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The Legal Implications of Online Universities

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The Legal Implications of Online Universities

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I. Introduction

{1} Aspiring screen writers, novelists and photographers need not look any further than the closest computer and Internet connection to learn tools of the trade from experts in the entertainment field. Through the Online Extension Program at the University of California, Los Angeles, a student can learn television script writing from a Hollywood professional and earn a UCLA diploma from a desktop computer as far away as Omaha, Nebraska. [1]

For education, the Internet is making it possible for more individuals than ever to access knowledge and to learn in new and different ways. At the dawn of the 21st Century, the education landscape is changing. . . . On college campuses, there is an influx of older, part-time students seeking the skills vital to success in an Information Age. Corporations are dealing with the shortage of skilled workers and the necessity of providing continuous training of their employees.

The Internet is enabling us to address these educational challenges, bringing learning to students instead of brining students to learning. It is allowing for the creation of learning communities that defy the constraints of time and distance as it provides access to knowledge that was once difficult to obtain. This is true in the schoolhouse, on the college campus, and in corporate training rooms. [2]

{2} This emergence in Internet education has spawned the development of many "Internet universities" - institutions of higher education that are Online divisions of a campus-based university, like UCLA's Online Extension Program, and others that are completely based in cyberspace like Jones International University. [3] Such development poses unique legal issues in regulatory, copyright and communications law. The first part of this note will analyze how copyright law should be applied to Internet universities. In copyright law, the unique employment relationship between a professor and the research-based university arguably allocates copyright ownership of an Internet course to the professor. The second part of this paper will posit that advocates of Online education should argue that the Department of Education, and not the Federal Communications Commission, should subsidize broadband access for Internet university students. The last part of this note will analyze federal financial aid rules which have limited the growth of Online universities. These rules limit how much federal loan money an Internet university student can obtain. Substantively, one could argue that the rules as implemented probably do not foster the growth of quality Internet universities as Congress intended, though this argument probably would fail under a traditional administrative law analysis. However, one could argue that the rules could be rescinded since they were not adequately publicized before they were promulgated by the Department of Education. Taken together, the current state of the law favors wealthy students at Online divisions of campus-based research institutions, yet limits access to Internet instruction due to copyright concerns. Only by making changes in education regulation, taking a broader view of the professor-research university employment relationship, and changing the legal strategy for

subsidizing universal broadband access can financially needy students get quality higher education from a broader variety of Internet universities.

II. Copyright

{3} The first major obstacle impeding the growth of purely Online universities is the legal battle over intellectual property. Putting a university course Online poses many unique copyright issues, especially when it comes to whether a university or a professor owns the copyright to the entire course.[4] In fact, the law is so unsettled in the course-ownership area, that the U.S. Copyright Office did not even attempt to address the issue in a report to Congress about distance education copyright law.[5] The problem centers on whether teaching falls under a university professor's "scope of employment" for purposes of copyright law. Copyright law's "work-for-hire" doctrine gives employers ownership of the works that their employees create when it is: a) "a work prepared by an employee *within the scope of his or her employment*" or b) "a work specially ordered or commissioned . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." [6] This portion of the note will suggest that for-profit, solely-instructional institutions of higher education can claim copyright ownership of Internet courses via the work-for-hire doctrine, but that nonprofit, research-based universities and colleges cannot. Furthermore, this note will conclude that in order to maintain the integrity of academic freedom that is inherent in the employment relationship between a professor and a research-based university, courts must insist on maintaining a distinction between the two types of institutions.

A. Context of Discussion of Application of Copyright Laws to Internet Education

{4} For purposes of this note, a "course" will refer to the content of the professor's lecture or activity that takes place during class sessions. A "course" will also encompass any curricular materials and readings that are authored only by the professor. A "course" does not refer to reading or supplemental materials created by authors other than the professor. This definition of "course" reflects the professor's curricular decisions as to how material is presented and organized, and what curricular information is most important.

{5} In addition, this note will only focus on whether copyright law should be interpreted to give the professor or the university ownership of the course. The U.S. Copyright Office issued a report entitled "Copyright and Digital Distance Education" to Congress in 1999 that recommended several changes to current copyright law, including expanding the definition of "fair use" and updating the definition of "educational transmission." [7] The "fair use" exception refers to those situations in which copyright law allows a user to use a copyrighted work without an author's permission. Certain educational uses of another's copyrighted material fall within the "fair use" exception to copyright law. [8] Another type of exception to copyright law includes the educational transmission of certain copyrighted materials. The Copyright Office recommends that the meaning of transmission in the Copyright Act be amended to eliminate "the requirement of a physical classroom." [9] Though the "fair use" and educational transmission exceptions are worthy of comment, they are beyond the scope of this note.

B. For Profit, Solely-Instructional Institutions of Higher Education

{6} The emergence of Internet technology has spawned the growth of many companies interested in making money by selling instruction Online. Universities like Jones International University (JIU) and University of Phoenix (UOP) are private entities whose sole purpose is to make money by selling relevant and convenient

instruction to students. JIU's website boasts that it is "an institution designed to provide educational programs via the Internet."^[10] The university is owned by Jonesknowledge.com, a privately-held entity.^[11] Company revenues come from student tuition.^[12] UOP's mission is "to provide relevant, real-world education to working adults," primarily through Online instruction.^[13] The university is a profit-making institution, and is also a subsidiary of Apollo Group, Inc., a publicly-held corporation.^[14] According to Apollo Group, out of \$177 million in revenues from its Online divisions, \$160 million comes from tuition.^[15]

{7} Because their purpose is to sell instruction to students for a profit, primarily teaching Online institutions like JIU and UOP should be able to claim copyright ownership of their Internet courses.^[16] They can claim copyright ownership by arguing that any Internet courses that their professor-employees develop and teach come within the professors' "scope of employment," which would qualify the course as a work-for-hire.^[17] If an employer solicits a work-for-hire from an employee, then the employer owns the copyright to the work.^[18] Thus, deciding whether a work was created within the scope of employment determines whether the work belongs to the professor or the university. In *Community for Creative Non-Violence v. Reid*, the Supreme Court crafted a list of factors that help courts determine whether a work falls within the scope of employment.^[19] The factors are:

- 1) The hiring party's right to control the manner and the means by which the product is accomplished;
- 2) The skill required;
- 3) The source of the instrumentalities and tools;
- 4) The location of the work;
- 5) The duration of the relationship between the parties;
- 6) Whether the hiring party has the right to assign additional projects to the hired party;
- 7) The extent of the hired party's discretion over when and how long to work;
- 8) The method of payment;
- 9) The hired party's role in hiring and paying assistants;
- 10) Whether the work is part of the regular business of the hiring party;
- 11) Whether the hiring party is in the business;
- 12) The provision of employee benefits; and
- 13) The tax treatment of the hired party.^[20]

{8} Applying these factors to an Internet professor for a solely instructional, for-profit Internet university, an Online course is probably within the scope of an Internet professor's employment. First, a for-profit Internet university is a profit-making institution, and it will probably control the manner and means of the course to make it cost effective. Second, a teaching-based Internet university professor would focus only on teaching. A professor famous for research, but poor in the classroom, will probably not be able to create a popular Online course that an Internet education company will be able to sell. Third, the Internet university company usually provides the equipment necessary to create the course at a company site. If for-profit Internet universities hire full-time faculty, the relationship would probably be employment at the will of the professor with set hours of work, benefits and payment terms, and with the company providing all the labor necessary for their professor-employees to create the course.^[21] Fourth, an Internet course is certainly "part of the regular business of" an Internet university.^[22] Finally, if a for-profit, teaching-only Online university hires full-time faculty, the university would deduct the same kind of employment taxes from the professor's paycheck as non-education companies do. Using the above factors, professors will probably not be able to argue that their courses at this type of university are beyond the "scope of their employment." Since creating the course falls within their job duties, their work qualifies as a "work-for-hire," and transfers ownership to the Internet university.^[23]

{9} No court case has focused on the specific issue of a for-profit, solely-instructional college. A federal district court in Colorado agreed that course materials written by the professor at teaching-only institutions belong to the institution and not the professor. In *Vanderhurst v. Colorado Mountain College Dist.*, the court said that the college owned the copyright to a course outline created by a veterinary professor because he wrote it in the scope of his employment as a professor.^[24] At Colorado Mountain College a professor is hired only to teach. Professors employed at Colorado Mountain College do not to perform research.^[25] The

college's catalogue states that its mission is "learning through learning," and that its goals, in priority order, are:

1. We will be accountable for *providing quality educational opportunities* that promote access and success for our learners. 2. We will *design and deliver* vocational and liberal education degree and certificate programs that prepare our learners for the workforce, citizenship and transfer to four-year institutions. 3. We will *offer cultural and life-long educational opportunities* that prepare our learners for enriched lives. 4. We will join with diverse communities, business, industry, schools and government to *build strong communities* in our region and our world.^[26]

{10} Colorado Mountain College's mission statement never says that it is devoted to promoting faculty and institutional research.^[27] Instead, Colorado Mountain College hires professors solely to advance its goals of meeting student educational needs through instruction.^[28] Therefore, according to *Vanderhurst* and *Reid*, when a professor agrees to work for a solely-instructional educational institution, the courses they teach are within the scope of their employment. Accordingly, such a course qualifies as a work-for-hire. The copyright would then belong to the teaching institution. Because many of the new for-profit Internet universities are created for delivering instructional content only, those universities should be able to argue that they own the copyrights to their teaching professors' courses as well.

C. Research-Based, Non-Profit Institutions with an Online Entity

{11} The work-for-hire doctrine, arguably, does not apply to research-based university and college professors. Prior to revisions made to the Copyright Act in 1976, only the common law exempted the work of professors from a broad work-for-hire clause in a university copyright policy.^[29] Citing the unusual employment relationship between a professor and a university, courts dealing with the professor-university copyright ownership question before 1976 carved out an exception to university ownership of a professor's work.^[30] In *Williams v. Weisser*, a case that took place during this period before the change to copyright law in 1976, the judge explained why a professor's work could never be a work-for-hire.

Indeed the undesirable consequences which would follow from a holding that a university owns the copyright to the lectures of its professors are such as to compel a holding that it does not. Professors are a peripatetic lot, moving from campus to campus. The courses they teach begin to take shape at one institution and are developed and embellished at another... Further, should plaintiff leave UCLA and give a substantially similar course at his next post, UCLA would be able to enjoin him from using the material, which according to defendant, it owns.

Another strange consequence which would follow from equating university lectures with other products of the mind which an employee is hired to create, is, that in order to determine just what it is getting, the university would have to find out the precise extent to which a professor's lectures have taken concrete shape when he first comes to work. Not even defendant suggests that a contract for employment implies an assignment to the university of any common law copyright which the professor already owns.^[31]

D. The Professor Research-Based Exemption After 1976

1. Argument that the exemption was abolished.

{12} When Congress updated The Copyright Act in 1976, it drafted a law that forbade courts from using custom to decide whether or not a work was a work-for-hire.^[32] Based on the reasoning of *Williams v. Weisser* and a similar case *Sherrill v. Grieves*, Professor Lape has suggested that the change did away with the

professor exception to the work-for-hire doctrine.^[33]

The argument that the 1976 Act's rejection of evidence of custom abolished the professors' exception appears to be as follows: 1) custom was admissible under the 1909 Act; 2) *Williams* used custom to determine whether a work is a work made for hire; and 3) under the 1976 Act, only a written agreement can 'alter the work-for-hire rules set forth in section 201.'^[34]

In fact, professors Borow and Versteeg recommended that after the 1976 Copyright Act, university professors could only secure their rights via an express agreement or by creative interpretations of case law dicta.^[35]

{13} Still, no court has explicitly affirmed the contention that the changes in the 1976 Copyright Act abolished the work-for-hire exemption for the research-based work of professors. The closest courts have come is when they evaluate whether a professor's activities during research at a university qualifies as activity within the scope of employment for non-copyright causes of action.^[36] In *Cooke v. Roberts*, the court held that a research professor's conduct was activity within the scope of employment.^[37] The court did not say explicitly that the *research* itself was within the scope of employment, thus qualifying as a work-for-hire. In fact, the court specifically stated that it would not address the issue of copyright ownership of the research.^[38] Instead, the court held that only the professor's *behavior* was considered to be within the scope of employment.

{14} The evidence indicates that Dr. Roberts was required to obtain approval from several University bodies to operate the Project. The Project's budget and funding were administered by the University's Institute of Governmental Studies. Additionally, all funding applications for the project were submitted by the University Sponsored Projects Office. All grant funds were distributed to the University by the granting agencies. All OCIs purchased by the Project were paid for by University checks Dr. Roberts was acting in the course and scope of her employment as a Professor at the University of California. Therefore this action, as essentially a suit against the University of California an instrumentality of the state of California is barred by the Eleventh Amendment.^[39]

2. Argument that the exemption still exists.

{15} There appears to be judicial support for keeping the professor exemption for research-based work - both inside and outside the university.^[40] In *Weinstein v. University of Illinois*, the Seventh Circuit Court of Appeals said that research professors not the university owned the copyright to a paper they had written together using university funds.^[41] The three professors created a pharmaceutical clinical program, got funding for it from the university, and wrote a scholarly article about the program.^[42] The University claimed that it retained the copyright to the article because the article was written within the scope of the professors' employment and therefore qualified as a work-for-hire for the university.^[43] The circuit court disagreed with the University's argument, despite the University's funding and requirement that professors write and publish scholarly articles as a part of their job duties.^[44] Specifically, the court explained that university professors traditionally retain copyright to their *academic work* and, therefore, the policy exemption only applies to administrative duties.^[45] Simply because the University required the professors to publish their article, it was "not simultaneously claiming for the University a copyright on the ground that the work had become a 'requirement or duty'."^[46] Furthermore, the court said that the work belonged to the professors because the University of Illinois dean "told Weinstein to *publish* the article, not to ask the University for permission to publish permission that would have been essential if the University owned the copyright."^[47] The court said that it would find the paper to be within the scope of the professors' employment only if there were: 1) an underlying history of the creation of the copyright policy which would negate the court's conclusion or 2) a different documented course of practice.^[48]

{16} In *Hays v. Sony Corp. of America*, the same court again held that a professor's research-based work was exempted from the scope of employment.[49] The court ruled that even though Congress did not specifically mention that the research work of a professor would be exempted from the scope of employment definition in the work-for-hire doctrine, it did not expressly remove the exemption either.[50] Combined with the fact that courts have traditionally preserved the professor exemption, the *Hays* court did not choose to explicitly nullify it.[51] A Second Circuit Court of Appeals case shows that the professor exemption for research-based work applies even outside of the university. In *Krepner-Tregoe, Inc. v. Vroom*, a management training company that wanted to use a Yale business school professor's course materials -- which were based on research performed at the research institution had to buy the copyrights from Professor Vroom himself, not Yale.[52]

3. Rationale for keeping the professor exemption for research-based university work.

{17} When arguing that a professor's research-based work falls outside of work-for-hire, courts agree that the university-professor relationship is atypical of that between employer and employee.[53] An employer-employee relationship is that of master and servant, with the master determining the scope of the servant's job duties. In private enterprise, the master tells the servant what to do so that ultimately the business makes a profit. In non-profit and government work (outside of public universities and colleges), the master gives the servant duties and assignments to further the goals of their organization. In other words, in most situations the master-servant relationship assumes that a master wants a great degree of control over her servant because that *control is necessary to most effectively achieve the economic or policy goals of the organization*. That type of master-servant relationship flies in the face of traditional academia.[54]

{18} Traditional academia serves two important functions: 1) to teach students; and 2) to provide an academic environment for professors to *independently* develop research and writing expertise in their particular fields of study. As Professor Meyer has noted, the return to a university for investing in its faculty, "is a vigorous atmosphere of scholarship which in the great academic tradition encourages the pursuit of knowledge as an end in itself, as well as all of the reputational and financial endowments which accrue to a university meeting its academic goals." [55] When a university hires a professor, it does not know exactly which academic areas the professor will research, which perspectives the professor will use, what intellectual theories she will develop, what books and articles she will write, nor will the university know how innovative and original her courses are. Instead, a research university hires a professor in the hopes that the professor will bring scholarly fame to the institution through significant contributions of research and writing in prestigious publications in her field of expertise. The professor's success in achieving this goal is solely outside of the university's control because an academic's peers at other universities or colleges decide whether that professor's article will be published in a prestigious scholarly publication.[56] Thus, unlike most master-servant relationships where the employer has control over servants to meet the goals of the organization, a research-based university or college deliberately *relinquishes control over*, and fosters independence in, its professors when it comes to research so that those professors may achieve academic success through acceptance by their peers. Such independence also implies that professors have the *academic freedom* to develop and express ideas without censure by their employing university, since new and untested ideas and theories are the things that make academic discourse thrive.

4. Rationale for keeping the professor exemption at research-based, non-profit or public Online universities.

{19} Before the onset of Online education, universities generally did not dispute the contention that a professor owned the copyright to her research-based work.[57] That was probably because before the Internet, a professor's materials were not all that profitable. However, with the advent of Online universities,

a professor's Internet course is worth a lot more. So now, determining ownership of a professor's research-based materials is a significantly more important financial issue.

{20} Since finances are so important, preserving the professor exemption to the work-for-hire doctrine enhances the three goals of the professor-university relationship: academic independence, innovation, and freedom. As the Supreme Court said in *Mazer v. Stein*, the purpose of copyright law is to foster innovation. [58]

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered. [59]

If the professor gets to keep the copyright to the research-based course she teaches, she will have the economic *as well as* the employment incentive to continue creating original academic work. If the university retains copyright ownership, then not only does that remove incentive for professors to create original works from a financial perspective, it also threatens the unique employment relationship with their university or college. [60] As professors Wadley and Brown noted,

If academic employees are expected to create the kinds of things that will generate a profit for the institution, the opportunity to explore knowledge for the sake of expanding understanding markedly diminishes. Similarly, if the institution can use the force of copyright to determine whether possibly unpopular views are disseminated, the opportunity to dissent or to criticize will be significantly chilled. [61]

In other words, as Professor Dreyfuss has said, giving copyright ownership of research-based materials to universities would endanger the academic freedom, innovation and independence that is a unique aspect of the professor-university relationship. [62] "[U]niversities are not contributing the essentials of creation the momentary flash of genius accompanied by the quiet, dogged determination needed for production of a masterpiece or a major scientific breakthrough. On the contrary, the professors are." [63] The uniqueness of the employment relationship in academia mandates that the professor exemption to the work-for-hire doctrine be preserved.

5. How To Determine When the Exception Applies

{21} In certain situations, a professor who works for an Online university may be able to assert that the professor exemption gives him the copyright to his Online university work. The most obvious application is when a research-based university wants to broadcast one of its professor's courses Online. A professor has a strong case that absent a written agreement to the contrary the copyright to her research-based Internet course belongs to her. [64] So, once a university or college is determined to be research-based, one can argue that the professor owns the copyright to her Online work.

{22} For purposes of this note, a university or college is research-based if research is one of the stated goals of the institution and when tuition is not the primary source of revenue. Mission statements and financial data indicate whether an institution exists solely for the purpose of delivering instruction to students. Jones International University is not research-based. In its faculty mission statement, it states that Jones International University is, "an institution designed to provide educational programs via the Internet." [65] No mention of research is included. [66] In addition, most of JIU's revenue comes from tuition without a supplementary infusion of private or public research grants -- reaffirming the contention that it is not a

university that prioritizes research in its professors. [67] The UCLA Extension Program which offers many Online courses explicitly states that it is a private institution that is completely disaffiliated from the main research-based UCLA campus. [68] Furthermore, UCLA's Extension Program refers to the employees that teach their courses as "instructors", not professors a further indication that an employee at the UCLA Extension Program is hired to deliver an educational product and not to produce original research that necessitates academic freedom, independence, and innovation. [69] However, if a tenured professor at the main campus of UCLA who *was* hired to conduct research were to create an Internet course of instruction, the main campus of UCLA would not own the copyright to the professor's work. In other words, at JIU and the UCLA Extension program, it is clear that the professor is being hired only to teach, which disqualifies the instructor/professor from claiming that she has the same type of employment relationship with the university as a research professor does with a research university.

{23} A research-based university or college is one that proves that faculty academic research is a significant part of its mission. Even some private Online subsidiaries of such institutions can qualify for purposes of the professor exemption if the professor is hired *based on an understanding* that she is to perform original research that will be evaluated by peers in her field outside of the university. For example, the campus-based University of Maryland at College Park states the primacy of research in its mission statement.

The University of Maryland, College Park, is a public research university, the flagship campus of the University System of Maryland, and the original 1862 land-grant institution in Maryland. ... In keeping with the legislative mandates of 1988 and 1999, the University of Maryland is committed to achieving excellence as the State's primary center of research and graduate education and the institution of choice for undergraduate students of exceptional ability and promise. [70]

The University of Maryland also has an Online division called University of Maryland University College that touts research as a part of its academic vision. [71]

UMUC will be the Global University in Maryland, known for quality academic programs and outstanding faculty, products and services to students and clients independent of time and place constraints. *UMUC will be the benchmark institution for research, development, and application in pedagogy, learning outcomes, delivery, and support services.* [72]

From these mission statements, it is inferred that a professor hired at either university is hired to conduct original research that will be evaluated by entities outside of the professor's university. [73] The Online and campus divisions of Duke University's Fuqua School of Business also "[pride themselves] in [their] unique approach to the business of management education and research" on the Fuqua website, suggesting that both programs hold themselves out to professors and to the public as being research institutions that value academic innovation, independence, and freedom in their professors. [74]

E. Overview of Copyright Law

{24} In summary, courts should carefully determine the exact nature of the employment relationship between a professor and the Internet university or college he or she works for. If the relationship is solely instructional, then courts should use the work-for-hire copyright doctrine to award copyright ownership of a course to the university that sponsored it. However, if the professor was hired with the understanding that she was going to be granted academic freedom to independently research and write and gain acceptance in her academic field by peers outside of her university, giving copyright ownership of an Internet course threatens that unique

professor-university relationship and the copyright should revert to the professor.

III. Universal Broadband

{25} A third legal issue surrounding Online universities is how and whether the government should provide students nationwide access to broadband Internet. The term "broadband" generally means "fast Internet", i.e. getting access to the Internet by means other than dialing up to an Internet Service Provider through a modem.^[75] Broadband can "come from" the portion of a regular telephone line that is not used for voice transmission.^[76] Other companies can also provide broadband Internet access using cables that are separate from regular telephone lines. Some companies can even provide broadband service through wireless technologies.^[77]

{26} Increased access to broadband is critical to the growth and success of Online universities because broadband is significantly faster than dial-up Internet service, making Internet education the closest communications medium yet to person-to-person, interactive education.^[78] For example, downloading 100 hours of video over a regular phone line using a 33.6K modem "would take approximately 1.5 years."^[79] Downloading the same amount of information using broadband access would take 9.5 minutes.^[80]

For education, broadband access means the elimination of time and distance from the learning equation. Broadband carries with it powerful multimedia learning opportunities, the full interactivity of instructional content, and the quality and speed of communications. Broadband access today is 50 to several hundred times more powerful than its precursors.^[81]

{27} Greater affordability of broadband is essential because it gives more poor and rural residents access to higher education via the Internet. Some advocates of Online universities claim that because of the enormous potential for broadband higher education, the federal government should make nationwide affordable access to broadband a part of federal communications policy.^[82] Specifically, these advocates say that the government should subsidize broadband Internet access in poor and rural areas in the same way government subsidizes telephone service.^[83] For regular telephone service, the Communications Act requires certain telecommunications companies to contribute money to a Universal Service Fund that subsidizes phone service in rural, low-income, and other areas communications companies might not find profitable enough to serve.^[84] The four goals of the universal service program are: (1) to provide subsidies for "low-income individuals, consumers in rural, insular, and high cost areas, schools, libraries, and rural health care providers"; (2) maintaining affordability in basic residential telephone service; (3) making sure that basic telephone service remains affordable even as the telecommunications industry become increasingly deregulated; and (4) creating an incentive for lower priced services by fostering a more competitive environment for telecommunications companies.^[85]

{28} Arguably in today's information age, broadband access for education is just as important as basic residential telephone service, and therefore should also be subsidized by universal service funding.^[86] Though this is a laudable goal that Online university advocates could achieve in the long term, it is not a realistic way to achieve an immediate solution. Already, the access to broadband service in urban areas outpaces access in rural areas. The government could use Universal service funds to equalize the disparity, thereby making Internet education more affordable.^[87] Many portions of § 254 of the Communications Act could support such an argument. For example, in § 254(c)(2) of the Communications Act, Congress gave the entity in charge of the Universal Service Fund the power to change the types of services that the Universal

Service Fund can subsidize, thus making it possible to include broadband in the list of services that universal service funds. [88] However, subsidizing nationwide access to broadband for Online universities is, arguably, extending the scope of the universal service program beyond Congress' intent and is probably not realistic given the current de-regulatory focus of the Telecommunications Act of 1996. [89] The Universal Service Program has sparked a number of court battles between telecommunications carriers and the Federal Communications Commission, mainly over whether the company is entitled to reduced contributions to the Universal Service Fund. Given a private company's natural aversion to paying government fees or taxes, the Universal Service Fund is in danger of not even being in a position to provide basic telephone service for financially needy persons. Adding broadband access to the list of subsidized services funded by the Universal Service Fund might not be economically realistic given the current battle over preserving the fund for more fundamental communications products like telephone service. [90]

{29} However, Online university advocates could use the Higher Education Act to achieve broader availability to broadband Internet. Using the HEA, instead of the Communications Act, is a much more practical solution. According to the legislative history of the Higher Education Act:

A fundamental theme of Federal support for postsecondary education is assistance to achieve the goal of equal educational opportunity. . . H.R. 5192 seeks to advance the goal of achieving equal educational opportunity through student assistance by several types of improvements in the equity of these programs. First, the bill strengthens the balance of the student assistance programs so that students will be able to have not only access to a postsecondary education but also *the choice of the postsecondary education best suited to their needs, interests and talents* . . . Third, the bill makes fairer the consideration of a student's *educational costs* for the purpose of determining his or her eligibility for student assistance. For example, it requires that the living costs of a student commuting from home to school be determined separately from the living costs of a student living independently off campus. [91]

{30} As a practical and immediate solution to the problem of poor access to broadband Internet, Online university advocates should persuade the Department of Education to disburse government loans to pay for expensive broadband Internet service for Online university students. Advocates could accomplish this by arguing that the purpose of the Higher Education Act is to provide inexpensive loans or grants to Internet students so they can access their Online education in a technologically reasonable method. The Department of Education could encompass the costs of broadband into student expenses when calculating their financial need for federal aid. With the availability of government loans, more students would be able to afford Online courses, which would therefore motivate broadband companies to extend service to those students. Thus, when it comes to federal subsidies for broadband Internet education, Online advocates should use the Higher Education Act not the Communications Act to make their point if they want an immediate, practical solution.

IV. Federal Regulations Regarding Financial Aid

{31} Two federal regulations prevent students at nontraditional institutions like Online universities from obtaining enough guaranteed student loans (GSLs) to pay for tuition. The first regulation is the "Fifty Percent Rule," which prevents Online universities from offering more than half of its total course offerings over the Internet. [92] If the university does exceed the fifty percent limit, then its students cannot qualify for the cheaper federal tuition loans. [93] The second regulation is the "Twelve Hour Rule," which requires certain institutions to provide its students with twelve hours per week of professor-led instruction, exams or "preparation for examinations." [94] If the institution fails to provide its students with the minimum number of hours of "instruction" per week, then its students cannot qualify for federal tuition loans. [95] Thus, the

Twelve Hour Rule and the Fifty Percent Rule force Online universities to restrict the type and number of Internet courses it can offer that are eligible for federal financial aid.

A. History and Purpose of the Higher Education Act, the Fifty Percent Rule and the Twelve Hour Rule

{32} When President Johnson signed the Higher Education Act (HEA) of 1965 into law, he said that the purpose of the HEA was to allow "a high school senior anywhere in this great land of ours [to] apply to any college or any university in any of the fifty states and not be turned away because his family is poor."^[96] Ever since the HEA was passed into law, Congress has re-authorized it every six years, refining it so that it keeps pace with the increasing costs and needs of higher education in the United States. For example, during the 1986 HEA re-authorization, Congress noted that the HEA had evolved from a law that "primarily supported higher education through the purchase of things, such as buildings and books, to an Act which supports higher education primarily by investing in people through the student aid programs."^[97]

{33} The Fifty Percent Rule forbids institutions that offer more than half of its courses as correspondence and/or telecommunications courses from offering federal financial aid to their students.^[98] Therefore under the Fifty Percent Rule, students at completely Online universities have to pay tuition from their own funds or obtain an expensive private loan. The rule stems from explicit statutory language.^[99] HEA amendments made during the Act's 1992 re-authorization forbade the Department of Education from giving federal aid to institutions of higher education that offered more than fifty percent of their courses through correspondence, or enrolled more than Fifty Percent of its students in correspondence courses.^[100] In 1998, Congress amended the Act again, saying that even telecommunications courses counted as correspondence courses.^[101] Together, the language from the 1992 and 1998 amendments formed the Fifty Percent Rule.

{34} Under the Twelve Hour Rule, the Department of Education will only disburse federal financial aid for Online courses that offer twelve hours of instruction, examinations or study periods per week.^[102] The Twelve Hour Rule, unlike the Fifty Percent Rule, does not stem from explicit statutory language. Instead, the Department of Education created the Twelve hour rule in 1994 to clarify the HEA's vague definition of "academic year."^[103] Congress defined what an "academic year" was to prevent students from abusing the federal student loan program. Without a set, uniform definition of "academic year," colleges and universities could disburse federal loans on any terms they please. For example, a school could disburse the maximum amount of federal funds for its students every twelve months, regardless of whether its students were taking a full course load. By defining how much academic work should take place within an "academic year," Congress intended to prevent loans from being disbursed improperly. However, Congress only defined "academic year" for traditional universities that offer classes on a clock hour or credit-hour-with-terms basis.^[104] Congress did not define "academic year" for nontraditional universities that offer credit-based courses on an irregularly scheduled, non-term basis. Many online and nontraditional universities have nontraditional academic calendars, therefore the Twelve Hour Rule sets out a clear-cut definition of an academic year for them.^[105] In order to disburse federal aid to their students, online universities must offer twelve hours of instruction per week, consisting of regularly scheduled instruction, examinations, or preparation for examinations.^[106]

B. Defects in the Fifty Percent Rule

{35} The problem with the Fifty Percent Rule is that it does not account for the interactive component of the Internet.^[107] The rule indicates that if the number of Internet courses exceeds more than half of the total course offerings, the course then counts as a "correspondence" course, which disqualifies it from being eligible for federal financial aid.^[108] A correspondence course is a one-way educational experience in which the only interaction between the professor and students is when the professor grades the students' exams.^[109] However, an Internet course is completely unlike a correspondence course because the Internet enables

a student to acquire, transform, process, and generate information so that she can participate in a class discussion or ask questions in a manner equivalent to the professor-student interaction found in a campus-based course or seminar.[\[110\]](#)

{36} Only public policy arguments can lift the Fifty Percent Rule restriction since the Department was only effectuating explicit statutory language from the HEA when it created the Fifty Percent Rule.[\[111\]](#) To have the rule abolished, online universities will have to convince Congress to strike the statutory language that explicitly supports the Fifty Percent Rule. The strongest argument against the Fifty Percent Rule is that it discriminates against nontraditional students by making it harder for them to get financial aid.[\[112\]](#) Since 1970, there has been 235 percent growth in students over 40 years old attending post-secondary institutions.[\[113\]](#) Despite this growth, however, older, nontraditional students still get less than half of the federal financial aid that is available to younger (ages 18-24), traditional college students.[\[114\]](#) If a student wants to get a post-secondary degree by taking *only* Internet classes because she cannot get face to face instruction due to transportation problems, the student will not qualify for a guaranteed student loan (GSL) from the federal government.[\[115\]](#)

{37} The Fifty Percent Rule arguably frustrates the purpose of the Act. Every six years, when the HEA is re-authorized, Congress repeats the same rationale for why the HEA exists.

Perhaps the most dramatic change in the HEA over the last 20 years has been the shift from an Act which primarily supported higher education through the purchase of things, such as buildings and books, to an Act which supports higher education primarily by investing in people through the student aid programs...[\[116\]](#) The GSL has become the loan of necessity for all families...[\[117\]](#) The goal of educational opportunity is updated by modifying the student assistance programs to more effectively serve nontraditional students.[\[118\]](#)

Because the Fifty Percent Rule gives "substantial preference to the mainstream educational experience" of younger students at traditional universities, Congress does not seem to have met its goal of helping nontraditional students finance higher education.[\[119\]](#)

C. Problems With the Twelve Hour Rule

{38} Online universities face an additional regulatory barrier in the Twelve Hour Rule. The Twelve Hour Rule requires nontraditional higher education institutions to provide twelve hours *per week* of teacher-led instruction, exams, or final exam reading period.[\[120\]](#) Unlike the Fifty Percent Rule, which stems from explicit statutory language of the HEA, the statutory authority for the Twelve Hour Rule is much less clear. The statute says that an educational program qualifies for federal financial aid if it provides at least "30 weeks of instructional time" during an academic year.[\[121\]](#) The Department of Education used this statutory language to justify a rule that requires a certain amount of instructional time per week within the thirty-week academic year.[\[122\]](#) The Department claimed that the rule's creation was the best way to prevent new, untested forms of education like online universities from abusing federal financial aid laws.[\[123\]](#) For example, in one analogous situation, a vocational school improperly disbursed federal financial aid when it assigned too many academic credits to courses with unreasonably low instructional hours.[\[124\]](#) However, this note will explain that because online universities can accommodate the scheduling needs of working, self-supporting students, the Twelve Hour Rule actually discriminates against financially needy students whose only access to a quality education is through the Internet.

V. Analysis

A. Substantive Analysis: Since the HEA was ambiguous on the issue of instructional time at nontraditional universities, the Twelve Hour Rule is arguably invalid because it exceeds a broad interpretation of the HEA's intent.

{39} Since the HEA did not specifically instruct the Department of Education to quantify the amount of instructional hours per week or year, the Department had discretion to promulgate the Twelve Hour Rule. [125] Under an administrative law analysis, since the statute failed to define "instruction" or "week of instructional time" within an "academic year," the Department could reasonably conclude that Congress was leaving that for the Department to decide. [126] However, courts will overturn an administrative rule if it determines that the rule regulates areas outside those authorized by the statute, or negates the statute's intent. [127] One could argue that since a broad interpretation of the HEA required the Department to lessen the administrative regulations governing non-traditional institutions of higher education, [128] the Twelve Hour Rule negates a broad interpretation of the HEA's intent.

{40} A very broad interpretation of the HEA indicates that Congress put minimal restraints on nontraditional universities. The first part of the statute defines the minimum amount of instructional time of *any institution* which would include nontraditional ones that must be provided during an academic year.

For the purpose of *any program* under this title, the term 'academic year' shall require a *minimum of 30 weeks of instructional time*. . . [129]

The second part of the statute specifies instructional time requirements per academic year for *traditional institutions* that run on clock hours, semesters, quarters or trimesters.

With respect to an undergraduate course of study... a full-time student is expected to complete at least *24 semester or trimester hours or 36 quarter hours at an institution that measures program length in credit hours, or at least 900 clock hours* at an institution that measures program length in clock hours. [130]

Notice that the above language does not specify the total number of instructional hours or instructional credits that nontraditional universities must provide during the academic year. [131] Typically, many of the newer institutions including online universities fall into this nontraditional institution category. [132] Also note that in the statute that Congress explicitly gave the Department the ability to grant financial aid eligibility to certain institutions that fell outside of statutory standards for "good cause." [133]

{41} Combined with an analysis of the legislative history of the HEA, one could argue that Congress intended that the Department of Education refrain from imposing overly burdensome regulations on nontraditional institutions. [134] This argument can probably be countered by a simple administrative law analysis that the Department does have discretion to promulgate rules to prevent abuse of federal financial aid laws. [135] However, if one takes a broader view of the purpose of the HEA, then the Department could be viewed as stepping beyond its statutory authority. [136] A broader view of the HEA is that it gave the Department authority to regulate how federal financial aid loan monies are spent AND to make higher education accessible to a *greater number* of students by providing them with government loans. [137]

{42} Assuming that one takes this very broad view of the HEA's purpose, the Department of Education does NOT have the authority to promulgate a rule that limits the number of non-traditional higher education

opportunities like online universities. Congress noted in the 1992 House Conference Report on the HEA re-authorization that the Internet enabled adult students to access higher education because "the ability to 'time shift' the viewing of telecourse programs to meet the student's schedule adds an essential flexibility to an academic program that many adult learners need."[\[138\]](#)

{43} Thus, legislative history has indicated that Congress wanted the Department to implement the HEA in a way that guaranteed educational quality AND accommodated the irregular academic schedules so that working students could get government loans to pay for higher education at quality schools that met their needs. Internet courses are unique in that they have the technical capability to allow students to download course instruction at the students' pace, which makes it an attractive educational option for older students who have work and family responsibilities.[\[139\]](#) Past enforcement of the Twelve Hour Rule, however, requires that instruction be parsed out in equal amounts over each week of instruction.[\[140\]](#) This "equal time" requirement makes it less likely that self-paced Internet courses that could be downloaded in unequal amounts of time could qualify for federal financial aid.[\[141\]](#) To illustrate, consider a single mother holding two jobs. For the first twenty-four weeks of a course, her schedule allows her fifteen hours of time to download Internet instruction per week for twenty-four weeks. However, for the remaining six weeks of the course, she can only download four hours per week. According to the Twelve Hour Rule, a woman in this situation would probably not get federal financial aid, even though she met the HEA requirements of thirty weeks and the Department's 360 total instructional hours requirement.[\[142\]](#) If an institution wanted the Department to grant the institution an exception to the Twelve Hour Rule so that a self-paced program could qualify for federal aid, it would have to get explicit agency permission to do so, which can take as long as six months.[\[143\]](#) A necessary result of the Department's slow, case-by-case approval process is that the rule inhibits institutions that could offer quality, self-paced Internet courses from developing them because doing so might endanger their federal financial aid eligibility. Alternatively, the approval process denies federal aid to financially needy students who want to take quality, self-paced Internet courses by creating a bureaucratic approval process that is so long and complicated that it deters many institutions from applying for financial aid eligibility.

{44} Because the Twelve Hour Rule poses a substantial barrier to compliance for innovative, quality Internet educational programs, the rule contrary to a broad interpretation of congressional intent makes a quality Online degree unaffordable for financially needy students who require the type of scheduling flexibility that only an Internet course can offer. Though the Department of Education can legitimately claim under *Chevron*[\[144\]](#) that it had discretion to promulgate the Twelve Hour Rule in order to prevent fiscal abuse by nontraditional universities, it should focus its regulatory efforts on nontraditional universities that fail to meet the accreditation standards of university accreditation associations. If a nontraditional, completely Online university like Jones International University obtains the same accreditation as other traditional universities that receive federal aid, JIU students should not be precluded from obtaining federal aid solely because they take their courses through Internet instruction. Unfortunately, the Twelve Hour Rule focuses too much attention on numbers and not enough on quality, and hurts needy students in the process (arguably against a very broad interpretation of the HEA's intent).

B. Procedural Analysis: Initial 1994 Promulgation of the Twelve Hour Rule

{45} A stronger argument against the Twelve Hour Rule is that the Department did not go through proper procedures before creating the rule. Under § 553(b)(3) of the Administrative Procedure Act, administrative agencies are required to give notice to the public in the Federal Register that they are proposing to promulgate rules in a certain policy area in the future.[\[145\]](#) According to the Act, the notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[\[146\]](#) After public notice is given, the Act requires agencies to accept comments from interested parties about the proposed rules.[\[147\]](#) Once the agency decides on the final rule, the agency must incorporate the issues and

concerns of commentators in the explanation of its final ruling.^[148]

{46} Arguably, the Department did not give the public proper notice that it intended to make a weekly instructional hours requirement. Notifying the public about a proposed rule change that does not concern the substance of the final rule it actually achieves *is not proper notice* and violates § 553(b) of the Administrative Procedure Act.^[149] In February of 1994, the Department gave notice in the Federal Register that it intended to make additional regulations to further specify the HEA's definition of "academic year."^[150] In its public notice, the Department did not indicate that it was considering changing the definition of "week of instructional time" from a minimum number of *days* to a minimum number of *hours*, a change that would have a substantial effect on nontraditional universities that offer methods of instruction that cater to the needs of an adult student population.

The Secretary has determined that the terms used in the definition of *academic year* must be clarified if the definition is to be well-understood and applied consistently. **In determining what constitutes the 30-week period, the Secretary would count the period that begins on the first day of classes and ends on the last day of classes or examinations.** For example, if an institution's first day of classes begins on a Tuesday, the first week of the academic year would begin on that Tuesday and end the following Monday. The institution would not begin counting with the Sunday preceding the first day of classes. The Secretary proposes that, for purposes of this definition, **a week would be a consecutive seven-day period**, as opposed to a **five-day or six-day school week** or seven individual days that are spread out over more than one calendar week. This approach would facilitate counting and readily accommodate institutions that start and end on different days of the week. For purposes of this definition, a *week of instructional time* would be any week in which at least **one day** of regularly scheduled instruction, examinations, or preparation for examinations occurs... This proposal would accommodate innovative educational programs such as those offered only on weekends or condensed schedules.^[151]

In response to the public notice, the Department indicated that it was going to create a definition of "week of instruction" for nontraditional institutions like Online universities based on calculating the total number of *days* in the week. In fact, in a notice of interim final regulations, the Department temporarily defined a week of instruction as "any week in which [there are] at least *five days* of regularly scheduled instruction, examinations, or preparation for examinations . . . for all other programs."^[152] Nowhere in the public notice or in the notice of interim final regulations did the Department give the public warning that it might change a definition of a week from a *days* to an *hours* requirement.

{47} It was not until the final Twelve Hour Rule was promulgated that the majority of Online education advocates would have been aware that the Department switched the definition of "week of instruction" from days to hours.^[153] The switch from days to hours of instruction is significant because it makes it more difficult for Online universities to cater to the needs of its students who can only work on their Internet course five days a week for a small amount of time each day. Changing the rule from a daily to an hourly requirement adds a significant burden to an Online university and its students. Instead of working five days a week for smaller amounts of time that fit more practicably into a person's schedule, the Twelve Hour Rule requires an Internet university student to devote approximately 1.7 hours each day of the week to an Internet class "session."^[154] Most nontraditional, Online university students are willing to invest the time in an Internet course only if the class is spread out over many months and can be available at their convenience.^[155] However, many of these students do not have 8-12 hours of free time *each* week to devote to an Internet class. The result of this rule is to force schools to either: a) create courses that meet the needs of a nontraditional student body, but fail to qualify for federal financial aid; or b) change their courses to meet federal financial aid requirements while suffering a drop in student enrollment because the students cannot work with such a schedule. When the Department switched the definition of "week of instruction" from days

to hours, it significantly affected the ability of Online institutions to qualify for federal financial aid and did so without giving those interested parties adequate warning. [156] Notifying the public about a proposed rule change that does not concern the substance of the final rule it actually promulgates is not proper notice and violates § 553(b) of the Act. [157] In this case, telling the public that the Department would be changing the number of days in the definition of "week of instruction" does not justify creating a rule that would measure a "week of instruction" by hours instead.

C. Procedural Analysis Continued: 1999-2000 Review of the Twelve Hour Rule

{48} Later agency public notices also demonstrate that the agency did not give proper notice to interested parties with a separate rule related to the Twelve Hour Rule in 1994. The rule the Department implemented was that *only* a pre-exam reading period qualified as "preparation for examinations." The Twelve Hour Rule, however, said that this category of instruction could count toward the required number of hours of instructional time an institution must offer during an academic year. [158] Excluding non-reading-period activities that prepare students for examinations is a sweeping pedagogical policy statement that warrants a rule notice of its own it is not just an interpretation of a rule. [159] Basically, such a policy twist to that definition could be called "the Twelve Hour Rule B." The effect of this second rule is to exclude Online study group discussions and other interactive educational activities from qualifying as instructional time under the Twelve Hour Rule. [160] Surely, proponents of Online education would have submitted critical public comments to the Department about this new policy had the Department notified them in 1994 when it originally implemented the "Twelve Hour Rule B." However, the Department did not provide proper notice for "Twelve Hour Rule B," as the *past tense* language in a public notice six years AFTER the birth of the rule reveals:

It was never intended that homework should count as instructional time in determining whether a program meets the definition of an academic year, since the Twelve Hour Rule was designed to quantify the in-class component of an academic program. For that reason, the only time spent 'in preparation for exams' that *could* count as instructional time *was* the preparation time that some institutions schedule as study days in lieu of scheduled classes between the end of formal class work and the beginning of final exams. [161]

Ultimately, the Department tried to undo the damage done (through not putting "Twelve Hour Rule B" up for public notice in 1994) by finally posting it in the Federal Register in 1999 and then approving it as a final rule one year later. [162]

{49} Of further note, the Department did not appear to give a thorough response to the concerns of interested parties when it requested comments in 1999 to reconsider the Twelve Hour Rule. Arguably, the Department's lack of a thorough response would constitute a violation of § 553 of the APA. [163] When the Department sought public comment on the applicability of the original Twelve Hour Rule to Online education, many interested parties said that the rule did "not adequately address newer, non-traditional approaches to the delivery of post-secondary education to students, such as distance education." [164] In response, the Department failed to address these concerns and focused instead on its contention that the current requirement of twelve hours of instruction per week was the best way to ensure that Online university educational programs provided students with adequate instructional time. [165] However, the Department may easily correct this oversight by publishing further explanatory statements from the transcript of the negotiated rulemaking strengthening the logical connection between Online education and heightened concern over educational program quality.

D. Overview of the Fifty Percent and Twelve Hour Rules

{50} In summary, abolishing the Fifty Percent and Twelve Hour Rules requires two types of solutions. Since there are only weak legal arguments against the Fifty Percent Rule, the only way to change that rule is through congressional amendment. As for the Twelve Hour Rule, without further evidence, only weak arguments exist for overturning it on substantive grounds. However, from an administrative law analysis, Online education advocates have a stronger argument against the rule based on improper notice by the Department.

VI. Conclusion

{51} Online universities pose unique legal issues in copyright, communications, and regulatory law. First, courts must stop applying the work-for-hire doctrine haphazardly in order to prevent the battle over copyright ownership of Internet courses from endangering the current world of academia. Second, lobbyists should rethink their strategies for finding ways of making broadband affordable. Third, institutions of higher education vary in purpose and quality. Hence, regulators have to learn to back off when Congress wants Internet universities to be given regulatory flexibility. Perhaps they should concentrate on making higher education affordable and obtainable to a greater variety of people and let accrediting agencies evaluate educational quality rather than creating confusing rules that do not achieve the quality-check purpose for which they were intended. Only by objective assessment of congressional and administrative intent, the unique relationship between professors and research-based universities, and the true purpose of communications law can courts correct the federal rules, misapplied copyright doctrines, and legal strategies that have impeded the availability of this type of higher education to a broader audience. Only then can Internet universities and colleges offer a variety of quality higher education that Americans in all parts of the nation can afford.

ENDNOTES

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[1]. See Welcome to UCLA Extension, at <http://www.unex.ucla.edu> (last modified Feb. 13, 2002).

[2]. See WEB-BASED EDUCATION COMM'N, 107TH CONG., REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES, THE POWER OF INTERET LEARNING: MOVING FROM PROMISE TO PRACTICE (2000), available at <http://www.ed.gov/offices/AC/WBEC/FinalReport> (last modified Jan. 4, 2001) (provides links to download the report in pdf format) [hereinafter WEB-BASED EDUCATION COMM'N].

[3]. See Jones International University, at <http://jiu-web-a.jonesinternational.edu/eprise/main/JIU/home.html> (last visited Apr. 1, 2002).

[4]. See U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION 32-36 (1999), available at <http://lcweb.loc.gov/copyright/disted> (last modified Apr. 10, 2000) (provides link to download the report in pdf format).

[5]. *See id.* at 1-6.

[6]. Copyright Act of 1976, 17 U.S.C. § 101 (1976 & Supp. 2000).

[7]. *See* WEB-BASED EDUCATION COMM'N, *supra* note 2, at 95.

[8]. *See* 17 U.S.C. § 107 (1976 & Supp. 2000).

[9]. *See* WEB-BASED EDUCATION COMM'N, *supra* note 2, at 95.

[10]. *See* Faculty Center, Jones International University, at http://jiu-web-a.jonesinternational.edu/eprise/main/JIU/facultycenter/JIU_facultycenter.html?banner=faculty (last visited Apr. 1, 2002).

[11]. *See* E-mail from Steven Shapiro, Vice President, Marketing and Communications, Jones International University, to Betsy Kaiser, student writer at the Vanderbilt Law School (Mar. 7, 2000) (on file with author).

[12]. *See id.*

[13]. Why the University of Phoenix, University Overview, at <http://www.phoenix.edu/students/index.html> (last visited Apr. 1, 2002).

[14]. About Apollo: General Overview, at http://www.apollogrp.com/About_Apollo/index_ns.asp?p=1_1.htm (last visited Apr. 1, 2002).

[15]. *See* Telephone Interview with Janess Pasinski, Investor Relations Representative, Apollo Group, Phoenix, AZ (Mar. 8, 2001). Ms. Pasinski specified that those figures are only for the entire Apollo Group, not just for UOP. *Id.* However, she also indicated that UOP's Online division is the largest subsidiary of all of Apollo's Online divisions. *Id.* The Apollo Group Annual Report also suggests that student tuition is the main source of revenue for all of the Online division of Apollo Group. *See id.* The report said that the Apollo Group's operating margin increased along with student enrollment. *See* APOLLO GROUP, INC., 2001 ANNUAL REPORT, available at http://www.apollogrp.com/About_Apollo/index_ns.asp?p=1_2.htm (last modified Dec. 5, 2001).

[16]. Absent a written agreement to the contrary.

[17]. *See* Copyright Act of 1976, 17 U.S.C. § 101 (1976 & Supp. 2000).

[18]. *See id.*

[19]. Ryan Craig, *The Development of Internet Education and the Role of Copyright Law*, 47 J. COPYRIGHT SOC'Y 75, 118 (citing Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)).

[20]. *See id.* at 118-19 (quoting 490 U.S. at 751-52).

[21]. Faculty Center Webpage for Jones International University, at http://jiu-web-a.jonesinternational.edu/eprise/main/JIU/facultycenter/JIU_facultycenter.html?banner=faculty (last visited Apr. 1, 2002).

[22]. See Craig, *supra* note 19, at 118.

[23]. 17 U.S.C. § 101 (1976 & Supp. 2000).

[24]. Vanderhurst v. Colo. Mtn. Coll. Dist., 16 F. Supp. 2d 1297, 1307 (1998).

[25]. Colorado Mountain College Catalog 2001-02, *available at* http://www.coloradomtn.edu/catalog/a_welcome/home.html.

[26]. *Id.* (emphasis added).

[27]. *See id.*

[28]. *See id.*

[29]. Williams v. Weisser, 273 Cal. App. 2d 726 (1969); Sherrill v. Grieves, 57 Wash. L. Rep. 286 (1929).

[30]. *Williams*, 273 Cal. App. 2d at 726.

[31]. *Id.*; *see also Sherrill*, 57 Wash. L. Rep. at 286.

[32]. Laura G. Lape, *Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies*, 37 VILL. L. REV. 223, 242 (1992).

[33]. *Id.*

[34]. *Id.* at 242-43.

[35]. Todd A. Borow, *Copyright Ownership of Scholarly Works Created by University Faculty and Posted on School-Provided Web Pages*, 7 U. MIAMI BUS. L. REV. 149, 169 (1998); Russ VerSteege, *Copyright and the Educational Process: The Right of Teacher Inception*, 75 IOWA L. REV. 381, 411-12 (1990).

[36]. Glatt v. Daugherty, No. CA-6020, 1980 OH App. LEXIS 13649, at *7 (Ohio App. 1980); Cooke v. Roberts, No. C-90-2427-JPV 1992 U.S. Dist. LEXIS 12386, at *8-*9 (N.D. Cal. 1992).

[37]. *See Cooke*, 1992 U.S. Dist. LEXIS 12386 at *8.

[38]. *See id.* at *11 n.2.

[39]. *Id.* at *9.

[40]. *See Lape, supra* note 32, at n.1 (citing Todd F. Simon, *Faculty Writings: Are They "Works Made for Hire" Under the 1976 Copyright Act?*, 9 J.C. & U.L 485 (1983); Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590 (1987); Leonard D. Duboff, *An Academic's Copyright: Publish and Perish*, 32 J. COPYRIGHT SOC'Y 17 (1985)).

[41]. *See Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1094 (7th Cir. 1987).

[42]. *See id.* at 1092.

[43]. *See id.* at 1094.

[44]. *See id.*

[45]. *See id.*

[46]. *Id.*

[47]. *Id.* at 1095.

[48]. *See id.* at 1094.

[49]. *See Hays v. Sony Corp. of Am.*, 847 F.2d 412 (7th Cir. 1988).

[50]. *See Lape, supra* note 32, at 243 (citing *Hays*, 847 F.2d at 416-17).

[51]. *See id.* at 245.

[52]. *See Krepner-Tregoe, Inc. v. Vroom*, 186 F.3d 283, 285 (2d Cir. 1999).

[53]. *See Weinstein*, 811 F.2d at 1095. The University of Illinois told the professor to publish the article he had written in an independent publication. *Id.* The university, when making this demand on the professor, assumed that the article belonged to the professor, and therefore, he, and not the university, should be the one to get it published. *Id.*

[54]. By "academia," the author is referring to private non-profit or public research-based universities or colleges. *See James B. Wadley & Jolynn M. Brown, Working Between the Lines of Reid: Teachers, Copyrights, Work for Hire, and a New Washburn University Policy*, 38 WASHBURN L.J. 385, 417 (1999). "[T]he primary mission of the institutions is not to make money but to freely disseminate knowledge and understanding. Imputing upon academic institutions the same business rationale for the employment relationship as is found in the non-academic business world may do a serious disservice to the public interest." *Id.*

[55]. *See Mark L. Meyer, To Promote the Progress of Science and Useful Arts: The Protection of and Rights in Scientific Research*, 39 J.L. & TECH. 1, 33 (1998).

[56]. With the ironic exception of law reviews run by students who are not even licensed to practice the law!

[57]. *See Rochelle Cooper Dreyfuss, Collaborative Research: Conflicts on Authorship, Ownership and Accountability*, 53 VAND. L. REV. 1162, 1186-87 (2000).

[58]. *See Mazer v. Stein*, 347 U.S. 201, 219 (1954).

[59]. *Id.*

[60]. *See Wadley & Brown, supra* note 54, at 417.

[61]. *See id.*

[62]. See Dreyfuss, *supra* note 40, at 626.

[63]. See Note, Sunil R. Kulkarni, *All Professors Create Equally: Why Faculty Should Have Complete Control over the Intellectual Property Rights in Their Creations*, 47 HASTINGS L.J. 221, 239 (1995).

[64]. See *supra* Part II.D-4.

[65]. See Jones International University, at http://jiu-web-a.jonesinternational.edu/eprise/main/JIU/facultycenter/JIU_facultycenter.html?banner=faculty, (last visited Apr. 1, 2002).

[66]. See *id.*

[67]. See E-mail from Steven Shapiro, Vice President, Marketing and Communications, Jones International University, to Betsy Kaiser, student writer at Vanderbilt Law School (Mar. 7, 2001) (on file with author).

[68]. See UCLA Extension Program, at <http://www.unex.ucla.edu> (last visited Apr. 1, 2002).

[69]. See What We Can Do for You: Instructor Profiles, from UCLA Extension Program, at http://www.unex.ucla.edu/what_we_can_do/instructors.html (last visited Apr. 1, 2002).

[70]. See University of Maryland Mission Statement, available at http://www.inform.umd.edu/EdRes/provost/Strategic_Planning/Mission2000.html, (last visited Apr. 1, 2002).

[71]. University of Maryland University College, *UMUC Values and Vision: The Global University in Maryland*, Our Vision, at <http://www.umuc.edu/gen/vision.html> (last visited Apr. 1, 2002).

[72]. *Id.*, *emphasis added*.

[73]. *UMUC Values and Vision*, *supra* note 71. Though UMUC indicates that consumer demand, not just research, will determine how its Online division develops, it scales back the business-like attitude by touting UMUC as a research-based institution as indicated in the quoted language in the text. See *id.* Also, UMUC says that the "wisdom and social accountability" of a public institution will prevent UMUC from veering completely away from its research mission. *Id.*

[74]. Duke University, The Fuqua School of Business, *Academic Programs*, at <http://www.fuqua.duke.edu/admin> (last visited Apr. 1, 2002).

[75]. HARRY NEWTON, NEWTON'S TELECOMMUNICATIONS DICTIONARY 842 (16th ed. 2000).

[76]. *Id.*

[77]. *Id.*; see also E-mail from James D. Bruce, Prof. of Electrical Engineering and V.P. for Info. Sys., Massachusetts Institute of Technology, to Betsy Kaiser, student writer at Vanderbilt Law School (Jan. 13, 2001) (on file with author).

[78]. WEB-BASED EDUCATION COMM'N, *supra* note 2, at 22.

[79]. *Id.*

[80]. *Id.*

[81]. *Id.*

[82]. Michael Saylor, *The Missing Issue*, WASH. POST, Mar. 14, 2000, at A17.

[83] *Id.*

[84]. Communications Act of 1934, 47 U.S.C.S. § 254(b)(3) (Law Co-op. 1995 & Supp. 2001).

[85]. THOMAS G. KRATTENMAKER, TELECOMMUNICATIONS LAW AND POLICY 470 (2d ed. 1998).

[86]. Saylor, *supra* note 82.

[87]. WEB-BASED EDUCATION COMM'N, *supra* note 2, at 25. *See generally* NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION & ECONOMICS AND STATISTICS ADMINISTRATION, A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET, *available at* <http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf> (last accessed Apr. 1, 2002).

[88]. 47 U.S.C. § 254(c)(2) (2002). "The Joint Board may, from time to time, recommend to the Commission modifications in the definition of services that are supported by Federal universal service support mechanisms." *Id.*

[89]. *Id.* at § 151. Providing greater access to education is not included in the purpose of the Communications Act. The Act's stated purpose is:

to make available . . . to all the people of the United States . . . a rapid, efficient nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges, *for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority.* *Id.* (emphasis added). *See also* Alenco Comm., Inc. v. FCC., 201 F.3d 608, 614 (5th Cir. 2000); Tex. Pub. Util. Comm'n. v. FCC., 183 F.3d 393, 405 (5th Cir. 1999).

[90]. *See cases cited id.*

[91]. H.R. REP. NO. 96-520, at 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3141, 3144-45; *see also* H.R. REP. NO. 102-447, at 8 (1992), *reprinted in* 1992 U.S.C.C.A.N. 334, 341; H.R. CONF. REP. NO. 105-750, at 275, 277-79 (1998), *reprinted in* 1998 U.S.C.C.A.N. 404, 410, 412-14.; H.R. REP. NO. 99-383 at 5, (1986), *reprinted in* 1986 U.S.C.C.A.N. 2572, 2576. Though the quoted text comes from the legislative history of the 1980 HEA re-authorization, the 1986, 1992 and 1998 legislative histories reaffirm the same conviction expressed in the quoted text that the primary goal of the HEA is to monitor the costs of higher education and to adapt public policies to make higher education accessible to more people through government loans. *See id.*

[92]. 34 C.F.R. § 600.7(a)(1)(i-ii) and (b) (2000). For its latest complete award year, a non-vocational institution of higher education does not qualify for Title IV (GSL) funds if more than 50% of the courses were correspondence courses or if more than half of the students were enrolled in correspondence courses. *Id.* "The Secretary considers a telecommunications course to be a correspondence course if the sum of telecommunications courses and other correspondence courses the institution provided during that award year equaled or exceeded 50% of the total number of courses it provided during that year." If an institution

qualifies for Title IV funds, then its students qualify to apply for federal student loans. *See* 20 U.S.C. §1091(a)(1) (2000).

[93]. 20 U.S.C. § 1091(k)-(l)(1)(A)(2000). Subsection k provides: "Special rule for correspondence courses. A student shall not be eligible to receive grant, loan, or work assistance under this ... title for a correspondence course unless such course is part of a program leading to an associate, bachelor or graduate degree." According to subsection (l), a student will not be considered enrolled in correspondence "unless the total amount of telecommunications and correspondence courses at such institution equals or exceeds 50 percent of the total amount of all courses at the institution."

[94]. 34 C.F.R. § 668.8(b)(3)(ii)(A-B)(2000).

[95]. *See* 20 U.S.C. § 1088(b)(2000). An Online course has to offer at least 12 hours of "instruction" for a minimum of 15 weeks in the case of a program preparing "students for gainful employment in a recognized profession" and not requiring an associate's degree for admission; and 10 weeks in the case of a graduate or professional program or a program requiring the equivalent of an associate's degree for admission. in order for it to qualify for Title IV eligibility. If the program qualifies for Title IV eligibility, then its students qualify to take out GSLs to pay for tuition.

[96]. *See* H.R. REP. NO. 99-383, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2572, 2576.

[97]. *Id.*

[98]. 34 C.F.R. § 600.7(a)(1)(i-ii) & (b) (2000).

[99]. *See* 34 C.F.R. § 600.7(a)(1)(i-ii) & (b) (2000); 20 U.S.C. § 1002(a)(3)(A-B)(2000).

[100]. 20 U.S.C. § 1002(a)(3)(A-B)(2000).

[101]. *See* U.S.C. § 1091(L)(1)(a)(2000).

[102]. Student Assistance General Provisions, 59 Fed. Reg. 61,142, 61,143 (Nov. 29, 1994) (to be codified at 34 C.F.R. pt. 668).

[103]. *Id.*; 20 U.S.C. § 1088(a)(2)(2000).

[104]. *See* 20 U.S.C. § 1088(a)(2). A credit-hour-with-terms based system refers to one in which credit hours are offered on a semester, quarter or trimester basis. Online universities typically offer their courses based on a credit hour system without terms. *Id.*

[105]. *See* Student Assistance General Provisions, 59 Fed. Reg. 61,143 (Nov. 29, 1994) (to be codified at 34 C.F.R. pt. 668).

[106]. *See id.*

[107]. *See* Newton, *supra* note 75, at 842. Newton says (in his definition of the Telecommunications Act of 1996) that the Internet which provides "information services" offers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications." *Id.*

[108]. See Institutional Eligibility under the Higher Education Act of 1965, 34 C.F.R. § 600.7(a)(1)(i)-(b) (2001).

[109]. See Institutional Eligibility under the Higher Education Act of 1965, 34 C.F.R. § 600.2 (2001). A correspondence course is one that is "provided by an institution under which the institution provides instructional materials, including examinations on the materials, to students who are not physically attending classes at the institution. When students complete a portion of the instructional materials, the students take the examinations that relate to that portion of the materials, and return the examinations to the institution for grading." *Id.*

[110]. See NEWTON, *supra* note 75.

[111]. See 20 U.S.C. § 1091(k) (2000); see also *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984).

[112]. See WEB-BASED EDUCATION COMM'N, *supra* note 2, at 91.

[113]. See *id.* at 92.

[114]. See *id.*

[115]. See *id.* at 91.

[116]. See H.R. REP. NO. 99-383, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2572, 2576; see also H.R. REP. NO. 102-447, at 8 (1992), *reprinted in* 1992 U.S.C.C.A.N. 334, 341. Though the legislative history of the 1998 re-authorization of the HEA does not repeat the same language as quoted in the text, it affirms the same idea that the primary goal of the HEA is to monitor the costs of higher education and to adapt public policies to make higher education accessible to more people through government loans. See *id.* The 1998 legislative history implemented this intent when both houses of congress: 1) amended the HEA to require a study comparing "change in tuition and fees" for higher education with "the Consumer Price Index and other appropriate measures of inflation," 2) asked the National Center for Education Statistics to re-evaluate information on the costs of higher education, and 3) created a "Higher Education Market Basket," a program run by the National Center for Education Statistics and the Bureau of Labor Statistics to determine the costs of higher education *to guide future decision making in this area.* See H.R. CONF. REP. NO. 105-750, at 275, 277-79 (1998), *reprinted in* 1998 U.S.C.C.A.N. 404, 410, 412-14.

[117]. H.R. REP. NO. 99-383, at 6.

[118]. H.R. REP. NO. 99-383, at 7; see also H.R. REP. NO. 102-447, at 8.

[119]. See WEB-BASED EDUCATION COMM'N, *supra* note 2, at 92.

[120]. *Id.* at 91.

[121]. See 20 U.S.C. § 1088(a)(2) (2001).

[122]. See 34 C.F.R. § 666.8(3)(ii) (2000). "Non-traditional higher education institution" refers to those institutions that use a credit hour system with no terms i.e., courses are offered on an irregular basis, not on a semester, trimester or quarter system. See *id.* Many online universities fall into this "nontraditional" category. The Twelve Hour Rule gives the Department the authority to determine which educational activities qualify

as "preparation for examinations." The rule automatically counts teacher-led instruction and exams towards the 12-hour total.

[123]. See 59 Fed. Reg. 61,143 (Nov. 29, 1994) (to be codified at 34 C.F.R. pt. 668).

[124]. See *In the Matter of Webster Career College*, No. 91-39-SP, 1991 EOHA LEXIS 24, 40-41 (1991). No cases about violations of the Twelve Hour Rule could be found in publicly-available records.

[125]. See *Chevron*, 467 U.S. at 843.

[126]. See *id.*; see also 20 U.S.C. § 1088(a)(2) (2000).

[127]. See *Chevron*, 480 U.S. at 843; see also Administrative Procedure Act, 5 U.S.C. § 706(2)(a)-(c); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 306 (1978) (holding that an agency may not exceed statutory authority).

[128]. See Carney McCullough, Branch Chief, General Provisions, Director of Scholarship and Financial Aid, U.S. Department of Education, speech to the National Association for Financial Aid Administrators (July 1998). A school that has "no terms" for purposes of determining Federal financial aid eligibility is one that does not run on a quarter, trimester or semester system. See also Final Audit Report, University of Phoenix's Management of Student Financial Assistance Programs: Final Audit Report, Audit Control No. ED-OIG/A09-70022, U. S. Dept. of Educ. at 10 (Mar. 2000). "Under the standard unit of measuring credit in higher education (referred to as the Carnegie Unit of Credit), one credit hour generally consists of one hour of classroom work and two hours of outside preparation over the course of its academic term." See 20 U.S.C. § 1088(a)(2) (2000).

[129]. 20 U.S.C. § 1088(a)(2) (2000).

[130]. *Id.* (emphasis added).

[131]. See *id.*; see also Notice of Proposed Rulemaking (NPRM) of Rule 668.8, 59 Fed. Reg. 9526 (Feb. 28, 1994) (to be codified at 34 C.F.R. pt. 668). The Department of Education said that it created the Twelve Hour Rule to prevent nontraditional institutions from abusing the HEA's vague definition of "academic year." *Id.*

[132]. See Carney McCullough, *supra* note 128. "In discussions around the Department and with members of the community over the last few years, it has become apparent that what used to be called 'nontraditional' programs are becoming more the usual and less the unusual... Some of the 'nontraditional' programs we've been talking about have restructured the mode of educational instruction and now are offering classes on the weekends, in the evenings, on an accelerated basis, adding mini-sessions within their traditional terms, as well as many others." *Id.*

[133]. See 20 U.S.C. § 1088(a)(2) (2000); see also Rule 668.2, 59 Fed. Reg. 9529 (Feb. 28, 1994) (to be codified at 34 C.F.R. § 668.2). The Department could not determine the criteria for "good cause," so it decided not to implement this part of the statute. The last sentence of 20 U.S.C. § 1088(a)(2) reads: "The Secretary may reduce such minimum of 30 weeks to not less than 26 weeks for good cause, as determined by the Secretary on a case-by-case basis, in the case of an institution of higher education that provides a 2-year or 4-year program of instruction for which the institution awards an associate or baccalaureate degree."

[134]. See 20 U.S.C. § 1088(a)(2) (2000).

[135]. See *Chevron*, 467 U.S. at 843.

[136]. See *id.*

[137]. See H.R. REP. NO. 99-383, at 5-7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2572, 2576-78; see also H.R. REP. NO. 102-447, at 8 (1992), *reprinted in* 1992 U.S.C.C.A.N. 334, 341; H.R. CONF. REP. NO. 105-750, at 275, 277-79 (1998), *reprinted in* 1998 U.S.C.C.A.N. 404, 410, 412-14.

[138]. See H.R. CONF. REP. NO. 102-630, at 507 (1992), *reprinted in* 1992 U.S.C.C.A.N. 528, 622.

[139]. WEB-BASED EDUCATION COMM'N, *supra* note 2, at 91-92. "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." *Id.*

[140]. Letter from Jeff Baker, Policy Development Division, Student Financial Aid Programs, U.S. Department of Education, to Ms. Debbie Bailey, Financial Aid Office, LeTourneau University (Jan. 6, 1997) (on file with author); see also Memorandum from Drinker, Biddle and Reath, LLP, to Sharon Bob, Student Financial Aid Programs, U.S. Department of Education (Aug. 25, 1998) (on file with author); Letter from Jeff Baker, Director, Policy Development Division, Student Financial Assistance Programs, U.S. Department of Education, to Charles M. Seigel, Vice President, University of Phoenix, (May 30, 1996) (on file with author).

[141]. *Id.*

[142]. For this example, the Department would say that her twenty-four, 15-hour weeks of instruction qualify as "weeks of instruction" that count towards a 30-week "academic year" according to the HEA because they exceed twelve hours of instruction per week. However, the six remaining weeks which the woman needs to complete her academic year of 30 weeks ($24 + 6 = 30$) would not qualify as a "week of instruction," since they are not equal in length to the preceding 24 weeks. Because the remaining six weeks are disqualified from the total tally of instructional weeks, the result is that the Department would determine that the woman never completed an "academic year," and is thus disqualified from getting the *full amount of* federal financial aid that a student at a traditional university would get.

[143]. Letter from Jeff Baker, U.S. Department of Education, to Debbie Bailey, Financial Aid Office, LeTourneau University, *supra* note 140. The Department's response to Ms. Bailey's request for clarification of the Twelve Hour Rule six months after she submitted the request; see also Self-Paced Study Online, The University of North Carolina at Chapel Hill, at www.unc.edu. Self-paced Internet courses at UNC-Chapel Hill can qualify for federal financial aid, *but only because the courses must be completed within one semester*. *Id.* Limiting the self-paced unit to a semester brings the course out of the Twelve Hour Rule requirement because the rule only applies to institutions that offer credit hours *but no terms*. Therefore, UNC's self-paced course is self-paced only within the confines of the semester. Nontraditional institutions that do not offer courses on a semester, quarter or trimester basis would not be able to offer UNC's limited "self-paced" course. Regulations that allow only credit- hour-with-terms institutions to offer such a course discriminate against institutions without terms that offer the same course over an extended amount of time. Because the Department of Education says that a nontraditional universities that offers 360 instructional hours per academic year is equivalent to twenty-four credits at a semester-based institution, allowing a term-based institution to offer a self-paced course, but not a non-term-based institution to offer an educationally equivalent one would be arbitrary.

[144]. 144 *Chevron*, 467 U.S. at 844.

[145]. Administrative Procedure Act, 5 U.S.C. § 553(b) (2000); *see also* *Rodway v. USDA*, 514 F.2d 809, 814 (D.C. Cir. 1975).

[146]. 5 U.S.C. § 553(b) (2000).

[147]. 5 U.S.C. § 553(c) (2000).

[148]. *Id.*; *see also* Final Audit Report Office, *supra* note 128, at 5 (citing 59 Fed. Reg. 61,143 (Nov. 29, 1994) (to be codified at 34 C.F.R. pt. 668)) (justifying the rule on general rulemaking authority and pedagogical grounds).

[149]. *Rodway*, 514 F.2d at 814.

[150]. Notice of Proposed Rulemaking (NPRM) of Rule 668.8, 59 Fed. Reg. 9526 (Feb. 28, 1994) (to be codified at 34 C.F.R. pt. 668).

[151]. NPRM, 59 Fed. Reg. 9526 (emphasis added).

[152]. Interim Final Regulations, Rule 668.2, 59 Fed. Reg. 22348 (Apr. 29, 1994) (to be codified at 34 C.F.R. § 668.2) (emphasis added).

[153]. Final Audit Report, *supra* note 128, at 5. In this report, the Department mentioned that the University of Phoenix submitted comments about the proposed rule change, urging the Department to word the rule so that it would measure *student workload* as opposed to instructional hours. *Id.* However, the report does not indicate whether UOP advocated that their desire to have a rule that measures workload, as opposed to instruction, infers that it predicted an hourly requirement; *see also* *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir. 1980) (citing *South Terminal Corp. v. EPA*, 504 F. 2d 646, 659 (1st Cir. 1974) ("Unfairness results unless persons are 'sufficiently alerted to likely alternatives' so that they know whether their interests are 'at stake.'")); *Spartan Radiocasting.*, 619 F.2d at 321 (citing *American Iron & Steel Inst. v. EPA*, 568 F. 2d 284, 291 (3d Cir. 1977) ("In cases where an administrative agency has failed to give the public advance notice of the scope of its proceedings, courts have invalidated the decisions made.")). NOTE: At the time of this writing the Department had not responded to a request to see the public comments for the Twelve Hour Rule, as requested under the Freedom of Information Act.

[154]. Or, in the case of a 45-week program, the student would have to devote 1.14 hours per day.

[155]. If a student cannot make the time commitment to attend an Online class 1.7 hours per day every day for 30 weeks, perhaps their schedule would allow them to do commit more hours during certain weeks than others while still accumulating the same total number of instructional hours as the 360 hours/30-week total per year that the Twelve Hour Rule and the HEA requires.

[156]. *See Spartan Radiocasting*, 619 F.2d at 321.

[157]. *See Rodway*, 514 F.2d at 814.

[158]. *See* Notice of Proposed Rulemaking (NPRM) of Rule 668.8, 59 Fed. Reg. 9526, 9529 (Feb. 28, 1994) (to be codified at 34 C.F.R. pt. 668); *see also* NPRM of Rule 668.2, 59 Fed. Reg. 22,348, 22,351 (Apr. 29, 1994) (to be codified at 34 C.F.R. § 668.2).

[159]. See 5 U.S.C. § 553(b)(3)(A). (Interpretive rules are not subject to notice and comment requirements); see also *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 628 (5th Cir. 2001) (citing *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616 (5th Cir. 1994)). A new substantive rule is made if an agency's action contradicts the text of the rule. See *id.*

[160]. See U.S. Dept. of Ed. Office of Inspector General, Semiannual Report to Congress No. 40 (Oct. 1, 1999 - Mar. 31, 2000), available at <http://www.ed.gov/offices/OIG/semiann/sar40.pdf>; see also Press Release, Apollo Group, Inc., Apollo Group, Inc. Announces the Completion of the Department of Education Office of Inspector General Audit (Mar. 28, 2000); Telephone Interview with Cheryl Leibovitz, U.S. Dept. of Education Office of Post-Secondary Education (Nov. 16, 2000) (notes on file with author).

[161]. See NPRM of Rule 668.2, 65 Fed. Reg. 49,134, 49,142 (Aug. 10, 2000) (emphasis added).

[162]. See 65 Fed. Reg. 49,141, 49,142.

[163]. See *United States v. Nova Scotia Food Prod.*, 568 F.2d 240, 251 (2d Cir. 1977).

[164]. See 65 Fed. Reg. 49,134, 49,142. Note that the Department initiated a negotiated rulemaking calling for and creating a special committee of interested parties to serve the same function as a normal public notice and comment period. *Id.*

[165]. See *id.*

Related Browsing

1. <http://www.online-universities.org/>. This website lists universities that offer accredited online courses and degrees. The site also provides links to schools and information about the degrees offered.
2. <http://www.ecollege.com/>. This website contains information about designing and building an online course. eCollege works with colleges, universities, corporations, and elementary and high schools to establish courses. The website also provides information to educators concerning how to make online courses more effective, and information for students concerning how to achieve their goals through online learning.
3. <http://www.cyberu.com/>. CyberU provides information about over 20,000 online classes in a variety of areas including arts, business, humanities, science, and technology. Additionally, the website offers online training classes for professionals.
4. <http://www.geteducated.com/articles/hr98.htm>. An article entitled, "Online Universities Teach Knowledge Beyond the Books," is available on this website. The article discusses some advantages and benefits to online courses and provides information about different types of technology used in online learning. Finally, after the article there are links to universities that offer online courses.

5. <http://www.cnn.com/2000/TECH/computing/09/15/online.college.idg/>. "IT Pros Give Online Universities High Marks" is one example of articles on cnn.com about online universities. This article includes statements from IT professionals about the advantages and possible problems with online education. Links to related stories and to related sites are provided after the article.
6. <http://www.fcc.gov/broadband/>. The Federal Communications Commission's website provides information and links about laws and headlines relating to broadband.
7. <http://www.attbroadband.com>. This website contains information about broadband Internet services available to consumers.
8. <http://www.college-university-distance-learning-education-online.com/about-distance-learning.htm>. Colleges Universities Distance Learning Education Online is a resource for distance education. It has compiled a large number of online distance learning programs throughout the world in its database and one can request more information at no charge. It features top distance learning programs at the bachelor's and master's level that it will recommend to suit your needs and career goals.
9. <http://www.online-college-degree.com/>. Offers links to online undergraduate and graduate degrees and design programs, as well as provides information for both college students and college-bound high school students with time-saving scholarship search tools.
10. <http://www.arl.org/scomm/copyright/UniCopy.html>. Offers links to University Copyright policies and other intellectual property resources.
11. <http://www.adec.edu/online-resources.html>. Contains a number of articles and links regarding online resources. Created by The American Distance Education Consortium. Specifically, one of the articles featured is entitled, "Who Owns Online Courses and Course Materials? Intellectual Property Policies For a New Learning Environment."
12. <http://www.ed.gov/>. U.S. Department of Education website.