

# LEGAL ISSUES IN THE “E-LEARNING BUSINESS”

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## Introduction

Distance education has challenged traditional models of teaching and learning in higher education and forced institutions of higher education to reexamine a variety of policies related to issues such as curriculum development and control, evaluation of faculty and students, and ownership and use of intellectual property. From a legal perspective, the technology and scope involved in online or distance education pose particular challenges because many legal and policy standards applicable to higher education are based largely on the traditional model of brick-and-mortar classrooms and face-to-face interaction. These issues have become important not just with regard to distance-education courses, but in all other courses where the technology and techniques of distance education are incorporated to at least some extent.

### I. POLICY AND CONTRACT ISSUES

In negotiating contracts with outside vendors for online educational services or support, a variety of legal and policy issues can come into play, such as:

**Exclusivity** – The university will usually want to protect its ability to engage in other online ventures with other vendors.

- Watch out for vague no-compete clauses, and for obligations that might extend even beyond the term of the rest of the contract.
- Keep contract terms for distance-education programs limited in duration, because the market is rapidly changing and the institution’s needs and priorities might change fairly rapidly, along with the related technology.

**Identity of Business Partners** – Colleges and universities concerned about their reputations as non-profit educational institutions should take special care in choosing their business partners in the realm of distance education. Many vendors providing services in this area are new companies that may not survive in a difficult business climate. Others are likely to be bought out by large publishing companies and other for-profit entities trying to increase their presence in the higher education marketplace. *See, e.g., “A Wave of Consolidation Hits For-Profit Higher Education,” The Chronicle of Higher Education: Academe Today* (Aug. 10, 2001).

- Be sure to look closely at assignment and successorship clauses, and consider whether you would be concerned if a vendor is purchased by a larger entity (such as a large publishing company) that might not share the institution's interests and goals, or that might be competing with the institution's own programs.

**Intermingling of Intellectual Property** – The university must take care when intellectual property created by its faculty or staff is intermingled with intellectual property created by the outside vendor/contractor. The contract should specify who has the rights to the intermingled intellectual property, to create and use derivative works, etc., especially in the event that the contract is terminated.

**Use of University Name and Marks** -- The university must protect how and when its official name and marks are used by other parties in order to prevent dilution or confusion with regard to those marks. The university must also be careful not to use the official marks of other entities without their written permission.

**Editing of Content** – Contracts often discuss responsibility for offensive materials, materials that potentially violate the copyrights of other parties, how and whether materials are to be periodically updated or removed from the Internet (along with related warranties and indemnification).

**Responsibility for Copyright Clearance** – Who is responsible for deciding when permissions should be sought, and from whom? Who is responsible for following through with these clearances, if necessary? It is important to keep a good paper trail of copyright permissions for works used in distance education courses, especially when working with outside vendors or organizations on the content for such courses.

**Handling of Technical Problems and Risk Management/Insurance** -- Who is responsible if the technology breaks down? The university will want a quick service response from the vendor, with additional resources provided if the problem cannot be resolved quickly. It may be helpful to review contractual provisions on this issue with your risk management or insurance personnel.

**Hyperlinks and Advertising** – When working with outside vendors or organizations, a university needs to decide how and to what extent it will permit links to the web sites of other organizations, or advertising by other organizations on the university's own web sites. Many institutions have policies regulating advertising and endorsements that should be consulted when distance education programs are developed.

**Marketing of Courses and Programs** – Institutions need to decide how and to whom their distance education programs will be marketed, and who will have responsibility for such marketing. For example, many institutions are targeting their own alumni for e-courses. Counsel will want to be sure that the development staff are comfortable with any contractual provisions dealing with access to alumni mailing lists, the nature and frequency of communications to alumni, etc.

**Fallback** – If a distance-education venture proves to be unreasonably costly or fails to attract sufficient interest, counsel and others involved in negotiations on behalf of an institution should think about the value of the works created in and of themselves. Many components of distance-education courses might be valuable for teaching and research purposes, especially if the

institution retains the rights to use such materials in such ways. Accordingly, it is a good idea to consider possible alternative uses of distance education materials and to protect the institution's rights to such uses to the extent possible.

## **II. Ownership and Control of Online Course Materials and Courseware**

In light of the complexity and expense of the resources involved in developing online course materials, many institutions are revisiting their intellectual property policies to clarify how they apply to online educational materials. Major national associations such as the American Council on Education (ACE), Association of American Universities (AAU), and American Association of University Professors (AAUP) have called upon institutions to review their existing intellectual property policies and practices with regard to online education and have developed policy recommendations in this area (see list of resources at end of this outline).

Copyright law involves a bundle of rights, and questions of ownership and use of online course materials should not be viewed as an all-or-nothing, zero-sum game. The best policies and practices will recognize and balance the rights of individual creators and contributors as well as the needs of institutions as communities of scholars and learners. Such policies and practices should be sufficiently flexible so as to permit exceptions where appropriate and to be adaptable to new forms of technology, and should be coupled with procedures for policy clarification or dispute resolution when needed.

In considering the question of ownership of online educational materials, institutions must take into account not just legal standards under copyright law but also academic tradition and practical considerations of policy administration. While most of the current debate focuses on the relative rights of faculty members and institutions, the rights and responsibilities of other creators, developers, and users must also be considered in university policies.

### **A. Faculty Rights and Interests**

Faculty ownership rights and interests in online course materials are rooted in legal and educational policy considerations. Traditionally, most colleges and universities have not sought to assert copyright over ordinary course materials and other traditional scholarly works. *See, e.g.,* Gorman, Robert A., "Intellectual Property: The Rights of Faculty as Creators and Users," 84 *Academe* 3:14 (May-June 1998). Even if institutional policies assert institutional ownership of such materials, they have often recognized the prevailing academic tradition as a practical matter. Under the principle of academic freedom, faculty members generally have the right to develop and modify course materials within their fields of expertise, and to use pedagogical techniques they deem most appropriate for the subject matter. *See* 1940 Statement of Principles on Academic Freedom and Tenure, AAUP Policy Documents & Reports.

The AAUP Statement on Copyright summarizes the academic tradition in this way:

[I]t has been the prevailing academic practice to treat the faculty member as the copyright owner of works that are created independently and at the faculty member's own initiative for traditional academic purposes. Examples include class notes and syllabi; books and articles; works of fiction and nonfiction; poems and dramatic works; musical and choreographic works; pictorial, graphic, and sculptural works; and educational software, commonly known as "courseware." This practice has been followed for the most part, regardless of the physical medium in which these "traditional

academic works” appear; that is, whether on paper or in audiovisual or electronic form. . . . This practice should ordinarily apply to the development of courseware for use in programs of distance education.

This approach has a practical aspect as well. Faculty members create lots of scholarly works, many of which have little commercial value. The administrative burden of claiming and exercising ownership over all such works would be substantial in practice. For example, the negotiation of publishing contracts for articles and textbooks for all faculty members would be incredibly labor-intensive for a university general counsel’s office.

## **1. Definition of “Scholarly Works” and New Media**

With the advent of digital technology and new forms of media, many new questions have arisen about the definition of “scholarly works.” Some policies reference traditional forms of works such as articles and textbooks. Depending on one’s field of study, however, a faculty member’s scholarly work might take the form of a multimedia production, CD-ROM, interactive textbook, web site, computer code, or software, among others. Some of these works might include inventive elements subject to patent protection as well as copyright, further complicating their status under university policy. It has thus become increasingly important to coordinate the work of technology transfer offices and others who deal with patents with the work of individuals on campus who deal with works subject to copyright protection.

Web pages can present special challenges for universities, because they can take so many forms and include such a wide variety of information and expression from a multitude of creators and sources. Colleges and universities often provide the resources necessary to facilitate their development without controlling or monitoring their content. The resulting diversity in web pages associated with these institutions reflects the breadth of their missions and can be a good thing. Each institution will want to make sure, however, that its constituents (including faculty, staff, students, and organizations) understand when they are speaking on behalf of the institution or some component thereof, and when they are speaking as individual scholars or citizens.

Publicly accessible web pages, including those associated with courses that are not restricted to enrolled students, also pose special challenges with regard to educational fair use to the extent that they incorporate copyrighted materials from other sources. Many scholars want their work to be available and accessible to scholars at other institutions and to the public at large, not just to their immediate students. This desire may be consistent with the institution’s mission, but it also requires careful consideration of the copyright issues involved.

## **2. Rights that Faculty Care About**

Faculty members have many of the same concerns with online educational materials as they do with traditional scholarly works, including:

- The ability to edit and control the presentation of their work, and to exercise a right of first refusal in the preparation of subsequent versions

- The ability to change and update materials over time, reflecting new research, evidence, or developments
- The ability to create derivative or related works (for example, faculty members may want to retain the right to publish articles on subjects covered in online educational materials and courses)
- Professional recognition and credit both in and outside the institution – including consideration of online works in promotion and tenure policies
- The right to take educational materials they create when they leave for another institution, for their own teaching and research purposes
- The right to have a say in whether and how their works are commercialized, and to share in the profits (if any) from such commercialization
- The right to share their work with peers in their disciplines (e.g., to check their work or to build upon it)

These interests should be taken into account when reviewing and revising policies on intellectual property and online education. The University of North Texas Distributed Learning Policy ([http://www.unt.edu/legalaffairs/distributed\\_learning.html](http://www.unt.edu/legalaffairs/distributed_learning.html)) includes an interesting section on “Revision Rights” that recognizes the academic integrity concerns of faculty members and the institution:

Faculty members should normally retain the right to update, edit or otherwise revise electronically developed course materials that become out of date, or, in certain circumstances, should place a time limit upon the use of electronically developed course materials that are particularly time sensitive, regardless of who owns copyright in the electronically developed course materials. These rights and limitations may be negotiated in advance of the creation of the electronically developed course materials and may be reduced to writing. Absent a written agreement, each faculty member will have the right and moral obligation to revise work on an annual basis in order to maintain academic standards. If a faculty member does choose to revise the work and such revision is done in a satisfactory manner, the faculty member retains the rights to full royalties . . . for another year.

**B. Institutional Rights and Interests: “Works Made for Hire” and the Academic Exception**

Some colleges and universities have asserted ownership over faculty course materials based on the “work made for hire” doctrine (*see* 17 U.S.C. §§ 101 and 201), under which an employer can assert ownership over works prepared by its employees acting within the scope of their employment. A variety of opinions exist within the higher education community about the strength and practical value of this legal argument as applied to faculty in light of academic norms and traditions. The case law on this subject is relatively sparse, but some federal courts have acknowledged traditional academic practice and suggested that faculty authors own copyright in their own academic materials. *See, e.g., Weinstein v. University of Illinois*, 811 F.2d 1091, 1094 (7<sup>th</sup> Cir. 1987) (discussing the longstanding tradition that higher education faculty

own the copyrights in their academic work, as stated in Nimmer's Copyright treatise and elsewhere); *Hays v. Sony Corp. of America*, 847 F.2d 412, 416 (7<sup>th</sup> Cir. 1988) (noting that although college faculty do academic writing as part of their employment responsibilities and use employer facilities to do so, "[a] college or university does not supervise its faculty in the preparation of academic books or articles, and is poorly equipped to exploit their writings, whether through publication or otherwise"); *but see, e.g., Vanderhurst v. Colorado Mountain College District*, 16 F. Supp.2d 1297 (D. Colo. 1998) (applying work-for-hire doctrine to teaching outline).

Some university policies explicitly assert the work-for-hire doctrine in claiming ownership over scholarly works, although many such institutions grant back the rights to faculty for the policy and administrative reasons discussed in section I.A above. In some instances, faculty members have tried to disclaim application of this doctrine to particular works by doing all of the work for particular projects at home, with their own computers. Policies or practices that have the effect of encouraging faculty members to try to create works on their own time, and with their own resources away from the campus, may not be in an institution's best interest.

Other institutions may assert ownership over certain types of faculty-created works as a matter of contract law, asserting that their policies create contractual rights and responsibilities. Institutions must be careful in relying upon this legal rationale, however, if their policies are merely incorporated in faculty handbooks or similar documents that include disclaimers about legal enforceability.

## **1. Rights that Institutions Care About**

Institutions may care more about online educational materials than about other forms of scholarly works in part because of the financial and technical resources often required to develop such works, particularly in the case of online courses. Rights that institutions may especially care about include the following:

- Use of works for educational and administrative purposes (e.g., teaching within the institution, accreditation reviews, etc.)
- Timely revision and maintenance of electronic course materials for continued use

Just as it recognizes faculty interests in timely revision of electronic materials (see III.A.2 above), the University of North Texas Distributed Learning Policy also recognizes the University's interest in this regard:

If the University believes a revision is necessary and no timely revision is made or if the revision made, in the University's opinion, does not maintain academic standards, the University may refuse to market the product, or the University may employ another person to update the work and charge the cost of updating the faculty member's portion of the revision against any royalties paid to the original author.

- Recovery of costs associated with the development of such works, and sharing of profits associated with the commercialization of such works

- Control of use of the university’s name, seal, or marks in conjunction with such works

This interest can arise even for works of which the university does not claim ownership. For example, Columbia University’s Copyright Policy (adopted in 2000) states as follows:

A faculty member, or other creator, who owns the copyright in his or her works under this Policy, . . . may commercialize those works, without the authority or permission of the University, so long as the University’s name is not used in connection with works so made available, other than to identify the faculty member as an instructor at the University.

### **C. Policy Provisions that Try to Balance These Interests**

A number of model policy provisions have emerged to address these issues, such as the following:

#### **1. Works Involving Substantial or Significant Use of University Resources**

Many institutions have developed policies indicating that the institution owns copyrightable works that are created with “substantial,” “significant,” “unusual,” or “extraordinary” university resources. (See policy statements from AAU, ACE, and AAUP in the list of resources at the end of this outline.) These terms are obviously difficult to define with precision, because they vary from one department to the next and can change over time as new forms of support for faculty become the norm. A policy using such concepts will need to be sufficiently flexible to incorporate and reflect such developments, and to make comparisons to similarly situated faculty rather than to rely on generalizations across all disciplines. Currently, for example, usual university resources for most faculty might include ordinary use of resources such as libraries, office space and equipment, computer and network facilities, secretarial and administrative support, and supplies. For any given department, unit, or individual, however, what constitutes a usual resource will depend upon the functions and responsibilities of that department, unit, or individual. For example, access to high-end computing facilities may be a usual resource in computer science, but perhaps not in a department such as philosophy.

This policy approach reflects the institution’s fiduciary responsibilities with regard to investment and management of limited resources. To some extent, its underlying assumptions reflect aspects of the work-for-hire doctrine, because this sort of standard takes into account some of the same considerations used to determine whether an employee was acting within the scope of his or her employment in creating a work. It is not identical to the work-for-hire doctrine, however. Accordingly, if this sort of standard is to be used in a university policy, it is important to understand the legal basis upon which the policy will be premised – for example, as a contract between faculty and the institution. Policy statements from the ACE and AAUP, among others, note that the provision by the institution of certain types of creative resources might rise to the level of joint authorship of a work, creating the possibility of joint ownership. Misunderstandings about ownership can be avoided by requiring institutional permission to use limited or

unusual resources, and by clarifying the ownership and use implications of such arrangements in writing when they occur.

## **2. Administrative Works**

When faculty or staff members are acting in administrative capacities (e.g., as chairs or members of university committees or task forces, as department chairs, etc.), many university policies state that the copyrightable works produced pursuant to such responsibilities are owned by the institution. Such works are produced for the institution, after all, and their expression may be attributed to the institution rather than to any given individual.

## **3. “Commissioned” or Institutional Works**

Many university policies also assert ownership over works that are specifically commissioned or requested by the institution—e.g., when a unit within the institution instigates or facilitates the creation of works for the express purpose of making such works available to individuals or entities other than, or in addition to, the creator(s) for use in teaching, research, patient care, public information, or other university activities. Such arrangements should probably be reflected in written agreements at the outset of any such projects to avoid future misunderstandings. The creation of such works by faculty might also include the provision of specific compensation such as additional financial compensation, release time, etc.

For purposes of clarity in the academic culture, general expectations that faculty members will teach courses or publish scholarly works should probably not be construed as the equivalent of the commissioning of specific works.

Stanford University’s Copyright Policy (<http://portfolio.stanford.edu/101242>) includes a category called “Institutional Works” in which the University retains ownership:

The University shall retain ownership of works created as institutional works. Institutional works include works that are supported by a specific allocation of University funds or that are created at the direction of the University for a specific University purpose. Institutional works also include works whose authorship cannot be attributed to one or a discrete number of authors but rather result from simultaneous or sequential contributions over time by multiple faculty and students. For example, software tools developed and improved over time by multiple faculty and students where authorship is not appropriately attributed to a single or defined group of authors would constitute an institutional work. The mere fact that multiple individuals have contributed to the creation of a work shall not cause the work to constitute an institutional work.

## **4. Sponsored Projects**

The terms of agreements covering sponsored projects may govern the ownership of works produced pursuant to such projects. In such cases, however, it may be important to distinguish works created as required outcomes for such projects from related scholarly works that build upon the research or findings involved in such projects.

## **5. Use of the Institution's Name, Seal, and Marks**

Ownership and control of online works also raise the issue of how and when an institution's name, seal, or marks are used. The use of these insignia of the university may be perceived as connoting institutional sponsorship or endorsement of a work. Institutional policies should be reviewed to ensure that they provide guidance on how and when these insignia can be used, keeping in mind (among other things) the institution's needs to protect its reputation and trademarks. Some institutions view the use of the name, seal, or marks – other than for purposes of identification of the creators – as in and of itself use of a significant institutional resource triggering the institution's ownership interests (see, e.g., AAU policy statement at p.7).

### **D. Collaborative Works: Other Creators and Contributors; Multimedia Projects; Working with Outside Entities**

Faculty members are not the only creators of copyrightable works in the online environment. The nature of the technology is such that technical staff are increasingly involved in developing code related to courseware or course materials. The work-for-hire doctrine will typically apply to staff members acting within the scope of their employment. It will not apply, however, to students, who own the copyrightable works they create unless they are acting as employees of the institution or have transferred copyright to the institution. Similarly, independent contractors or outside consultants who are not regular employees may own the copyright to works they produce unless a written agreement specifying otherwise is executed.

Multimedia works frequently involve multiple creators, creating special challenges under copyright law. Collaborative projects might also involve faculty or staff from other institutions. In such projects, written agreements should be executed as early as possible in the process to clarify the rights and responsibilities for on-line educational materials. Even if ownership is held by a single entity (such as the university), the rights to use such works can often be divided and shared so as to meet the needs of each party. For example, multiple parties may have non-exclusive rights to copy, display, or distribute a particular work.

Colleges and universities must be especially careful in protecting their rights in working with outside entities in the creation of online course materials and courseware. For example, institutions wishing to work with multiple outside vendors (e.g., with different departments or schools on campus) must scrutinize the breadth of any contractual clauses dealing with exclusivity and non-competition. Other issues to consider in such contracts include the rights and responsibilities for editing and updating materials, getting permissions to use or incorporate copyrighted materials from other sources, and responding if and when the technology breaks down.

In many situations involving multiple contributors, the issue of credit may be at least as important as questions of copyright ownership and control. This is an issue not just for faculty and students, but increasingly for technical staff whose expertise is in short supply and is indispensable in putting together online educational materials. Appropriate credits can be acknowledged without altering copyright ownership.

## **E. Revenue Sharing**

Given the wide variety of collaborative models and contributions possible in the development of online course materials, a fair division of revenues (if any) will not always fit easily into a predetermined formula. In its report on intellectual property policies (at p.11), the Association of American Universities (“AAU”) recommends that “the existing rules for revenue sharing based on patent and licensing income is apt to be a good first approximation of distribution rules governing new media.” The AAU (at p.29) also recommends the adoption of two principles in the process of determining distribution rules:

first, that there be a fair distribution of revenues among those directly involved in the creation of works (i.e., faculty, departments, schools, divisions, and in some cases doctoral or post-doctoral students); and second, that the principle of collaborative creation lead ‘the university’ to retain a significant share of the proceeds for investment in research and teaching activities that are critically important to the mission of the university but that may not generate their own revenues.

## **F. Resolution of Disputes**

As technology and institutional policies and practices evolve, questions and disputes about ownership issues with regard to online educational materials and other copyrightable works are inevitable. Many institutions struggle with how to make these decisions. At the University of Michigan, for example, a faculty member was recently named to a new Associate Provost position, in part to deal with the policy issues related to copyright ownership and online education (working closely with the Office of the General Counsel). Both the AAU and AAUP recommend that colleges establish a committee, representing both faculty and administration, to play a role in ongoing policy development and dispute resolution. The AAU report listed at the end of this outline under “Some Helpful Resources,” for example, states (at pp. 12-13) that:

The university should form a standing committee that will review policy on a regular basis. The committee should recommend policy changes that are required to respond to the rapid development of new forms of information technology and new types of relationships that develop among the university, its faculty members, and external for-profit companies (i.e., those “partners” who are either directly or indirectly involved in the creation of new media content that will bear the university’s name or claim its sponsorship). The committee should hear and adjudicate disputes over interpretations of university policy in this area. Its members should be appointed by either the President or the Provost, and should include members of the faculty.

One reason for handling disputes in this fashion--rather than through traditional faculty grievance committees, for example—is that disputes may involve the rights and interests of a number of individuals (not only faculty) both in and outside the institution. If such a process is established, the question of how appeals will be handled should also be addressed.

### III. OTHER FACULTY ISSUES

#### A. Educational Decision-Making

Distance education raises many of the same issues as traditional courses with regard to academic governance. The recent Statement on Distance Education from the American Association of University Professors (AAUP) notes:

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.

*AAUP Policy Documents & Reports* (Ninth Ed. 2001) at 180.

Contracts with outside corporations and other entities to develop and support distance-education programs are often negotiated at a high level—and sometimes in secret—posing a particular challenge to faculty involvement. For example, such contracts can impact faculty workload and assignments if they require institutions to provide certain numbers or types of courses, or if they require or encourage institutions to use outside contractors to assist in the development or delivery of such courses. Rules regarding faculty consultation on curricular matters may be spelled out in a faculty handbook, collective bargaining agreement, or similar document and should be consulted in such circumstances.

##### 1. Curriculum Development

With regard to the role of faculty members in curriculum development in this context, the AAUP Statement on Distance Education says that:

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 authority, 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 this use. These determinations should conform with institutional policies.

*Id.* Thus, when considering the development of distance education courses, it is important to be aware of the existing institutional procedures on curriculum approval.

##### 2. Other Governance Issues

Other governance issues to consider in dealing with distance education include, among others:

- a. Who owns the course materials, and how they may be used subsequent to development (see materials from prior session at this conference on “Copyright Issues in E-Learning”)
- b. Who is eligible to take such courses, and who will make such decisions (e.g., is the regular admissions process involved in selecting students? What are the standards for admission?)
- c. How to determine the type and amount of credit awarded for such courses
- d. Rules regarding teaching loads and required faculty-student contact
  - Note that some contracts with distance-education vendors require 24-7 availability from faculty members, which is usually not feasible
  - Faculty members teaching distance education courses need to be aware of contractual obligations that create obligations for them
- e. Rules regarding faculty assignments
  - Can faculty be required to teach online courses?
  - Can faculty insist on teaching online courses only?
- f. Tuition charges
  - If your institution charges different tuition rates for in-state and out-of-state students, how will tuition be handled for distance-education courses?
  - What are potential competitor institutions charging for tuition for similar online courses?
- g. Allocation of necessary supporting resources
  - Do faculty and instructional staff have the technical support they need in case of problems with the technology?

For an example of a policy that addresses many of these issues in detail, see “San Diego State’s Senate Creates a Detailed Policy for Distance Education Courses,” *The Chronicle of Higher Education: Academe Today* (Apr. 26, 2000).

## **B. Educational Quality and Integrity Issues**

Distance education raises a host of educational quality and integrity issues that have yet to be answered in this rapidly changing environment. In the rush to appear to be active in the online environment or to attempt to seek revenues in this context, institutions must be especially careful to consider questions of how various types of distance-education courses and programs reflect and further their core educational missions. In a recent report on distance education, the American Federation of Teachers (AFT) concluded that the standardization of online education based on a business model can rob the students of the diversity of knowledge that individual

professors bring to the classroom. See American Federation of Teachers: "A Virtual Revolution: Trends in the Expansion of Distance Education" (2001), [http://www.aft.org/higher\\_ed/technology/](http://www.aft.org/higher_ed/technology/). The American Association of University Professors (AAUP) recommends that faculty members should be involved in the oversight of distance-education courses to the same extent as in other courses with regard to factors such as course development and approval, selection of qualified faculty to teach, pedagogical determinations about appropriate class size, and oversight of final course offerings by the appropriate faculty committee to ensure conformity with previously established traditions of course quality and relevance to programs. See AAUP Statement on Distance Education, *AAUP Policy Documents & Reports* at 179-81 (Ninth Ed. 2001). For a helpful list of practical considerations for quality control, see "Teaching at an Internet Distance: the Pedagogy of Online Teaching and Learning: The Report of a 1998-1999 University of Illinois Faculty Seminar," [http://www.vpaa.uillinois.edu/tid/report/tid\\_report.html](http://www.vpaa.uillinois.edu/tid/report/tid_report.html). See also, e.g., "Distance Education Quality Checklist," National Education Association (1999) [www.nea.org/technology/briefs/16.html](http://www.nea.org/technology/briefs/16.html).

The University of Michigan recently declined to participate in U21global, a multinational consortium of research universities working with Thomson Learning (the publishing giant) to establish online courses and programs, the content of which would be developed largely by outside contractors. Among the University of Michigan's concerns were the extent to which the University and its faculty would be involved in the development and assessment of the courses, which would in turn lead to degrees with the member universities' names and seals on them.

### **1. Academic Freedom in Course Content and Delivery**

Distance education raises special concerns with academic freedom and educational quality to the extent that the creation, use, and revision of course materials may not necessarily be handled by the same faculty member(s)--or even by faculty members at all. In some for-profit institutions, for example, the individuals who create original course materials are not involved at all in the use of those materials and do not interact with students. Thus, their ideas are left in the hands of others to interpret and revise. The individuals who are responsible for the "delivery" of the course content may not have the same expertise or training as the creators. The institution might also ask for courses to be structured and packaged in very specific ways to meet its own needs, thus placing other constraints on traditional academic freedom in teaching.

Some issues to address in contracts relating to academic freedom and quality issues might include the following:

1. Who is responsible for revising such courses, and when?
2. What happens if a faculty-creator dies, moves to another institution, or changes his or her mind about the content or pedagogy of the course?
3. Who will resolve conflicts among creators and instructors of such courses?
4. Who is responsible for ensuring compliance with copyright law in the use of course materials?
5. What is the impact on fair use of offering such courses to non-traditional students on a for-profit basis?

See, e.g., University of North Texas, "Distributed Learning -- Creation, Use, Ownership, Royalties, Revision and Distribution of Electronically Developed Course Materials," (Feb. 11, 2000); [http://www.unt.edu/planning/UNT\\_Policy/volume3/16\\_1\\_2.html](http://www.unt.edu/planning/UNT_Policy/volume3/16_1_2.html).

## **2. Student-Faculty Interaction**

Universities may be tempted to create mega-courses to make as much money as possible from them, especially in light of the substantial expenditures necessary to develop and provide on-line courses. The number of students is a critical factor, however, in determining how a course will be taught and what types of interaction will be most effective. If distance-education courses are expected to produce substantial interaction among students and faculty, the student-faculty ratio must be considered even if the technology makes it possible to reach a much larger number of students than a traditional course. See, e.g., University of Illinois faculty report, "Teaching at an Internet Distance," <http://www.vpaa.uillinois.edu/tid/report/>.

Given the overall mission of colleges and universities, the need for some form of socialization and interaction for students may be critical to the success and viability of many distance-education programs. See, e.g., "An On-Line Student Enjoys Class Flexibility but Misses Social Contact," *The Chronicle of Higher Education: Academe Today* (Dec. 8, 1999). On the other hand, some proponents of distance education have noted that the lack of personal interaction may encourage shy, quiet students to participate more actively electronically than they would in person.

Others have suggested that subtle forms of discrimination may be eliminated when a faculty member and students are unaware of the gender and race of the individuals with whom they are interacting electronically. Of course, face-to-face interaction can be an effective tool for overcoming stereotypes and prejudice, one of the primary justifications for the diversity rationale behind affirmative action programs in higher education.

Finally, the fact that students can participate in distance-education courses at times and places that suit their own schedules may mean that some students will be more well-prepared than they would be otherwise. Yet some students may need direct, personal interaction with a faculty member and fellow students to motivate and inspire them. *The Chronicle of Higher Education* reports that "anecdotal evidence and studies by individual institutions suggest that course-completion and program-retention rates are generally lower in distance-education courses than in their face-to-face counterparts." "As Distance Education Comes of Age, the Challenge is Keeping the Students," *Academe Today* (Feb. 7, 2000).

## **3. Evaluations of Students and Faculty**

Distance education programs have begun to raise questions about how to evaluate and grade students whom the faculty member has never met, and how to ensure that the students themselves (rather than surrogates, for example) are participating in the course, taking the examinations, etc. Thus, distance-education programs must include safeguards to ensure that students are held to the same standards of academic honesty as students in

traditional courses. Given the widespread availability of materials on the Internet, concerns have arisen about plagiarism in written work.

Technical difficulties can also hamper the ability of students to participate fully or to complete course requirements. For example, in the fall of 1999, more than half of the 1,900 students enrolled in an experimental online course at the University of Iowa received F's on their midterm report cards. Many of them had not even started the course, and some of the lessons were not even up on the course Web site. The course was taught by a single professor (with help from 20 undergraduate teaching assistants), making it very difficult for the faculty member to have a sense of each individual's circumstances. Although such problems already exist in large lecture courses, they are exacerbated by the nature of distance education and the lack of face-to-face contact. Other issues to consider include how to ensure security and privacy of student work, feedback and grades.

Similar questions and concerns arise regarding the evaluation of faculty members involved in online education. Students should have the opportunity to evaluate faculty who teach such courses, just as they do in other courses. Evaluation policies must be crafted so that faculty members are not judged based on the performance or inadequacy of technology, however. *See, e.g.*, AAUP "Special Committee on Distance Education and Intellectual Property Issues: Suggestions and Guidelines" (Dec. 3, 1999), <http://www.aaup.org> (under "Distance Education & Intellectual Property Issues").

#### **4. Access for Individuals with Disabilities**

Another set of issues raised by the technology required in distance education is the provision of access for students with disabilities, as well as for faculty members with disabilities who may need accommodations in order to carry out their teaching functions electronically. Experts agree that the laws prohibiting discrimination on the basis of disability apply generally to online programs, just as they do to other education programs. *See* "Colleges Strive to Give Disabled Students Access to On-Line Courses," *The Chronicle of Higher Education* (Oct. 29, 1999) at <http://www.chronicle.com/free/v46/i10/10a06901.htm>. Accordingly, faculty members need to be aware of their responsibilities in teaching online courses and be provided with the technical support necessary to respond to student requests for accommodations. Some online services help Web-site designers build accessible pages, for example. *See, e.g.*, <http://www.cast.org/bobby/> for information on a program called Bobby that checks pages and points out potential problems of access.) When working with outside entities to provide online courses, colleges and universities must ensure that their programs comply with the relevant disability discrimination laws.

Moreover, universities using online education should keep in mind the varying learning styles of students, and consider taking advantage of the technology to provide multiple instructional formats.

#### **6. Other Access and Discrimination Issues**

Colleges and universities must also consider whether the use of distance-education courses and programs, due to the technology and technological savvy needed in order to

participate in them, might exacerbate inequalities between students based on income, geography, background, etc. (the so-called “Digital Divide” with modern technology). If such inequalities are a potential concern, institutions may want to consider the nature and extent of training and technical support they make available to their distance-education students.

Institutions should also consider the impact of distance-education programs on the bases of gender and age. For example, in September 2001 the American Association of University Women (AAUW) released a report, “The Third Shift,” indicating that distance education is often harder on women than men. The report notes that women compose the majority of online learners, and face particular challenges as they try to juggle demands of childcare, other jobs, etc.

### **C. Institutional Support and Compensation**

Significant resources are required to develop and maintain distance-education programs. Faculty members must give thought to how materials will be presented and how students will be evaluated, and must also become familiar with the technologies of instruction prior to delivery of distance-education courses. Accordingly, faculty members charged with these responsibilities may need significant release time from ordinary teaching duties while developing such courses. *See Statement on Distance Education, AAUP Policy Documents & Reports* at 180-81 (Ninth Ed. 2001). Once a course has been developed, a faculty member also needs to figure out how best to maintain contact with his or her students.

In order to carry out their instructional responsibilities, faculty members will also need technical training and support. As noted in the AAUP report, however,

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 which offer those courses and programs.

*Id.* at 179. Accordingly, faculty members will need to be able to call upon these technical resources as needed throughout the duration of distance-education courses.

Faculty workload and salary policies should take these types of considerations into account. As discussed above in section I.B, *supra*, these issues should be addressed in writing in faculty contracts and policies prior to the commencement of such work.

### **D. Faculty Conflicts of Interest and Commitment**

Faculty conflict-of-interest and commitment policies need to be reviewed with online education in mind, given how online materials can be developed and disseminated. Existing conflict-of-interest/commitment policies often address obligations (such as teaching traditional courses for other institutions) that are time and space-dependent. For example, policies often limit the amount of time a faculty member may spend in outside consulting (e.g., as a percentage of their overall work time), or the places in which faculty can teach (e.g., as part of the credit-bearing functions of other colleges or universities) without prior authorization. The Internet makes it possible, however, for a faculty member to create and disseminate complex works

online in less time than ever, and without necessarily making use of significant University resources.

## 1. Arthur Miller Case

Arthur Miller, a prominent Harvard Law School professor, became embroiled in a dispute with Harvard after he supplied videotaped lectures for Concord University School of Law, an online institution, without Harvard's permission. *See, e.g., "Who Owns On-Line Courses? Colleges and Professors Start to Sort it Out," The Chronicle of Higher Education* (Dec. 17, 1999) at A45 (discussing a future in which faculty members might become free agents who would own their course materials and sell access to various online institutions). New guidance was subsequently proposed that would forbid Harvard professors to teach online courses for other institutions – or even to provide materials for such courses – unless they first obtain permission. *See Young, Jeffrey R., "Harvard Considers Limits on Teaching Online Courses for Other Institutions," The Chronicle of Higher Education: Academe Today* (Apr. 25, 2000).

## 2. Policy Issues

Institutions considering how and to what extent existing policies on faculty conflicts of interest and commitment need to consider questions such as the following:

- How do online materials differ from books and articles published elsewhere, or from off-campus lectures on topics within a faculty member's professional expertise?

This line will be hard to draw in practice, especially given the variety of possible arrangements involved with online education. Faculty members may be providing some components of a traditional course (e.g., lectures in a digital form), but not others, to a particular outside entity. The outside entities with which faculty work may not always be other traditional colleges and universities—they might be for-profit entities that are increasingly involved in the provision of e-learning (e.g., for employees of corporations, or for other paying customers). Is the Concord School of Law really competing for the same students or in the same market with Harvard, for example? Furthermore, online educational experiences will not always take the form of traditional, semester-long courses, as various entities are experimenting with shorter modules and e-courses of various kinds, whether for academic credit or simply for skills and knowledge enhancement.

These lines may also be blurred by the institution's own experiments with online education. If an institution is providing course materials to a particular for-profit entity through a contractual arrangement, for example, are its faculty members forbidden from providing similar materials to outside entities of their own choosing?

In order to avoid being vague and overbroad, policy statements on this issue need to recognize and protect professional activities in conformance with the norms of a particular college or university such as, but not limited to: ordinary outside consulting; participation in professional or scholarly organizations; scholarly presentations and publications; pursuit of future employment opportunities; and

public service. One possible approach to these issues is to ensure simply that existing policies on conflicts of interest and commitment are not limited by traditional time and geographic space constraints.

Columbia University's Faculty Handbook section on "Outside Interests and Employment" (2000 ed., at p.153) handles this issue by focusing on courses and courseware:

Full-time faculty may not create courses, substantial parts of courses or courseware for, or accept teaching assignments from, either a non-profit institution or a commercial enterprise, unless specifically authorized in advance by the Provost on the recommendation of the appropriate dean or vice president. This policy applies equally to courses taught in person, or via the Internet or some other method of electronic transmittal. This policy is not intended to prevent faculty members from giving guest lectures at another institution or engaging in similar activities.

- How will such policies apply to faculty members with nine-month appointments or other similar arrangements that are not year-round in nature?

Many faculty contracts specify nine-month appointments. In such cases, a faculty member could easily create works for other institutions during the summer months. Conflict of interest/commitment policies need to take this unusual feature of academic culture into account, especially in an age where the Internet makes asynchronous education possible—i.e., an online course could be created during the summer months and then "taught" during the regular academic year, while the faculty/creator is doing other things.

- To what extent do such policies apply to part-time and adjunct faculty, if at all?

Policies that would restrict the extent to which faculty members can "compete" with their home institution by teaching elsewhere (online or not) are difficult to apply to part-time and adjunct faculty. Many part-time and adjunct faculty teach the same or similar courses at multiple institutions simultaneously in order to make a living wage. Furthermore, these individuals generally do not have the same job security as full-time faculty.

- How will disputes be handled under such policies?

Disputes about the reach and application of such policies are likely as faculty and institutions experiment with various models of online education. Accordingly, each institution needs to decide how such disputes will be handled (e.g., through the regular faculty grievance process, or through a process established to address intellectual property questions).

- On whom is the burden in these circumstances?

Questions of the burden of disclosure and burden of proof need to be addressed in this context. Will faculty members be expected to disclose potential conflicts of interest or

commitment? What if they do not perceive a potential conflict? On whom is the burden of proof or persuasion when such potential conflicts arise?

Columbia University's Faculty Handbook (p.153) puts the burden in the first instance on the faculty member, as follows:

[F]aculty should be sensitive to the fact that the distinction between occasional lectures, which are a normal part of academic life, and a teaching assignment for another university, which requires prior approval, is not always clear cut. When there is any question as to whether an outside engagement falls within the range of allowable activities, a faculty member should first consult with the appropriate dean or vice president. . . .

The responsibility for recognizing and avoiding conflicts of interest rests primarily with the individual.

### **3. Ethics Policies**

General policies on professional ethics may be of some use in this area, although they will often be too vague to answer the hard questions. For example, the AAUP Statement on Professional Ethics (which is incorporated into many faculty handbooks) recognizes the responsibilities of faculty members as "members of an academic institution," specifically "their paramount responsibilities within their institution in determining the amount and character of work done outside it." *AAUP Policy Documents & Reports* at 133, 134 (Ninth Ed. 2001).

#### **E. The Risks of Entrepreneurialism -- Liability**

If faculty are claiming ownership over copyrighted works such as online educational materials, or are otherwise engaged in work outside the scope of their college or university employment, they may also be responsible for any liability associated with such work (e.g., with regard to claims of copyright infringement, defamation, etc.). Institutions should examine their indemnification policies to determine how and when they apply to faculty and staff who create online course materials and courseware. *See, e.g., Institutional Responsibility for Legal Demands on Faculty, AAUP Policy Documents & Reports* at 130 (Ninth Ed. 2001).

## SOME HELPFUL RESOURCES

**American Council on Education (ACE):** “Developing a Distance Education Policy for 21<sup>st</sup> Century Learning” (March 2000) (briefing paper), <http://www.acenet.edu/>.

**Association of American Universities (AAU):** “Intellectual Property and New Media Technologies: A Framework for Policy Development at AAU Institutions” (a report to the AAU Digital Networks and Intellectual Property Management Committee by the Intellectual Property Task Force) (May 13, 1999), <http://www.tulane.edu~aau/IPNewMediaReport.html>.

\* For links to a large number of policies from AAU institutions on copyright, conflicts of interest or commitment, and related issues, see <http://www.inform.umd.edu/copyown/policies/index.html> (a site maintained by Rodney Petersen at the University of Maryland).

**American Association of University Professors (AAUP):** For updated information on policies and reports from the American Association of University Professors (AAUP), see the AAUP web site at [www.aaup.org](http://www.aaup.org), and click on “Distance Education & Intellectual Property Issues” under “Programs.”

Statement on Distance Education and Statement on Copyright, *AAUP Policy Documents & Reports* at 179-84 (Ninth Ed. 2001).

“Special Committee on Distance Education and Intellectual Property Issues: Suggestions and Guidelines” (Dec. 3, 1999), <http://www.aaup.org> (under “Distance Education & Intellectual Property Issues”). Includes sample language for institutional policies and contract language.

**U.S. Web-Based Education Commission**, Report: “The Power of the Internet for Learning: Moving from Promise to Practice” (Dec. 19, 2000). <http://www.webcommission.org> or <http://interact.hpcnet.org/webcommission/index.htm>. This report covers an array of policy issues in higher education implicated by the growth and development of distance learning.

**Eduventures.com** ([www.eduventures.com](http://www.eduventures.com)). A research firm dedicated exclusively to the coverage and service of learning markets.

**Fathom** ([www.fathom.com](http://www.fathom.com)). A web site developed by a consortium of universities and other non-profit institutions including free features as well as e-courses for which individuals can sign up.

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# **Regulation of e-Learning: Regulating the Medium and the Messenger**

## **NACUA CLE Workshop: The Digital University Comes of Age: E-Education, Communications and Commerce**

**November 1-2, 2001  
Washington, DC**

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*“We are trying to perfect the Pony Express while the telegraph wires are being strung.”*

Gordon K. Davies, Director, State Council for Higher Education of Virginia,  
Addressing a Meeting on Regulation of Branch Campuses  
1982

*“I thought that when I brought the Open University to the U.S. I would be dealing with one country. I was mistaken.”*

Sir John Daniel, former Vice Chancellor, British Open University  
Addressing the Annual Meeting of the National Governors Association  
February 28, 1999

*“The regulations that govern much of education today, from pre-kindergarten to higher education, are focused on supporting the welfare of the educational institution, not the individual learner. They were written for an earlier model, the factory model of education in which the teacher is the center of all instruction and all learners must advance at the same rate, despite their varying needs or abilities.”*

National Commission on Web-Based Education  
2000

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I. The regulatory context of e-Learning

A. Education historically considered primary example of “powers reserved to the States.”<sup>1</sup>

1. Premise is that education is a fundamentally local function carried out by local institutions.
  - a. Based upon the notion of an institution being “in” a state, a destination *to which* learners travel.
  - b. Primary regulatory concern is to safeguard integrity of education offering *within* the state.
  - c. Federal subsidies required creation of a *triad* consisting of the Federal government, states and, to deal with quality assurance, *voluntary accreditation*.
    - i. [T]he term “institution of higher education” means an educational institution *in any State* that -- \* \* \* (2) is legally authorized *within such State* to provide a program of education beyond secondary education; \* \* \* (5) is accredited by a nationally recognized accrediting agency or association \* \* \* .<sup>2</sup>
2. Result is three *overlapping* levels of regulatory authority, each often relying on the other to determine the acceptability of an institution.
  - a. Institution must be legally authorized by the state it is “in”,<sup>3</sup>
  - b. Institution must be accredited;<sup>4</sup> and
  - c. Institution must meet Federal *programmatic* standards of eligibility for its students to benefit from the Federal student aid programs.<sup>5</sup>
3. Each level has the power to require an institution to abide by specific rules.
  - a. No suggestion, let alone requirement, for consistency.
  - b. No clear Federal pre-emption due to reservation of rights to the states.
    - i. Potentially classic conflict between the Commerce and Reserved Powers clauses of the Constitution.

II. State as gatekeeper: State-based regulatory structure allows each state to establish its own statutory framework for the regulation of educational institutions “operating” within its border.

A. The term “operating” historically coincided with “physical presence”: the institution was *physically* within the state.

1. State regulatory schemes are dramatically different, ranging from the extremely prescriptive<sup>6</sup> to minimal<sup>7</sup> and in isolated cases non-existent.<sup>8</sup>

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<sup>1</sup> See, for example, General Education Provisions Act, Sec. 438, 20 U.S.C.A. § 1232a: “No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.”

<sup>2</sup> GENERAL DEFINITION OF INSTITUTION OF HIGHER EDUCATION, Higher Education Act of 1965, as amended., Sec. 101(a), 20 U.S.C.A. 1001(a) (emphasis added).

<sup>3</sup> HEA, Sec. 101(a)(2).

<sup>4</sup> HEA, Sec. 101(a)(5).

<sup>5</sup> For example, HEA Sec. 102(a) extends the definition of “institution of higher education” for purposes of participating in the Federal programs of student financial assistance pursuant to Title IV of the Higher Education Act (“Title IV Programs”) by including certain categories of otherwise *ineligible* institutions and limiting eligibility of otherwise eligible institutions with certain characteristics, e.g. “offers more than 50 percent of such institution’s courses by correspondence \* \* \*.” HEA Sec. 102(a)(3)(A), 20 USC 1002(a)(3)(A)(2000).

- B. Level of state regulation varies substantially depending on the *type* of institution.
1. For-profit (“proprietary”) institutions are the most highly regulated, often by an agency other than the state higher education agency, e.g. state education department.<sup>9</sup>
    - a. Non-profit (“independent”) and public institutions are less *prescriptively* regulated.
      - i. Frequent deference to decisions of accreditors, particularly the regional accrediting bodies.<sup>10</sup>
    - b. Public (state or local) institutions are also subject to a different type of regulation (budgetary and programmatic as well as qualitative) by the state higher education agency.<sup>11</sup>
    - c. An *out-of-state* institution, regardless of nature of control (e.g. whether public or independent) is generally treated for purposes of state law as an independent (or, in some cases, a proprietary) institution.<sup>12</sup>
- C. Interstate delivery of postsecondary education brings into conflict traditional exercise of state’s rights under Reserved Powers Clause with protection of interstate commerce under the Commerce Clause.<sup>13</sup>
1. Earliest direct challenge to state regulation of programs originating outside of the state (“foreign programs”) was based on control of correspondence study.<sup>14</sup>
    - a. Decision limited state role in regulation of interstate aspects of only one kind of “distance education,” that which was provided through correspondence (i.e. lesson plans sent through the mails).<sup>15</sup>

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<sup>6</sup> See, generally, N.Y. Educ. Law, pursuant to which *all* institutions operate pursuant to charters granted by the State and operate in accordance with “Master Plans” approved by the State.

<sup>7</sup> “If the [foreign] institution is accredited in its main campus by the regional accrediting agency for that region and if that accreditation includes extension, satellite or other off-campus operations, the programs in Delaware *will* be licensed upon application and payment of a fee.” *Policies, Standards and Procedures for Approving Degree Granting Institutions of Higher Education*, State Board of Education, 1998 (emphasis added).

<sup>8</sup> Only one state (Montana) presently has no licensure requirements whatsoever.

<sup>9</sup> For example, in Texas, proprietary schools are regulated by the Texas Workforce Commission rather than the Texas Higher Education Coordinating Board; in Illinois, proprietary schools are regulated by the State Board of Education rather than the Illinois Board of Higher Education, *except* in the case of *degree-granting* proprietary schools, which may be regulated by *both* agencies.

<sup>10</sup> The regional higher education accrediting agencies are the Commission on Institutions of Higher Education and the Commission on Technical and Career Institutions of the New England Association of Schools and Colleges, [www.neasc.org](http://www.neasc.org), the Commission on Higher Education of the Middle States Association of Colleges and Schools, [www.msache.org](http://www.msache.org), the Commission on Colleges of the Southern Association of Colleges and Schools, [www.sacscoc.org](http://www.sacscoc.org), the Higher Learning Commission of the North Central Association of Colleges and Schools, [www.ncacihe.org](http://www.ncacihe.org), the Accrediting Commission for Senior Colleges and Universities, [www.wascweb.org](http://www.wascweb.org), and the Accrediting Commission for Community and Junior Colleges, [www.accjc.org](http://www.accjc.org), of the Western Association of Schools and Colleges, and the Commission on Colleges of the Northwest Association of Colleges and Schools, [www.cocnasc.org](http://www.cocnasc.org). See, for example, Delaware *Policies*, *supra*.

<sup>11</sup> See, generally, [www.sheeo.org](http://www.sheeo.org).

<sup>12</sup> See, for example, South Carolina Code § 59-58-20 (4): A “nonpublic educational institution” is defined to include any postsecondary institution not owned or operated, in whole or in part, by the state of South Carolina.

<sup>13</sup> See, generally, Kaplin and Lee, *The Law of Higher Education*, §6.4 (1995).

<sup>14</sup> Correspondence school which employed agents in a state other than its place of business for the purpose of advertising the school’s programs consisting of sending educational materials through the mails engaged in “commerce among the states within the meaning of the Constitution of the United States.” *International Text-Book Co. v. Pigg*, 217 U.S. 678 (1910).

<sup>15</sup> Compare *State v. Williams*, 117 S.E.2d 444 (N.C. 1960) which, alluding to *International Text-Book* in dicta, decided for the school on the basis of a statutory defect (improper delegation).

2. State have always retained power to proscribe fraudulent practices such as outright “Diploma mills,” although enforcement has been spotty.<sup>16</sup>
- D. Early state efforts to regulate “foreign” institutions arose with the development of “multi-campus” institutions.
  1. Poster child was Nova University, which sought to establish branch campuses throughout the East of its main institution located in Florida.
    - a. In *Nova University v. The University of North Carolina*, 287 S.E.2d 872 (N.C. 1982)(*Nova I*), the court held that the power to regulate the conferral of degrees did not give the regulatory authority, the Board of Governors of the University of North Carolina, the power to regulate the content of courses Nova University sought to offer at its N.C. campus, finding a First Amendment violation.
      - i. The statute was subsequently rewritten to regulate authority to operate rather than quality of operations.
    - b. High water mark of state regulation of out-of-state institutions found in *Nova University v. Educational Institution Licensure Commission*, 483 A.2d 1172 (D.C. App. 1984)(*Nova II*) in which the D.C. Court of Appeals rejected a similar First Amendment argument, distinguishing between teaching, which it confirmed to be Constitutionally protected, and offering of programs leading to a recognized degree, which the court held not to be so protected.
      - i. Three prong state interest test: maintenance of the integrity of the degree-granting process, protection of state residents against fraud *and substandard education*, and protection of “legitimate institutions and of those holding degrees from them.” *Id.* At 1186.
      - ii. *Nova II* established the jurisprudence that states *may*, with a properly crafted statute, regulate the conduct of out-of-state institutions which *establish a presence* within their borders.
- E. By the 1980s, states saw the use of telecommunications technology as raising a new specter of *uncontrollable* delivery of educational services by “foreign” institutions.
  1. Emerging mode of delivery: broadcast and cable television (“telecourses”).
    - a. Courses offered by institutions into adjacent states.
      - i. Critical question was not whether such activities *should* be regulated but whether they *could*: Distinction between the assertion of jurisdiction and the ability to actually exercise it.<sup>17</sup>
- F. Joint effort of the State Higher Education Executive Officers Association (SHEEO) and Council on Postsecondary Accreditation (COPA)<sup>18</sup> to provide a national (but not Federal<sup>19</sup>) framework for regulation of “distance learning.”
  - a. Premise: states and accreditors would agree on a common set of standards for the assessment of telecommunicated learning.

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<sup>16</sup> For example, one health services website reports that “Bernadean University,” Van Nuys, California, has never been authorized to operate or to grant degrees. Yet it has managed to remain in business for more than 40 years. *see*, <http://www.quackwatch.com/04ConsumerEducation/Nonrecorg/bernadean.html>. *See also*, <http://www.degree.net/news.htm#brazen%20mill>

<sup>17</sup> One state commissioner of higher education, when asked how he might actually prevent the televised programming of an adjacent state from penetrating his borders suggesting dropping aluminum foil chaff.

<sup>18</sup> Report on Project Alltel (Authorization and Licensure of Learning via Telecommunications), SHEEO: Denver, 1984; *see also*, Goldstein, M., *The Regulatory and Policy Environment of Telecommunicated Learning*, 1993 (<http://www.dlallaw.com/practice-areas/index.html>).

<sup>19</sup> The author was SHEEO counsel at the time of Project Alltel. There was a substantial fear among state regulators that if they did not act the Federal government would do so.

- i. Each state *into which* an education service is delivered would give “full faith and credit” to the qualitative review performed by the state (and accreditor) of the originating institution’s domicile.
    - b. Effort failed: states could not agree among themselves on a common regulatory framework.
      - i. Lack of faith in or acceptance of criteria used or applied by sister states.
- G. Shift in basis for assertion of regulatory authority from *premises* of instruction (campus) to *medium* of instruction (broadcaster or cable system).<sup>20</sup>
  - 1. Issue of *physical presence* for courses offered via telecommunications.<sup>21</sup>
    - a. States have increasingly sought to broadly define physical presence by expanding the concept to include *in-state* partners that *passively deliver* the courseware.
      - i. Some states use sweeping language to inferentially encompass delivery media.<sup>22</sup>
      - ii. Some states have specified that using the services of a telecommunications entity located within the state triggers jurisdiction over the institution.<sup>23</sup>
        - (i) Such activity can generally trigger “physical presence,”<sup>24</sup> or it can be used as the basis to determine if the institution has engaged in regulated “degree activity.”<sup>25</sup>
  - 2. Advertising and promotion also afford a basis for the assertion of jurisdiction without any *instructional* presence within the state.
    - a. Distinction often drawn between the presence of advertising (sales) *agents* within the state<sup>26</sup> and the *act* of advertising.<sup>27</sup>

<sup>20</sup> In the same survey, 13 of the 37 states responding indicated that their regulations “specifically addresses electronically delivered programs from out-of-state.” *Ibid.*

<sup>21</sup> Of 37 states responding to a survey conducted by the New Hampshire Postsecondary Education Commission, 23 reported that they required “authorization/licensure of out-of-state programs” and of those, all but two indicated that “physical presence” was a “central issue” in asserting regulatory jurisdiction. *Survey of State Regulations of Higher Education Programs Originating from Other States and Distance Education Programs*, New Hampshire Postsecondary Education Commission, Concord, 1999.

<sup>22</sup> See, Or. Admin. R. 583-030-0005(3), which extends the jurisdiction of the state Office of Degree Authorization to “any school offering degrees and credits from outside Oregon, in connection with learning and evaluation meant to occur within this state, if there is any person assisting the school from within this state in any way, formal or informal.” State regulators have construed this provision to extend their authority to foreign institutions who use in-state telecommunications entities to distribute their services.

<sup>23</sup> The term “to operate” includes “[o]ffering courses in person, by correspondence, or electronic media, at any Washington location for degree credit, including electronic courses transmitted into the state of Washington.” Wash. Admin. Code § 250-61-050.

<sup>24</sup> “In addition [to the traditional concepts of physical presence, an] institution has physical presence in Colorado if it delivers, or plans to deliver, instruction in Colorado, and receives assistance from any other organization within the state in delivering the instruction, such as, but not limited to, a cable television company or a television broadcast station that carries instruction sponsored by the institution.” *Policies of the Colorado Commission on Higher Education for the Administration of the Degree Authorization Act* § 2.04.02. See, also, Ga. Code § 20-3-250-7, which prohibits institutions from offering “postsecondary instruction leading to a postsecondary degree or certificate to Georgia residents from a location outside this state by correspondence or any telecommunications or electronic media technology unless issued a current [Georgia] certificate of authority.”

<sup>25</sup> “An institution undertakes postsecondary degree activity in this State when it commences the activity by \* \* \* [t]ransmission, presentation, or dissemination of information over or through electronic equipment that is located in North Carolina and owned, leased, rented, licensed, or otherwise reserved for use by the institution; or \* \* \* [through a]greement with a third party to transmit, present, or disseminate information on behalf of the institution through \* \* \* the means [just] described.” *Rules and Standards for Licensing Nonpublic Institutions to Conduct Post-secondary Degree Activity in North Carolina*, § III.C (1998).

<sup>26</sup> “An agent shall not solicit prospective students in this state for enrollment in any \* \* \* out-of-state college unless such agent has received a license in the manner prescribed by the [State Board of Independent Colleges and Universities].” Fla. Stat. Ann. § 246.081(4).

- b. Use of the terms “college” or “university” are regulated.<sup>28</sup>
3. Distinction between programs that are available to the general public and those that are offered on “closed sites.”
  - a. A closed site is a location (typically a business, military base or organization) where the instructional program is offered only to employees of that organization pursuant to a contract entered into between the organization and the providing institution.
  - b. Some states do not apply their licensure laws to closed sites, either on the basis of statutory or regulatory exception or administrative discretion.<sup>29</sup>
- H. Equal protection issues arising from telecommunicated learning.
  1. Does state “discrimination” against “foreign” institutions using telecommunications technology raise Fourteenth Amendment issues?<sup>30</sup>
  2. Constitutional question is whether the discrimination furthers a legitimate governmental interest, or does so irrationally.<sup>31</sup>
- I. Consequences of assertion of jurisdiction over interstate telecommunicated learning.
  1. Requirement that the institution submit to the *differing* regulatory requirements of multiple jurisdictions.<sup>32</sup>
    - a. Possibility of *mutually exclusive* state requirements.
      - i. Potential *impossibility* (or impracticality) of adjusting a program that is uniformly distributed (e.g. via the internet) to meet varying requirements.
      - ii. Enforced homogeneity (lowest common denominator) instructional services.
    - b. Substantial delay in implementing a program.<sup>33</sup>
- J. Professional licensure
  - a. Refusal of instrumentalities of a state to recognize credentials awarded by the institution.
  - b. Independent of institutional licensure – the target is the learner.
    - i. Particularly important issue in terms of professional education where subsequent licensure is required.<sup>34</sup>

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<sup>27</sup> “No person, firm, association or corporation shall offer or otherwise advertise a college degree in the state of New York without the prior written approval of the department [of Education] \* \* \* unless the institution offering or advertising such a degree is accredited by at least one accrediting commission recognized by the United States commissioner [now Secretary] of education \* \* \* or unless the program leading to such degree is registered with the department of education.” N.Y. Educ. Law § 224 (1), (3).

<sup>28</sup> “Any individual, school, association, corporation or institution of learning, not having lawful authority to confer degrees, using the designation of “university” or “college” shall be punished by a fine of one thousand dollars.” Mass. Gen. Laws Ch. 266, § 89.

<sup>29</sup> For example, Indiana excludes from the definition of an institution subject to licensure “education \* \* \* that is maintained or given by an employer or group of employers, without charge, for employees or for persons the employer anticipates employing.” Ind. Code § 20-1-19-1(D)(i); See also, Ark. Code. § 6-51-603(6),(7); Haw. Rev. Stat. §446E-1-1; attached Closed Sites schedule.

<sup>30</sup> “The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.” *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

<sup>31</sup> See, for example, *Edie v. Sarasota County*, 908 F.2d 718, 722 (11<sup>th</sup> Cir. 1990); *McQuery v. Blodgett*, 924 F.2d 829, 834-5 n.6 (9<sup>th</sup> Cir. 1991).

<sup>32</sup> “Each state establishes its own regulatory structure, and therein lies the challenge. The past physical presence assumed for schooling is no longer a given. Educational content and services at the elementary, secondary, and higher education levels are increasingly delivered across state lines. The regulatory schemes of 56 operational units (states, territories, and Washington, DC) are “dramatically different...” *The Power of the Internet for Learning: Moving from Promise to Practice*, Report of the National Commission on Web-Based Education, December 2000, <http://interact.hpcnet.org/webcommission/index.htm> (“Web Commission Report”).

<sup>33</sup> Many states have substantial backlogs in processing applications, and generally put applications of domestic institutions ahead of those of foreign institutions. In some cases these backlogs exceed one year.

- ii. Place “foreign” e-learning school at a competitive disadvantage versus “home state” institutions.
  - (i) Risk of falsely implying the value of the credential.

### III. Accreditation as manager/gatekeeper of e-learning

- A. Almost all accrediting agencies have adopted standards for the evaluation of program offered via telecommunications and for institutions whose delivery methods are entirely or primarily via such means.<sup>35</sup>
  1. Regional accrediting agencies has arrived at “consensus” for evaluation of e-learning.<sup>36</sup>
  2. Transformation of accreditation from quantitative (process) to qualitative (outcomes) based reviews.<sup>37</sup>
  3. Creation of the Council for Higher Education Accreditation<sup>38</sup> to provide a coordinating mechanism to deal with cross-regional (i.e. e-learning) services.
  4. Likewise, telecommunications based organizations, such as the Western Cooperative for Educational Telecommunications,<sup>39</sup> have served as convenors for coordination of treatment of e-learning.
    - a. Promulgation of “best practices”<sup>40</sup> and policies<sup>41</sup> for e-learning for adoption by accreditor
      - i. Query: At what point do “best practices” articulated on a national basis become an inescapable constraint?
  5. Can accreditor establish *quantitative* limitations on e-learning.
    - a. Restricting geographic service area, number of students enrolled or number of programs.
      - i. Public purpose is to Protect the institution against its own success.
  6. Query: When do actions by accreditors in arriving at common approaches to telecommunicated learning pose antitrust issues?
    - a. When do constraints on the scope of institutional activities (and therefore its ability to compete) become anticompetitive?
      - i. Distinction between accreditor acting to influence legislation (e.g. state licensure rules)<sup>42</sup> and using its authority to constrain competition by dividing territory or limiting quantitative competition.<sup>43</sup>

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<sup>34</sup> See, for example, Kan. Stat. Ann. § 72-1374; Kan. Admin. Regs. § 91-1-26(u) which provide that in order to obtain state certification to teach in a Kansas school a prospective teacher must have completed his or her training at an institution that has been approved by the Kansas Department of Education or a *similar agency* in another state (i.e. a state Department of Education responsible for teacher certification, *not* merely the higher education authorizing agency).

<sup>35</sup> See, for example, NCA-CIHE Guidelines for Distance Education, <http://www.ncahigherlearningcommission.org/resources/guidelines/gdistance.html>

<sup>36</sup> See, Statement of Commitment by the Regional Accrediting Commissions for the Evaluation of Electronically Offered Degree and Certificate Programs, [www.wiche.edu/telecom/Accrediting%20-%20Commitment.pdf](http://www.wiche.edu/telecom/Accrediting%20-%20Commitment.pdf)

<sup>37</sup> See, for example, Robert C. Albrecht, ACCREDITATION IN THE UNCERTAIN WORLD OF HIGHER EDUCATION: OLD AND NEW APPROACHES, <http://www.ncacihe.org/restructuring/Albrecht1.pdf>.

<sup>38</sup> [www.chea.org](http://www.chea.org)

<sup>39</sup> [www.wiche.edu/telecom/](http://www.wiche.edu/telecom/)

<sup>40</sup> [www.chea.org/good-practices/browse.cfm?categoryID=7](http://www.chea.org/good-practices/browse.cfm?categoryID=7), see also, [www.wiche.edu/telecom/Accrediting%20-%20Best%20Practices.pdf](http://www.wiche.edu/telecom/Accrediting%20-%20Best%20Practices.pdf)

<sup>41</sup> See, Judith Eaton, Distance Learning: Academic and Political Challenges for Higher Education Accreditation, [http://www.chea.org/Research/distance-learning/chea\\_dis\\_learning.pdf](http://www.chea.org/Research/distance-learning/chea_dis_learning.pdf). See also, Core Academic Values, Quality, and Regional Accreditation: The Challenge of Distance Learning (CHEA Monograph Series 2000), <http://www.chea.org/Research/core-values.cfm>, and the series, Distance Learning in Higher Education, CHEA Updates, <http://www.chea.org/Research/distance-learning/distance-learning.cfm>.

- (i) *Marjorie Webster*<sup>44</sup> case may provide basis for antitrust argument against actions of accreditors in excluding or limiting a class of conduct.

#### IV. Federal government as manager of e-learning.

- A. National government controls student-centric financial assistance.
1. Law enacted (1965) when Sunrise Semester was the epitome of e-learning.
    - a. “Eligible programs” assumed to be classroom-based, real-time.
    - b. Anything else was “correspondence” study, restricting student access to financial aid.<sup>45</sup>
  2. Higher Education Act was amended in 1992 to eliminate overt discrimination against students by providing that enrollment in courses offered via telecommunications are to be treated, for purposes of access and calculating benefits under the Federal Student Financial Assistance Programs, in the same manner as would be the case for “conventional” (i.e. face-to-face) instruction.<sup>46</sup>
    - i. The Congress also took a global view of the technologies involved in telecommunicated learning.<sup>47</sup>
    - ii. Important distinction, since in the past Federal regulators would only consider synchronous (i.e. real time) technology-mediated learning as other than “correspondence study.”
  3. Restrictions remain.
    - a. “Fifty Percent Rule” which excludes institutions that offer more than half of their courses via telecommunications.<sup>48</sup>
      - i. Effect is that institution that is either entirely or substantially offering its programs via telecommunications cannot offer students access to Title IV student aid programs.

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<sup>42</sup> Note that the lobbying efforts of an accrediting agency (to, for example, seek the incorporation of agency standards into the states’ licensure process) are granted antitrust immunity. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 81 S.Ct. 523 (1961); *United Mine Workers v. Pennington*, 85 S.Ct. 1585 (1965). *Accord*, *Massachusetts School of Law at Andover v. American Bar Association*, 107 F.3d 1026 (3rd Cir. 1997), *Sherman College of Straight Chiropractic v. American Chiropractic Association*, 654 F.Supp. 716 (N.D.Ga. 1986).

<sup>43</sup> Despite some lower courts’ assertions to the contrary, the *Noerr-Pennington* doctrine does not seem to grant antitrust immunity to accrediting agency standard-setting activity, once states have adopted an agency’s standards as their own for licensure purposes. But see, for example, *Massachusetts School of Law at Andover v. American Bar Association*, 107 F.3d 1026 (3rd Cir. 1997).

<sup>44</sup> *Marjorie Webster Jr. College v. Middle States Ass’n of Colleges and Secondary Schools*, 432 F.2d 650 (D.C. Cir. 1970). While the decision was adverse to the plaintiff institution, a close reading of the factual situation, notably that the College had alternative routes to enable it to operate, may not be applicable where the accreditors join together to control access and activities.

<sup>45</sup> See, for example, 34 CFR § 690.66.

<sup>46</sup> “A student enrolled in a course of instruction at an eligible institution of higher education that is offered in whole or in part through telecommunications and leads to a recognized associate, bachelor, or graduate degree conferred by such institution shall not be considered to be enrolled in correspondence courses.” Sec. 484(g) of the Higher Education Amendments of 1992, 106 Stat. 617, codified at Sec. 484(m) of the Higher Education Act of 1965, as amended, 20 U.S.C.A. §1091.

<sup>47</sup> “For the purpose of this subsection, the term “telecommunications” means the use of television, audio, or computer transmission, including open broadcast, closed circuit, cable, microwave, or satellite, audio conferencing, computer conferencing, or video cassettes of discs.” *Ibid*.

<sup>48</sup> “Limitations based on course of study or enrollment. An institution shall not be considered to meet the definition of an institution of higher education in paragraph (1) if such institution - (A) offers more than 50 percent of such institution’s courses by correspondence.” HEA Sec. 102(a)(3), 20 USC § 1002(a)(3). Note that the limitation is entirely based on the number of *courses* offered, not the number of *students enrolled* in those courses. So an institution with 100 “conventional” courses and 10 e-learning courses could enroll 1,000 students in the former and 10,000 in the latter and still be eligible to participate in the Title IV Programs.

- b. “12-Hour Rule” which requires “non-standard term” programs to have at least 12 hours a week of “instruction.”<sup>49</sup>
  - i. Effect is that e-learning programs with flexible start-and-stop dates must demonstrate “12-hours per week of instruction, whereas a conventional semester or quarter-based program has no such obligation.
- c. “Incentive Compensation Rule” which prohibits “bonuses, commissions or other incentive payments” based on “success in securing enrollments.”<sup>50</sup>
  - ii. Effect is to make agreements between institutions that offer courses and award degrees and e-learning companies that provide services to those companies very difficult to structure to avoid implication that the latter is being paid on the basis of enrollments secured.
    - (i) Series of recent audits conducted by the Department of Education Inspector General argue that such arrangements are impermissible and should result in the repayment of *all* Title IV aid disbursed to students.<sup>51</sup>
    - (ii) Lack of clear regulatory guidance has resulted in the impairment of e-learning institutions and service providers to work constructively.<sup>52</sup>
  - iii. Department of Education has been ambivalent, recognizing invidious effects of the three rules but not knowing what to do with them.<sup>53</sup>

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<sup>49</sup> (ii) If an institution provides an educational program using credit hours but not a semester, trimester, or quarter system, the Secretary considers that the institution provides one week of instructional time in that program during any week the institution provides-- (A) *At least 12 hours of regularly scheduled instruction* or examinations; or (B) After the last scheduled day of classes for a payment period, at least 12 hours of study for final examinations. 34 CFR § 668.8(3)(ii).

<sup>50</sup>By entering into a program participation agreement, an institution agrees that-- It will not provide, nor contract with any entity that provides, any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the awarding of student financial assistance, except that this requirement shall not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance. This provision does not apply to the giving of token gifts to students or alumni for referring students for admission to the institution as long as: The gift is not in the form of money, check, or money order; no more than one such gift is given to any student or alumnus; and the gift has a value of not more than \$25. 34 CFR § 668.14(b)(22). *See also*, 20 USC § 1094(a)(20).

<sup>51</sup> *See, for example*, Final Audit Report, *Indiana Wesleyan University, Adult and Professional Studies Administration of Title IV Programs*, Control Number ED-OIG/A05-B004, <http://www.ed.gov/offices/OIG/AuditReports/a05b0004.pdf>. At least four other institutions with similar programs have been the subject of comparable reviews.

<sup>52</sup> “But there is a big catch in Maryland's plan [for a for-profit company developed by the University to support its e-learning effort]. Under federal law, colleges could lose their eligibility for federal financial aid if they are found to have paid commissions to people or companies that recruit students. The Department of Education has yet to clarify whether this would apply to companies like Maryland's -- or Fathom and other portals, for that matter -- if they help deliver students to academic programs at individual colleges.” Temple U. Shuts Down For-Profit Distance-Education Company, *The Chronicle of Higher Education*, July 20, 2001.

<sup>53</sup> Federal Report on Key Aid Rule Avoids Making Recommendations, *The Chronicle of Higher Education*, August 10, 2001.

- B. The National Commission on Web-Based Education<sup>54</sup> attacked restrictions.<sup>55</sup>
  - 1. Finding that regulations restrict innovation and growth of e-learning.<sup>56</sup>
- C. Legislative remedy – The Internet Equity and Education Act of 2001.<sup>57</sup>
  - 1. Adopted by House of Representatives August 10, 2001 by vote of 354-70.
    - a. Direct response to Web Commission report.<sup>58</sup>
    - b. Bill would repeal 50%<sup>59</sup> and 12-hour<sup>60</sup> rules, and limit incentive compensation restriction by excluding from its application third parties that provide services to institutions to support their e-learning enterprises.<sup>61</sup>

<sup>54</sup> See, generally, Web Commission Report, *supra*.

<sup>55</sup> The Commission recommended that the Department of Education and the Congress “Revise outdated regulations that impede innovation and replace them with approaches that embrace anytime, anywhere, any pace learning. The regulations that govern much of education today were written for an earlier model in which the teacher is the center of all instruction and all learners are expected to advance at the same rate, despite varying needs or abilities. Granting of credits, degrees, availability of funding, staffing, and educational services are governed by time-fixed and place-based models of yesteryear. The Internet allows for a learner-centered environment, but our legal and regulatory framework has not adjusted to these changes... We call upon Congress, the U.S. Department of Education, and state and regional education authorities to remove barriers that block full access to online learning resources, courses, and programs while ensuring accountability of taxpayer dollars.” *Id.*

<sup>56</sup> “Far from creating incentives for students and institutions to experiment with new distance education methodologies offered anytime, anyplace, and at any pace, the current student financial aid regulations discourage innovation. If a student cannot travel to an institution and participate in face-to-face instruction, that student may only qualify for reduced financial aid. The practical impact is a system of federal student financial assistance that gives substantial preference to the mainstream educational experience.” *Id.*

<sup>57</sup> H.R. 1992, <http://thomas.loc.gov/cgi-bin/query/D?c107:3:./temp/~c1072PyLTP>

<sup>58</sup> See, for example, Statement of the Hon. Howard P. “Buck” McKeon, Chairman, Subcommittee on 21st Century Competitiveness, Markup of H.R. 1992, The Internet Equity and Education Act of 2001, Committee on Education and the Workforce, Wednesday, August 1, 2001. <http://edworkforce.house.gov/markups/107th/fc/hr1992/81smc.htm>. See also, Report Accompanying H.R. 1992, Report 107-225, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess., Oct. 2, 2001.

<sup>59</sup> SEC. 2. “EXCEPTION TO 50 PERCENT LIMITATION- Notwithstanding the 50 percent limitation in subparagraph (A), a student enrolled in a course of instruction described in such subparagraph shall not be considered to be enrolled in correspondence courses if the student is enrolled in an institution that--(i) is participating in either or both of the loan programs under part B or D of title IV on the date of enactment of the Internet Equity and Education Act of 2001; (ii) has a cohort default rate (as determined under section 435(m)) for each of the 3 most recent fiscal years for which data are available that is less than 10 percent; and (iii)(I) has notified the Secretary, in form and manner prescribed by the Secretary (including such information as the Secretary may require to meet the requirements of subclause (II)), of the election by such institution to qualify its students as eligible students by means of the provisions of this subparagraph; and (II) the Secretary has not, within 90 days after such notice, and the receipt of any information required under subclause (I), notified the institution that the election by such institution would pose a significant risk to Federal funds and the integrity of programs under title IV.”

<sup>60</sup> SEC. 3. DEFINITION OF ACADEMIC YEAR. Section 481(a) of the Higher Education Act of 1965 (20 U.S.C. 1088(a)) is amended by adding at the end the following new paragraph: (3) For the purposes of any eligible program, a week of instruction is defined as a week in which at least one day of regularly scheduled instruction or examinations occurs, or at least one day of study for final examinations occurs after the last scheduled day of classes. For an educational program using credit hours, but not using a semester, trimester, or quarter system, an institution of higher education shall notify the Secretary, in the form and manner prescribed by the Secretary, if the institution plans to offer an eligible program of instruction of less than 12 hours of regularly scheduled instruction, examinations, or preparation for examinations for a week of instructional time.

<sup>61</sup> SEC. 4. INCENTIVE COMPENSATION. (a) AMENDMENT- Part G of title IV of the Higher Education Act of 1965 is amended by inserting after section 484B (20 U.S.C. 1091b) the following new section: SEC. 484C. INCENTIVE COMPENSATION PROHIBITED (b) EXCEPTIONS- Subsection (a) [restricting “incentive compensation”] does not apply to payment of a commission, bonus, or other incentive payment--(1) pursuant to any contract with any third-party service provider that has no control over eligibility for admission or enrollment or the awarding of financial aid at the institution of higher education, provided that no employee of the third-party service provider is paid a commission, bonus, or other incentive payment based directly on success in securing enrollments or financial aid; or (2) to persons or entities for success in securing agreements, contracts, or commitments from employers to provide financial support for enrollment by their employees in an institution of higher education or for activities that may lead to such agreements, contracts, or commitments.

## V. Issues to be examined

- A. Does state regulation of internet (or other media) delivered postsecondary instruction inherently impose an excessive burden on interstate commerce?
  - 1. Should there be Federal pre-emption respecting interstate delivery of postsecondary education via the internet?<sup>62</sup>
- B. Alternatively, does the pre-eminence of the states in the regulation of education *require* such oversight to protect the public and the integrity of academic credentials, or, is state regulation inherently a way for in-state institutions to protect their territory (and market) from foreign invasion?
- C. Should non-U.S. institutions be treated differently in terms of interstate comity than should domestic institutions?
  - 1. Should there be a treaty on the *global* delivery of postsecondary education?<sup>63</sup>
    - a. But note the issues that arise from the decentralized regulation of postsecondary education in the U.S.
- D. Should institutions within an accrediting region be treated differently from institutions outside the region?
  - 1. Should there be an accord among accrediting agencies for the uniform evaluation of telecommunicated learning?<sup>64</sup>
  - 2. Alternatively, should there be a single accrediting agency solely responsible for telecommunications-based learning?
    - a. Should such an agency continue to accredit *institutions* or should a process be developed to accredit *courseware* (i.e. individual telecommunications-based courses or course modules)?

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<sup>62</sup> Note that the National Commission on Web-Based Education, *supra*, heatedly debated the issue of pre-emptive federal standards, and ultimately avoided the politically charged issue by urging the federal and state governments and accrediting agencies to "work together" to reduce barriers.

<sup>63</sup> See, generally, publications of GATE (Global Association for Transnational Education), [www.gate.org](http://www.gate.org) and The National Committee for International Trade in Education (NCITE), <http://www.cqaie.org/ncite.htm>. "Educational services" are now included in the agenda for multi-lateral negotiations on reducing trade barriers.

<sup>64</sup> Such an effort was undertaken for the accreditation of the Western Governors University, with the creation of *IRAC* (Inter-Regional Accrediting Committee), to perform a coordinated, albeit *ad hoc* review of WGA intended to result in common accreditation among four of the regional associations. See, generally, publications of the Council on Higher Education Accreditation, 1 Dupont Circle, Washington, DC 20036 (<http://www.chea.org>).