators. In August 2001, Thomson Corp. announced it would invest $25 million in “Universitas 21 Global,” an online university targeting Latin America and Asia for English-language training. The venture will involve 16 colleges, including the University of Virginia and NYU. Private corporations are internally involved in distance learning as well. On January 19, 2005, Distance-Educator.com, a daily Internet publication, reported that Canon had recently announced its intention to make e-learning courses in information technology and professional skills available to over 11,000 of its employees in Europe.

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80. See Hobson, supra note 69, at 58.
81. The copyright laws applicable to private companies, as opposed to educational institutions, are a separate topic and will not be directly dealt with in this book.
Educational institutions, recognizing the potential of sharing resources and expertise in this expanding field, are joining forces to create programs that span state borders. Colleges have a long history of collaborative association, and distance education has provided new incentives to develop partnerships. Foreign governments are also involved in similar distance education efforts. In November 2003, the Government of Japan and the World Bank announced the establishment of the “Japan/World Bank Distance Learning Partnership.” The project’s aim is to assist East Asia and the Pacific region’s Global Development Learning Network to become a more effective teaching tool. In March 2004, Gilat Satellite Networks Ltd. announced an agreement to supply Russia’s Modern Institute for the Humanities, one of the world’s largest universities with over 145,000 students enrolled, with a satellite-based network to provide Internet access, distance learning, and videoconferencing to the university’s branches located throughout the Russian Federation.

1.2 THE FUTURE OF DISTANCE EDUCATION

While the growth of distance education in the United States has been dramatic, it has experienced its share of setbacks. As Michael Lambert, executive director of the Distance Education and Training Council, has stated: “You will see a lot of mistakes committed and a lot of money spent with little results.”

One recent victim was MindEdge.com, a website originally designed as a search engine allowing students to look for, compare, and enroll in online courses while the company earned commissions for these referrals. Unfortunately for the venture, students found it easier to proceed directly to a particular college’s website to register for courses. The ill-fated California Virtual University, described by its own CEO, Stanley Chodorow, as “a flawed idea,” ceased most of its operations in late 1999. According to

82. Distance-Educator.com (Mar. 26, 2003), at 1.
84. Gilat Signs Agreement with Russia’s Largest Open University, Distance-Educator.com (Mar. 25, 2004).
87. The Chron. of Higher Educ., May 19, 2000. See also Section 1.1, subsection [8]c supra for other examples of distance education ventures that have failed recently.
Mr. Chodorow: “There was an absence of an adequate financial structure. Member institutions never contributed much money to it, and private companies were not enthusiastic either.”

Despite such publicized failures, distance learning has continued to become an accepted form of education. The DOE’s 2004 National Education Technology Plan included a specific recommendation that states and school districts “provide every student access to e-learning.” The real question now is not whether distance learning has a role in education, but what form that role will ultimately take. Commenting on a recent poll by the National Education Association (NEA), NEA President Robert Chase noted: “For those who continue to divide higher education into ‘for’ and ‘against’ distance learning camps . . . this poll will be a surprise . . . [because] from the faculty perspective [it is] clear that distance learning can be quality learning.” The NEA poll revealed that 75 percent of the 400 instructors surveyed conveyed positive feelings about distance education, while only 14 percent were critical of the trend.

A more recent study found that nearly 70 percent of academic leaders believe student demand for online learning is still growing, while 83 percent of those institutions with online offerings expect their distance education enrollments to increase in the near term. The growth of distance education in the United States will not necessarily lead to a decline in on-campus learning, however. Frank Mayadas, program director at the Alfred P. Sloan Foundation’s Asynchronous Learning Networks, speculates that: “[o]ver a period of many years . . . the differences between campus-based and distance learning will be minimal.” Mary Beth Almeda, Director of the Center for Media and Independent Learning at the University of California, concurs by saying: “Technology won’t replace or supersede the classroom. There’s room for everything.” Michael Lambert best sums up the future of distance education.

88. Id.
90. News Release of the National Education Association, Confronting the Future of Distance Learning—Placing Quality in Reach (June 14, 2000), http://www.nea.org/nr/nr000614.html.
91. Id. See also Jaschik, supra note 11, at 2 (“A few years back, those organizing distance programs at community colleges would complain that faculty skepticism was a big obstacle, but . . . the survey found that is no longer the case.”).
93. Quoted in Thomas, supra note 85, at 2.
94. Id.
the situation by noting distance learning “will not replace traditional education but will enhance it.” Mr. Lambert points out that approximately 85 percent of “distance education” students are taught on-campus and use distance learning to supplement the classroom environment.

A recent survey of distance education programs in higher education found that their revenues grew by a mean of 15.52 percent in 2006 and that more than two-thirds of the colleges in the sample viewed their distance programs “as a financial resource . . . expected to produce a surplus for the college.” As such, the future debate over distance education will not involve its viability, which is a given, but its impact on faculty, institutional, and student relationships. One leading educator has expressed concern that distance learning will contribute to the commercialization of academia by forcing universities to be more interested in profits rather than educational standing. Other thought-provoking questions raised by faculty across the country concern whether:

- the creation of for-profit subsidiaries will reduce the number of tenured professorial positions
- universities will become more consumer oriented rather than student oriented
- the financial rewards associated with online courses will distract faculty from their traditional roles
- professors will maintain control over the material they produce
- faculty will have the same oversight regarding electronic courses as they do face-to-face ones
- professors ultimately will be replaced by the very materials they created

These challenges and concerns will no doubt be the subject of much discussion over the coming years.

1.3 THE CLASH OF LAW AND TECHNOLOGY

While new technology has been a driving force behind distance education, there is little doubt that, at least until recently, copyright law has been viewed as a significant hindrance to its development. As will be explored

95. Id.
96. Id.
99. See Horowitz, supra note 86, at 3. Several of these questions are considered and discussed in more detail in Chapter Five.
later, the law (which often evolves slowly) has struggled to maintain pace with technology in many areas. Distance learning is only one example of this phenomenon.

For years, educators have grappled with applying the murky doctrine of “fair use” to their lesson plans in order to avoid copyright infringement liability. The advent of digital distance learning has only made such application more difficult. Chapters Two and Three of this book deal with the basics of copyright law and the fair use doctrine in detail to assist distance educators in making better-informed decisions when teaching.

Digital technology has also made it easier to duplicate and distribute copyrighted works. As such, copyright owners have been reticent to license their works to colleges and universities for fear of the havoc students may cause by facilitating the worldwide, unauthorized dissemination of their materials. Advances in technology and a better understanding of licensing procedures have alleviated this problem to some extent. These topics and other licensing issues are covered in more detail in Chapter Four.

Using the Internet as the primary medium of distance education also carries with it legal risk. For years, Internet service providers, including colleges and universities, faced the prospect of being held vicariously or contributorily liable for the copyright piracy and associated legal misconduct of their subscribers or students. Recent federal legislation has lessened such exposure to providers in exchange for mandating cooperation with copyright owners and/or their agents who wish to identify and prosecute infringers. This and other related topics are discussed in Chapter Five.

Finally, for almost twenty-five years, copyright law placed severe constraints on the types of works that educators could perform or display in their electronic courses, and on where such courses could be transmitted. New federal statutes have eased such restrictions but in turn have imposed greater legal and technological burdens on educational institutions and their faculty. This is the principal topic of Chapter Six.

A word about the importance of these laws for educators is merited. In conducting seminars across the country, this author has often been asked whether teachers “really” need to have an understanding of copyright law. This skeptical inquiry arises, I believe, from a false sense of security propagated within the walls of academia. Many faculty simply dismiss the notion of ever being sued for infringement for reasons such as “content owners will never figure out what I’m doing in my classroom”; “lawsuits are too expensive”; “I’m not charging anybody”; and “there’s too much bad publicity in suing a school.”

While these rationalizations seem somewhat compelling, the reality is that while the prospect of legal action against educators for copyright infringement is currently remote, the threat is real and growing. Those
teachers who do not consider themselves potential targets may wish to reconsider in light of the thousands of college students now being sued by the music industry for illegally downloading songs from the Internet.\footnote{As of late 2004, the Recording Industry of America had filed over 6,200 such suits. See A. Ramasastry, \textit{Privacy, Piracy and Due Process in Peer-to-Peer File Swapping Suits} (Nov. 10, 2004), http://writ.findlaw.com/ramasastry/20041110.html.} One can assume most of those individuals also viewed themselves as too small to ever appear on anyone’s radar screen. However, new evidence suggests “investigators are now shifting their focus from companies profiting from the reproduction of copyrighted academic materials to individuals acquiring and exchanging those materials online for educational purposes, most often professors and students.”\footnote{C. Toth, \textit{E-violations of Copyright a Problem for Faculty, Students}, dailyvanguard.com (May 23, 2006), http://www.media.dailyvanguard.com/media/storage/paper941/news/2006/05/23/News/Eviolations.Of.Copyright.A.Problem.For.Faculty.Students-2607072.shtml.} Participants at a recent national workshop on how copyright law affects educational policy expressed awareness of recent litigation threats publishers have made against several colleges and their faculty.\footnote{W. Fisher & W. McGeveran, \textit{Obstacles to Educational Uses of Copyrighted Material in the Digital Age} 54 (August 10, 2006), Berkman Center Research Publication No. 2006–09, http://ssrn.com/abstract=923465.}

The Google case, discussed in more detail in Chapter Three, demonstrates the proclivity of copyright owners to pursue what they perceive as threats to their financial revenue stream. While the principal defendant in Google is an Internet search engine, that company is scanning and indexing books made available to it by a number of universities. In time, those institutions may well be added as defendants.\footnote{UC Libraries Join Google’s Book-Scanning Project Despite Lawsuits, siliconvalley.com (Aug. 9, 2006) (“Although the lawsuits aren’t directly targeting the university libraries, [the University of California’s] alliance with Google [has] irritated the publishing community.”).} They are already involved in having to defend and justify their actions publicly.\footnote{Id. at 2, quoting Jennifer Colvin, a spokesperson for the University of California’s library system: “There are so many benefits to this. We respect copyrights, but also want to give full access to our public domain material.”}

Lastly, educational institutions must weigh the odds of being sued against the potential costs of such an event. Under the law, instead of proving actual damages (which are often negligible), copyright owners may elect to recover “statutory” damages for each act of infringement.\footnote{17 U.S.C. §§ 504(a) and (b).} These amounts range from $750 to $30,000, and may reach as high as $150,000 if the plaintiff can demonstrate the infringement was “willful.”\footnote{17 U.S.C. §§ 504(c)(1) and (2).} As such,
illegally duplicating only a few works (even unintentionally) may expose the university or its faculty to significant liability. Even if these persons are successful in raising fair use or other educational exemptions to justify their conduct, the expense of litigating such suits is exorbitant. Current studies estimate the costs of defending a major copyright infringement action at close to $1,000,000.107

As such, the growing risk of litigation coupled with the prospect of paying out disproportionate damages and incurring substantial legal fees should be a warning bell to every educational institution or school system that copyright law education and compliance should be an important component of its agenda. At present, however, such copyright awareness on campus seems to be lacking. The publishing community has estimated that professors illegally posting long excerpts of works on the Internet have cost that industry over $20 million per year.108 The issue has also raised national concern. In May of 2006, the United States Senate unanimously passed a nonbinding resolution that “institutions of higher learning should adopt policies and educational programs on their campuses to help deter and eliminate illicit copyright infringement.”109 Two months earlier, the U.S. House reauthorized the Higher Education Act and included language therein to use federal funds to combat copyright piracy on campus.110

However these issues are resolved, distance learning will remain a significant component of education at all levels for many years to come. How copyright law affects and interacts with distance education is the subject of the remainder of this book.

107. Fisher, supra note 102, at 57.