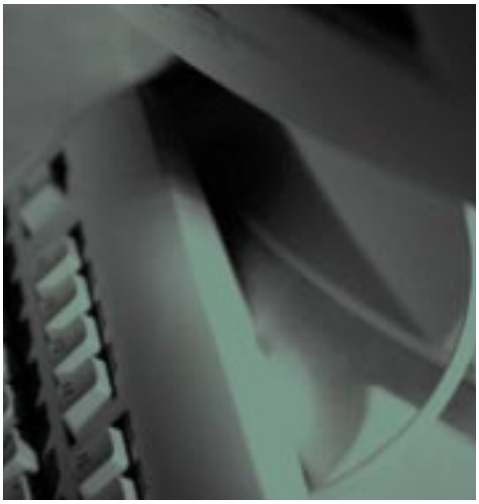
SIXTH IN A SERIES

Barriers to Distance Education



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American Council on Education
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EDUCAUSE

Distributed Education: Challenges, Choices, and a New Environment

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We are grateful to the AT&T Foundation, Accenture, and Hewlett-Packard Company for their generous support of this series on distributed education.

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Foreword

Barriers to Distance Education is the sixth and final monograph in a series of invited papers on distributed education, commissioned by the American Council on Education (ACE) and EDUCAUSE.

Technology provides higher education with the potential to disseminate knowledge to more people than ever before. Despite the promise of distributed education and continued advancements in technology, significant barriers remain. This paper describes the barriers to distance learning, both inside and outside the higher education community.

The genesis of this series evolved from a design meeting held at ACE in spring 1999. Extensive discussion and exploration of major issues led to a partnership with EDUCAUSE and a close working relationship with its president, Brian L. Hawkins, and vice president, Carole A. Barone.

This series, *Distributed Education: Challenges, Choices, and a New Environment*, has been sustained with generous support from the AT&T Foundation, Accenture, and Hewlett-Packard Company.

Distributed education raises a strategic and financial challenge for every type of higher education institution. Advancements in technology and expansion of markets for distributed learning pose questions for college and university presidents, regardless of their institutional mission. Our goal in this series is to provide presidents, provosts, and other senior decision makers with a sense of the landscape of technologically mediated education and the means to make wise strategic choices.

Michael A. Baer
Senior Vice President, Programs and Analysis
American Council on Education

Introduction

Today's new technologies, particularly the Internet, present higher education with the largest megaphone in its history–the capacity to disseminate knowledge to an exponentially larger number of people than ever before. To do this, educators use a vehicle now commonly known as distance education.[1] It is a subject that has stimulated intense passions, new and aggressive competitors, pressure for new (and often very different) resources, an evolving regulatory environment, and more ambiguities than certainties about appropriate policy and practice–not to mention the most fundamental questions about the future of the academy.

This paper describes the barriers to distance learning, both inside and outside the higher education community. Inside the academy, distance education programs encounter numerous challenges: the academy's acceptance of distance education as an appropriate teaching method, competition for limited financial resources, and the ability to withstand the slow governance gauntlet. Outside the academy, distance education encounters varying regulations, laws, policies, and practices imposed by congressional and state legislators, accreditors, and professional associations.

NOTE: A number of people read this paper and offered comments. We are particularly grateful to Michael Goldstein, who read, edited, and enhanced the paper.

1 *Distributed education* refers to a mix of instructional practices–blending new technologies with traditional classroom practices. This paper focuses on obstacles to programs that rely primarily on new technological delivery systems. Therefore, we use the term *distance education,* rather than distributed education.

Barriers Within the Academy

Need for Distance Learning

In 1992, Peter Drucker predicted that in the next 50 years, "schools and universities will change more drastically than they have since they assumed their present form 300 years ago when they organized themselves around the printed book" (Drucker, 1992, p. 97). With the rise of new technologies, in the future higher education will likely divide into three types of institutions. One type will be the traditional campus-based college or university. Let's call these "brick" institutions–the familiar campuses composed of classrooms, faculty offices, libraries, student unions, and perhaps residence halls. The most successful brick universities will likely be residential colleges that attract traditional students–that is, younger students, typically ages 18 to 22. Another type of institution will be new organizations that rely entirely on e-learning to distribute their programs. These "virtual" schools could be called "click" universities. The exclusively click universities will focus on nontraditional populations such as adult learners and part-time students. The third, and probably most prevalent, type will be a combination of the two: the "brick and click" institution, which will fuse conventional and e-learning methods. Today's major universities will likely try to become such brick and click institutions, which–according to current findings on e-commerce–will stand out as attractive alternatives for students interested in online learning. Recent research on commercial noneducation businesses shows that while consumers appreciate the convenience, ease, and time-independent nature of online shopping, they also seek the service of the physical store for returning merchandise, getting expert advice, trying and viewing products, and interacting with salespeople and fellow customers (Cassar, 2001; Daniels, 2001).

Based on these predictions and trends, what conclusions can we draw? First, America does not need all of its colleges and universities to offer distance education programs. Those institutions that will offer distance education will be part of a small but concentrated core of major providers, rather than a loosely organized abundance of small providers. Schools that choose to remain brick campuses may find that their faculty and staff are not interested in entering the world of distance learning, except perhaps as subscribers who can enlarge their own on-campus programs by purchasing the best distance education programs from other sources. Brick colleges may instead create their own niche, offering the best possible in-person education and stressing close interaction between faculty and students, and between students and students. In short, colleges may opt to bypass distance learning for reasons that are thoughtfully and strategically related to their missions.

Differences Between Distance Learning and Higher Education

U.S. President James A. Garfield described the ideal of American higher education as practiced by Mark Hopkins, the 19th century president of Williams College. President Garfield described Hopkins as teaching on one end of a log with a single student on the other. In many respects, this image captures those qualities that the academy still holds sacred today: teaching and learning in an intimate setting, with a close relationship between student and professor. Such imagery causes curriculum committees across the country, year after year, to continue referencing Cardinal Newman's *The Idea of a University,* which describes the ideal college as a community or family rooted in the teaching and learning of liberal education. That type of college never existed, with the possible exception of some doctoral education programs, but it remains an ideal to which many in academe still aspire.

Distance learning directly conflicts with Newman's vision of higher education. Far from an intimate setting among a family-like community, distance learning, by nature, is mass learning, conceivably involving thousands of students in a single course. The students do not even sit together in a single classroom. They may reside anywhere in the world, and they are learning in different places, such as offices and bedrooms, and taking the class at any hour of the day. One-on-one contact between professor and student, or among students, may not exist. The differences between the common perceptions of distance education and the traditional ideal of collegiate learning are difficult for an institution to accept or deem desirable.

Students

The traditional college student, who attends school full time and lives on campus, has not shown much interest in distance education (Levine and Cureton, 1998). But they make up less than 20 percent of the current college population.[2] The new majority of college students are very different: They are older, attend classes part time, hold jobs, have families, and live off campus. Unlike traditional students, nontraditional students do not consider school to be central to their lives. As a consequence, many older, part-time, and working students, especially those with children, reported in a national study that they wanted a very different type of relationship with their college (Levine and Cureton, 1998). They prefer relationships that are similar to those they already have with their bank, their electric company, and their supermarket. They want what they want, when and where they need it, and at a price they can afford.

The bottom line is that today's older adult students are bringing their consumer attitudes to higher education. They seek four things from their colleges–convenience, service, high quality, and low cost. They will not pay for activities and services they do not use, for hiring faculty to offer elective courses that they will not take, for buildings such as a chapel or a student union that they will not frequent. They are asking for a stripped-down version of higher education, absent the extras. Older adult students are suitable candidates for distance learning or face-to-face instruction in nearby business districts or suburban locations with convenient times and calendars.

2 According to *The Condition of Education 2002* (U.S. Department of Education, 2002), approximately 75 percent of all college students are considered nontraditional, and this percentage is higher when the parameters are both nontraditional and nonresidential students.

The founders of the University of Phoenix understood this. In fact, this regionally accredited institution, which is publicly traded on NASDAQ, now enrolls more students than any other private institution–albeit at scores of relatively small campuses. The University of Phoenix offers a limited number of majors and degrees, few electives, and instruction by part-time faculty working from a standardized curriculum at times and places that are convenient for students. The university emphasizes customer service, placing a premium on frequent evaluation and high-quality instruction in nearby locations. It has responded to market demands by offering its special brand of higher education, both in a traditional classroom setting and online, via distance education.

The University of Phoenix experience raises a serious question for distance learning. The actual size of the market for distance learning remains unclear. The enrollment in the online branch of Phoenix increased from less than 5,000 in 1997 to nearly 50,000 in 2002. Distributed learning may be far more attractive to certain types of students.[3] Further, recognizing the evolving character of much of the distance learning that is offered today, we still do not know nearly enough about various educational outcomes. If the best and the brightest of our traditional students attend physical classes taught by conventional faculty, why settle for something else? It is still not clear that "if you build it, they will come." Peter Cookson, president of TC Innovations–an initiative by Teachers College of Columbia University that blends traditional classroom practices with online and multimedia components–says we do know that if students do come, they want degrees or certificates, not just random online courses.

Pedagogy

A faculty member teaching at the front of the room remains the predominant mode of instruction in higher education. Universities do not educate graduate students about how to teach; they have always assumed that if a person sits through enough classes, teaches some classes as a graduate assistant, and loves the subject matter, then that person can teach at a college or university. Distance education highlights the flaws in this notion; the Internet is a highly interactive, highly individualized medium that most older faculty members did not experience as students. In addition, with the exception of a few programs, such as the University of Maryland's faculty teaching program for online courses, preparation for teaching distance learning courses is nearly nonexistent in higher education. As a result, most distance learning courses resemble traditional classroom courses or poor imitations–talking heads, lots of text, and streaming video. Distance education has failed to take advantage of the Internet as a new medium. It tends to be more mass than individual, to involve more one-way than interactive communication. This typical primitive response to new media mirrors past actions: When movies were invented, producers filmed plays. With the advent of television, radio actors performed on screen. And when distance learning started happening via the Internet, universities asked faculty to duplicate their courses online.

Higher education faces several barriers in the area of distance learning. First, academe lacks a pedagogy for using the Internet. The ability to use it effectively will advance as educators learn more about individual learning styles. With that knowledge, they can develop software to respond to the inherent differences between Internet-based and traditional classroom education. Second, faculty's role in using

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3 For an in-depth discussion on distributed education, see Oblinger, Barone, & Hawkins (2001).

this technology remains uncertain. They could be the traditional teacher, the software designer, the content creator, all of these things, or none of these things. Justifiably, faculty are concerned about the effects of distance learning not only on students, but also on their own careers and workloads. Third, faculty need to know more about interactive and individualized pedagogy, whether they become intimately involved in distance learning or simply continue to teach traditional courses. Knowledge of this new pedagogy will be essential if colleges expect success in distance learning. If traditional students participate in distance learning, they likely will expect the same quality of teaching in their on-campus courses.

Finally, distance learning entails a host of teaching and learning practices that may be convenient for students but are far more labor intensive than traditional college practices: Creating courses, maintaining chat rooms, and responding to e-mails from students around the clock require far more time and energy from faculty than traditional courses. Additionally, distance learning comes with a new language and different expectations, including "anytime, anyplace learning," "24/7 advising," and "round-the-clock availability of instructors." This new level of service raises potential barriers in terms of staffing, course loads, advising expectations, faculty support, teaching assistant roles, and so forth.

Internal Governance and External Competition

Higher education governance is highly democratic but also glacial in its pace. It may take years for an issue to work its way through a complex process that can involve task forces, commissions, committees, senates, faculties, schools, department chairs, deans, administrators, boards, states, professional associations, and accreditors. This is particularly true for a controversial issue such as distance learning.

The difficulty is that the development and evolution of distance learning are not proceeding on a typical higher education timetable. As a result, colleges and universities may not be the key actors creating and offering distance learning. Two important groups outside traditional higher education may influence the shape distance learning ultimately takes–the for-profit education sector and other knowledge-producing organizations.

For the first time in U.S. history, the business community sees higher education as an investment opportunity. Increasingly viewed as poorly run, low in productivity, high in cost, and still not effectively using technology, the traditional higher education community is seen by the for-profit sector as the next health care industry: another business ripe for takeover, remaking, and profits. While the dot.com implosion slowed down the for-profit rush into collegiate education, institutions such as Teachers College of Columbia University are still regularly being visited by television, telephone, software, hardware, venture capital, and start-up companies that wish to enter the education market and are seeking partners.

Higher education is an appealing industry for a variety of reasons. Not only is it perceived as weak and slow to change, but it also generates an enormous amount of cash and its market is increasing and becoming global. "Customers" (better known as students) invest in long-term "purchases" (i.e., an education that lasts two to four or more years), thereby providing a dependable cash flow and revenue stream. Enrollment in higher education also is counter-cyclical, which is unusual in business. This means that college and university enrollments actually grow during a bad economy because people are likely to go to college when they cannot find work and to drop out at a greater rate when there are more

jobs. Additionally, the states and the federal government subsidize higher education through their financial aid programs.

Although the gold rush attitude and the corporate cowboys of a few years ago have subsided, there is still enough good news to make online higher education attractive to entrepreneurs. Success stories such as the University of Phoenix and DeVry Institutes fuel continued interest. Jones International, a wholly online university, has now received regional accreditation. In addition, Kaplan* has created an online college and UNext, a for-profit online company, plans to offer an MBA in conjunction with Columbia University, Stanford University, Carnegie Mellon University, the University of Chicago, and the London School of Economics.

Another notable phenomenon is the convergence of knowledge-producing organizations, which also is contributing to the increase in distance learning providers. Publishers, television producers, museums, YMCAs, libraries, symphony orchestras, and universities are trying to reach larger audiences using the same new technologies. As a result, all of these organizations are creating products that resemble distance learning courses.

A book publisher recently told one of the authors that the company no longer focuses on the book publishing business: It now specializes in the knowledge and information business, focusing on teacher education and teacher professional development. The company's ultimate goal is to brand itself as the leading provider of professional development for teachers. The publisher hires university faculty or persons with expertise in the subject area full time to prepare content for its programs. It also is considering awarding its own credits and degrees. This company is unique in its scale, but not in its direction. As it evolves, distance learning promises to create a very competitive landscape.

Higher education comes to this competition with three important yet fragile strengths: its reputation and history (i.e., its "brand name"); its faculty and courses (i.e., its "intellectual capital and content"); and its ability to offer credits and degrees. Consider, for example, a brand-name giant such as Amazon.com. Amazon convinced the world that online bookselling was a completely different business from operating bookstores, thus establishing itself as the top name in this new field. Educators could do the same thing by convincing the world of the clear distinction between click and brick higher education. This would permit a for-profit or rival knowledge organization to become the preeminent brand name in distance education.

Microsoft Encarta is an excellent example of intellectual capital and content. Microsoft approached Encyclopedia Britannica, the industry's content leader, and invited the company to come online. Britannica rejected the invitation, so Microsoft bought Funk and Wagnalls and turned it into digital Encarta. In less than two years, it became the best-selling encyclopedia in the world, and Britannica sales dropped. Britannica contacted Microsoft about an online arrangement but was told it would now have to pay to put its encyclopedia online. The lesson is that if distributors cannot get major content providers to join them, they may choose to buy the content or develop the capacity to create the content themselves.

The story for credits and degrees is similar. In a conversation with a group of venture capitalists, the authors asked how big an obstacle state requirements would become if a state opposed a for-profit institution offering degrees within its borders. If the state was tenacious and forced the issue, the group estimated that overcoming this barrier could take as long as five years.

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* Kaplan, Inc., a well-known test preparation service.

In summary, colleges and universities may face a very limited amount of time to decide what role, if any, they wish to play in distance learning. Time may be one of higher education's greatest barriers to entering and succeeding in distance learning.

Money

Higher education is entering a difficult period financially, as a growing number of states face declining tax revenues and budget deficits. Since education is the largest item in most state budgets, cuts in this area are nearly unavoidable. And because the states' major focus is on K–12 education, the cuts likely will affect higher education disproportionately. From a national standpoint, the outlook is even more grim when a substantial tax cut and a war on terrorism are added to the mix.

Beyond this, interest rates on institutional funds have plummeted. At the campus level, endowment earnings have dropped. Fund raising could become more difficult because the value of foundation and individual portfolios has declined. At the same time, insurance and health care benefit costs to higher education have increased dramatically. Cost savings from anticipated employee turnover in previously competitive areas such as technology and finance have all but disappeared. The message is that colleges and universities are facing lower revenues and higher expenses. It will be difficult, under these circumstances, to sustain existing facilities, people, and programs, let alone try new initiatives.

Campuses that have not yet entered the distance learning world may discover that now is a difficult time to start. For those that have entered, it might be difficult to find the resources to grow. Securing funds to enter the distance learning market is a barrier even during the best of times. Marketing can cost much more than the course itself. The university must issue stipends and course releases to distance learning faculty, and it must factor in production facilities and equipment costs, as well. Finally, the university incurs staffing costs to administer and design the courses, and to work with faculty. Most colleges underestimate these costs. Legions of campuses have invested token sums such as a few hundred thousand dollars only to find that the amount is highly inadequate.

In some extreme instances, institutions have invested tens of millions of dollars in unsuccessful for-profit distance learning ventures. Perhaps the most visible to date was New York University's launching–and subsequent closing–of an effort to privatize its continuing education school. Similarly, the United Kingdom's well-financed Open University closed its American operation after only two years. Many well-known and well-financed college and university consortia have entered the distance education market to gales of publicity, only to fall into obscurity shortly thereafter, with little to no word on their progress. Such cases encourage caution and demonstrate that even if you build it, people won't necessarily come–and neither will their wallets. On the heels of the dot.com implosion, these cases serve as yet another reminder to temper enthusiasm with practical considerations and careful, long-term thinking.

Barriers External to the Academy

Federal

External constituents and factors play a large role in imposing barriers to distance learning, in some respects dictating what institutions can and cannot do. Federal law and policy affect distance education programs in four primary areas: student financial aid, accommodations for persons with disabilities, intellectual property law, and international trade agreements.

Financial Aid

With the rising cost of higher education and institutions' increasing dependence on student tuition dollars to cover costs, students are relying more on government aid to meet their financial obligations. In fact, the federal government represents the largest single source of student aid in this country.

Balancing the need to accommodate new delivery media with the need to address concerns about insufficient instruction time and possible misuse of federal funds, Congress included several provisions in the 1992 amendments to the *Higher Education Act* that limit access to federal financial aid for students in distance education programs. For example, prior to a recent regulatory change, the *Higher Education Act* required a minimum of 12 contact hours per week of instruction when the institution did not operate on a conventional semester, trimester, or quarter system. This requirement was replaced by a more liberal standard with the adoption of a new rule that becomes effective July 1, 2003. Under the new regulation, an institution that offers instruction through "nonstandard" term modules must conduct regularly scheduled instructional activities or examinations one day per week to satisfy the 30-week academic year requirement. When this rule takes effect, it will standardize the definition of one week of instruction for standard and "nonstandard" term programs. On the other hand, it is unclear how the rule will actually be interpreted when applied to online distance learning courses; this could serve as another barrier for institutions that elect such a delivery medium.

Another safeguard incorporated into the law is the 50 Percent Rule, which protects the public from unscrupulous schools offering fraudulent certificate programs. Under this rule, an institution that offers more than 50 percent of its courses via telecommunications or enrolls 50 percent or more of its students through technologically mediated devices is ineligible for federal financial aid. This rule effectively bars students at distance learning institutions from receiving federal student aid.

Congress initially wrote these provisions to prevent fraud and abuse, yet such stringent rules inhibit the expansion of distance learning programs. To provide more opportunities for students to seek an education through distance learning and qualify for federal financial aid, new rules governing enrollment periods and delivery media should be explored. To experiment with new approaches, Congress

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established the Distance Education Demonstration Program (DEDP) in 1998, granting the Department of Education the ability to waive those rules that impair uses of technology for a limited group of institutions. According to a report from the department to Congress, participating institutions have experienced growth in their online course offerings and student enrollments (U.S. Department of Education, 2001a). Although this represents a positive outcome, the DEDP remains only a temporary avenue for its recipients. Educators expect a full re-evaluation of the federal financial aid policies covering online learning when Congress reauthorizes the *Higher Education Act* during the 2003–04 academic year.

Two U.S. Department of Education reports[4] to Congress discuss other barriers for distance learning institutions. For instance, these reports suggest that legislators still need to address the rules and procedures of federal aid for students who enroll at multiple institutions within a single system. Similarly, the reports contend that Congress needs to review procedures for awarding federal financial aid to students who take courses concurrently at different institutional systems and even from institutions in different states. Although these financial aid issues also may be salient to traditional on-campus schools, they are especially important in distance education because technology facilitates taking courses from multiple institutions–quite possibly crossing multiple state lines.

To effectively address financial aid issues, distance learning programs need additional flexibility. The current scheme is too rigid and sets up obstacles to unconventional situations such as students enrolling at multiple universities, courses with overlapping start/end dates, and self-paced learning programs. Inevitably, nonstandard terms create new logistical problems, and institutions are challenged with coordinating disbursements of funds and communicating these special arrangements to the students.

Finally, disbursing funds directly to distance learning students who may not have physical contact with the institution raises concerns among policy makers about the potential for fraud and abuse. Institutions may need some of these funds to pay for related educational expenses other than tuition and fees, such as housing, books, and food. To alleviate such concerns, special mechanisms may be required to prevent fraud and abuse of financial aid funds in these cases.

Persons with Disabilities

Distance learning holds the promise of opening doors for many of the 54 million persons with disabilities in the United States. However, the Internet is not a panacea: Access barriers to online education may arise if the courses are not carefully constructed or the right adaptive technology is not available for persons with disabilities. For instance, a person who has a hearing disability may be disadvantaged when a streaming video lecture is played without closed caption displays. Likewise, a person who is visually impaired may be unable to navigate through an online course if the site posts unlabeled graphics or poorly labeled videos.

The laws providing equal access for persons with disabilities require institutions to address such concerns. Chief among these laws is the *Americans with Disabilities Act of 1990* (ADA). In 1996, the Department of Justice issued a letter interpreting the ADA as requiring governmental entities and places of public accommodation such as colleges and universities to provide "effective communications" through

4 U.S. Department of Education. (2001a). *Report to congress on the distance education demonstration program (January 2001).* Washington, DC: U.S. Government Printing Office. http://www.ed.gov/offices/OPE/PPI/DistEd/DistanceDemoReport.pdf.
U.S. Department of Education. (2001b). *Student financial assistance and nontraditional educational programs (including the "12-hour rule"): A report to Congress.* Washington, DC: U.S. Government Printing Office. http://www.ed.gov/offices/OPE/News/12HourRuleReport.html

all media. In essence, higher education institutions must create web sites that work with students' adaptive technology or, in some cases, furnish appropriate auxiliary aids and services to ensure equal opportunity. Exceptions exist if the requirement of auxiliary aids or services would fundamentally alter the program or service, or if providing the accommodation would place an undue burden on the institution. Although it is not yet clear what this will mean in practice, the potential implication is that distance learning programs must be accessible to persons with disabilities in the same manner as "conventional" classrooms–which may mean that colleges must design special web pages or use mediated devices to augment existing services.

Intellectual Property

In recent years, faculty and institutional administrators have debated whether the scholarly works of faculty belong to the faculty member or the institution. This issue has become more relevant as faculty members and institutions view distance learning as a potential entrepreneurial venture and as a venue to distribute intellectual work. In the context of course materials and lectures created by faculty, the ownership of intellectual property is governed by federal copyright law, which generally protects the author of a work from the unauthorized duplication, distribution, or alteration of "original works of authorship fixed in any tangible medium of expression," including the Internet. The key exception is the "work made for hire" provision of the copyright law, which effectively transfers the ownership of a work from the author to the entity that has paid for his or her services. Notwithstanding this rule, which seems to indicate that institutions own the works of their faculty, the longstanding practice in higher education has been to allow faculty to own their lecture notes and classroom presentations. Distance education through online media is, however, a new phenomenon, and faculty and institutions increasingly view this delivery method as a potentially lucrative source of income.

The primary interests for faculty retention of ownership rights include:

- *Actual Use of Work:* If the course is to be replayed, particularly for commercial purposes, the professor should have the right to use the work and not be required to seek approval from the institution.
- *Attribution of Work:* As Anna Neumann (1999) of Teachers College mentions, professors feel a sense of attachment to, and at times a sense of identity with, their work because it represents their intellectual investment and labor. Thus, their creations should be properly attributed to them.
- *Control over Scholarly Work:* If a professor leaves the institution and wishes to adopt course content at his/her next institution, permission should not be required from the university where the scholarly products were created. Control and dominion over the work should rest with the faculty who created it.
- *Rights to Derivative Work:* Professors may wish to create related courses or articles based on an existing course. The rights to derivative work should rest with the professors to allow for further academic development.
- *Distribution of Work:* Professors often wish to convey their work to others. In order to facilitate the sharing of scholarly work, distribution rights should rest with faculty.

Many faculty argue with the intellectual property law, asserting that course lectures and other content should be faculty property. Faculty base this assertion on the academy's practice of permitting professors to retain the rights to their lectures, course materials, and book royalties. Not surprisingly, faculty unions, such as the American Association of University Professors (AAUP), the American Federation of Teachers (AFT), and the National Education Association (NEA) also have taken the position that faculty should

retain ownership rights. In fact, the AAUP *Statement on Copyright* "asserts faculty ownership of the copyright of traditional academic works 'regardless of the physical medium' in which they appear" (AAUP, 1998a). Similarly, the AAUP *Statement on Distance Education* states: "The faculty member. . .who creates the course. . .for use in distance education shall exercise control over the future use, modification, and distribution of recorded instructional material" (AAUP, 1998b).

Institutions are re-examining their intellectual property policies and practices related to course content because they fear losing ownership of courses. The time, money, and resources poured into distance learning courses are supported by the institutions through employment arrangements with faculty. Therefore, it can be argued that the product is a "work made for hire" and thus the property of the institution. According to the *Copyright Act,* works made for hire occur when "the employer or other person for whom the work was prepared is considered the author. . . , unless the parties have expressly agreed otherwise in a written instrument signed by them, [that the employer] owns all of the rights comprised in the copyright."[5]

Besides ownership rights, the intellectual property debate also has centered around revenue/income distribution. For the same reasons enumerated above, faculty and institutions have argued for the rights to the revenue generated from the licensing, replay, distribution, and duplication of courses.

Institutions and faculty groups must strive to maintain a policy that provides for the university's use of materials and simultaneously fosters and supports faculty innovation. Some universities have adopted policies that apply institutional ownership only when the use of university resources is significant or substantial. This would likely occur when the university resources exceed what would be typically expected for faculty in a given discipline. Similarly, a number of institutions have adopted policies that share revenues from works produced by faculty. Others have created policies in which property rights belong to one party and the revenue generated belongs to another party. Ultimately, the barrier is meeting the shared interests of the parties when ownership rights of courses remain uncertain.

Aside from disputes about ownership rights between faculty and their respective institutions, distance learning courses also pose the added complication of how to properly use copyrighted materials without obtaining separate rights and paying royalties. Two provisions of the *Digital Millennium Copyright Act of 2000* permit an institution to use copyrighted works for distance education courses.

The primary interests for institutional retention of ownership rights include:

- *Use of University Resources:* When university resources are used to produce, record, and transmit a course, the course content should belong to the institution.
- *Purpose of Employment:* The institution hires professors to design and teach courses, and they are compensated accordingly. Thus, the institution should have the right to ownership of the course.
- *Control over the Scholarly Work, Including Distribution:* Faculty distribution of course materials could threaten tuition, which is the core revenue stream for many higher education institutions. Institutions would fall into serious financial jeopardy without control and distribution of the course materials.
- *Conflict of Commitments:* A professor's distribution of course materials to another institution while employed by the originating university raises a conflict of commitments issue.

5 17 U.S.C. §201 (2002).

The first provision allows for the performance or display of certain works by a governmental body or nonprofit educational institution; however, its limitations are problematic for online education programs on several levels. First, this section applies only to nonprofit or public institutions, putting the for-profit providers at a disadvantage. Second, it applies to the "performance and display of works," and it is still unsettled whether transmission via the Internet qualifies. Third, the performance or display must be made in locations devoted to instruction or a substitute venue to accommodate persons with disabilities. Distribution to the home or work site may not qualify.

The second key provision is known as the fair-use exemption. Factoring in the purpose, nature, amount, and effect of use, this provision permits a partial reproduction of an original work when used for teaching, scholarship, research, criticism, comment, or news reporting–regardless of the medium. The pending *Technology, Education, and Copyright Harmonization Act* (TEACH), if adopted in its current state, would expand the types of work that could be performed or displayed for classroom use at an accredited institution. The act also would exempt accredited schools that transmit via the Internet or other similar formats from charges of copyright violation simply because the materials are temporarily "distributed" or "reproduced."

If there is no exemption, a distance learning provider must obtain a license from the copyright holder before reproducing or performing a copyrighted work. Such a license could be costly and, at the very least, time consuming to obtain.

International Trade

In 1995, the United States and scores of other nations began negotiating a new *General Agreement on Trade in Services* (GATS). GATS is intended to be a multilateral trade agreement that lowers barriers to the provision of services across national boundaries. Higher education is included among the potentially covered services; this has caused some segments of American higher education to worry about the potential effects of GATS on domestic colleges and universities.

Organizations such as the American Council on Education (ACE) and the Council for Higher Education Accreditation (CHEA) have urged the government to take a cautionary stance. They are concerned that trade agreements could weaken state authority over educational decisions or jeopardize the autonomy of accrediting associations. On the other hand, the opening of new markets could serve American higher education well. The negotiations over the GATS agreement are expected to conclude in January 2005.

States

The states serve as the primary arbiters of policy and governance issues in education. Indeed, under the American federal system, education is a role reserved primarily for individual states. The United States so unfailingly adheres to this practice, that Sir John Daniel–at the 1999 Annual Meeting of the National Governors Association (NGA)–said about his experience in expanding the Open University to the United States: "I thought that when I brought the Open University to the [United States], I would be dealing with one country. I was mistaken" (Goldstein, 2001).

Every state has laws or regulations that govern the operations of colleges and universities, and many now have rules regarding distance learning programs as well. Unfortunately, many of the rules governing higher education institutions pre-date the Internet by decades. More than 20 years ago, when television was the medium of choice for distance learning, legislators made a serious effort to arrive at common standards for approval of out-of-state programs. It failed, and since then even more

fragmentation has occurred, as states became increasingly aware of the potential impact of Internet-based learning on their domestic higher education establishment. Some states have enacted laws that clearly intend to allow the state higher education agency to regulate distance learning that originates from beyond state borders. On the one hand, it seems settled that states have an obligation to oversee the quality and nature of educational services provided to their citizens. Yet the future of distance learning is very much in question if it must operate in an environment with more than 50 different regulatory systems. Even if the substantive legal requirements do not differ significantly, the burden on an institution to maintain good standing in every state can be enormous. Whether such restrictions are permitted under the commerce clause of the U.S. Constitution or are a proper exercise of state sovereignty under its reserved powers clause have yet to be determined.

Lack of adequate state funding is a barrier with which public institutions also must contend. Budgets for the 2001–02 fiscal year represented the smallest increase to higher education in the past five years. In fact, colleges in 13 states did not receive enough funds even to keep up with the rate of inflation. Although revenue from distance education could help compensate for declines in state funding, the start-up costs, including equipment acquisition and course development, require significant contributions from the state. In order to finance distance learning ventures, the logrolling effect of cutting other state allocations will likely be necessary.

In many states, lobbying against distance learning as the exclusive educational medium also has occurred in areas as diverse as teacher education and massage therapy. In these cases, distance learning courses are acceptable for program credit or for state licensure only if providers offer them in conjunction with conventional in-person classes. Although many of these state policies are intended to protect students, they often impose heavier regulatory burdens on distance learning programs.

Not all state laws and policies serve as barriers to distance education. A number of states have enacted laws that encourage the development of distance learning programs. For example, the Florida legislature has mandated that the professional development system for teachers offer distance learning or some other technology-based delivery system. Colorado and Illinois have enacted even more attractive policies: They offer funding opportunities to develop distance education programs. Ultimately, state legislatures should seek a balance between protective policies and enticing incentives to advance innovation and monitor quality.

Accrediting Agencies

Accrediting bodies exist to ensure high quality at member colleges and universities through peer review, support the process of accessing federal funds, ease the transfer process between higher education institutions, and engender public confidence in member institutions' academic programs (Eaton, 2002). To achieve these objectives, the accrediting bodies created the current policies and practices with the traditional, in-person educational experience in mind. Unfortunately, this evaluation system does not fit most distance learning institutions. Accordingly, in 2001, eight regional accrediting commissions collaborated to formulate the *Statement of Commitment by the Regional Accrediting Commissions* (2001). The group adopted the *Best Practices for Electronically Offered Degree and Certificate Programs,* a publication created by the Western Cooperative for Educational Telecommunications (2000). These two documents acknowledge the emergence of new providers in higher education and underscore that accreditors are striving for a balance between the dual role of "fulfilling the expectation that regional

accreditation is a dependable indicator of institutional quality and encouraging perceptive and imaginative experimentation" (*Statement of Commitment,* 2001, p. ii). Nonetheless, these documents fail to provide new evaluation processes for accreditation with regard to distance education.

Equally important is that the higher education community continues to criticize the regional accreditation process. This becomes an even larger problem with distance education because different standards exist among regions. For instance, some innovative institutions recognize the North Central Association of Colleges and Schools as a "friendly" accrediting body. Since the likelihood of obtaining accreditation sometimes depends on the region in which an institution seeks accreditation, this lack of consistency encourages institutions to "shop around" among various forums or regions to establish themselves as accredited institutions. With clearer, more consistent policies and practices, institutions could expect the same level of evaluation in all regions.

Thus, two major obstacles exist in the accreditation of distance learning programs: lack of clear, applicable evaluation guidelines and inconsistent standards. Educators and legislators must address these obstacles, for the influence of accreditation extends to other key areas of higher education–including participation in federal student aid programs and, oftentimes, eligibility in employee reimbursement plans.[6]

Professional Organizations, Unions, Consortia, and Partnerships

Two prominent faculty union groups and a number of professional organizations have voiced their concerns about distance education programs. They fear that the new online medium could potentially shift higher education into a mass production engine without an adequate level of quality control, and could threaten the academic profession's academic freedom and workload standards. At the same time, higher education institutions are entering into more joint ventures–creating new organizational forms and interinstitutional agreements to help facilitate successful distance learning programs. Of course, these ventures also raise potential barriers that must be addressed.

In 1997, the AAUP *Report on Distance Learning* acknowledged the potential benefits of online education but also cautioned the academy that state-operated distance education programs, although created as cost-cutting avenues, actually may shift costs from the classroom to the technology centers in order to cover associated costs such as additional staffing.

In June 2000, the NEA released the results of a survey on distance education. According to this report, 72 percent of the faculty polled responded positively to the new medium. Those who had taught web-based courses reported a higher level of positive feelings. One month later, the AFT passed a resolution opposing exclusive undergraduate programs offered via distance learning (Carnevale, 2001). Although the NEA survey found perceived differences between distance learning and traditional, in-person courses, it did not issue such a summary dismissal of distance learning for undergraduate education.

Aside from faculty unions, higher education organizations have been divided in their response to the growth of distance learning. Some have treated the phenomenon with skepticism, while others have expressed support. The consistent theme at higher education

In many states, lobbying against distance learning as the exclusive educational medium also has occurred in areas as diverse as teacher education and massage therapy.

6 In addition, the *Technology, Education, and Copyright Harmonization Act* (TEACH), if passed, would broaden the scope of eligibility of performance and display of copyrighted materials at accredited institutions. Thus, in terms of accreditation, much more may be at stake for distance learning institutions.

conferences and meetings, however, is that the academy needs to prepare itself for what will likely be a paradigm shift in educational delivery.

One response to this challenge, in part to minimize risks and in part to harness synergies, has been the rapid growth of consortia projects and partnerships (Katz, 2002). State-based programs, such as the Michigan and Kentucky virtual universities, and multistate projects, such as the Southern Regional Electronic University, Western Governors University, and The Great Plains Interactive Distance Education Alliance, allow institutions to pool their resources and talents and often to share risks. Generally, these consortia are designed so that each institution brings a unique contribution to the group. Hundreds of courses and scores of programs are now available through these cooperative ventures. Collaborative efforts and partnerships do raise their own critical issues that could become barriers if ignored. Questions of choice of partner and form of organization revolve around issues such as commonality of mission, ability to consummate articulation and credit-recognition policies, selection of accrediting agency, legal structure, exclusivity rights for course usage, and ownership of intellectual property. These issues seem likely to directly affect the success or failure of these ventures.[7]

7 For a more in-depth discussion, see *Distance Learning Partnerships* (Katz, 2002).

Conclusion

In the span of five generations, the U.S. economy has shifted from agrarian to industrial to information based. Since World War II, the economy has transformed even more dramatically from production to service to knowledge. In the course of these shifts, higher education has become a primary economic engine of society. In 1900, 4 percent of persons aged 18 to 22 attended college; today, approximately 63 percent of high school graduates enroll in postsecondary education immediately following secondary school completion (U.S. Department of Education, 2002). People need a high level of education to obtain the best jobs our society offers, and increasingly they need that education consistently throughout their lives as the half-life of knowledge gets shorter and shorter.

Distance learning programs are a reflection of this new world. They offer education without borders. Distance education is what former University of Michigan President Jim Duderstadt would call "just-in-time" rather than "just-in-case" education. It grows out of today's technological revolution. It aims to be individualized, interactive, and independent of time, emphasizing learning over teaching and commonality of outcomes over commonality of processes.

Furthermore, new legal concerns have become issues in distance education: faculty and institutions battle for intellectual property rights, institutions and students need more flexibility from governmental financial aid programs, educators seek legal exceptions to display copyrighted materials, and institutions must provide proper educational media for persons with disabilities. At the same time, institutions must conform to international agreements, state laws, rules established by accrediting bodies, and professional association policies. And all of this must be balanced with protecting institutions and their constituents, offering students choice, and ensuring the public good.

Obstacles can serve two very different purposes. Some obstacles ensure high quality and create the standards necessary to assess any new activity. Others are simply gatekeepers–political, personal, and institutional–to bar any type of change. The challenge facing academe is to distinguish between the two: to preserve the former and sweep away the latter. Distance learning remains immature and experimental. Higher education institutions need to innovate and allow distance learning to evolve and develop–but they cannot do so wholly unchecked.

[Distance learning] aims to be individualized, interactive, and independent of time, emphasizing learning over teaching and commonality of outcomes over commonality of processes.

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Statutory and Regulatory Provisions

Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 *et seq.* (2002).

Copyright Act of 1976, 17 U.S.C. § 102 *et seq.* (2002).

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