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Software Licensing

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Hello. This is Melissa McGann. I am an attorney with Andre, Morris & Buttery in San Luis Obispo, California, and I practice intellectual property law. Welcome to “Software Licensing,” a presentation in Portical’s technology planning series. Today we will discuss the application of copyright law to computer software and basic licensing issues applicable to educators.

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Copyright Law

- Rights afforded by copyright law:
 - Reproduction
 - Preparation of derivative works
 - Distribution
 - Display
 - Performance




Are you familiar with the basic principles of copyright law from the presentation entitled, “Primer on Copyright Law and Fair Use”? Copyright law affords an author of an original work the exclusive rights of reproduction, preparation of derivative works, distribution, display and performance.

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Ownership v. License

- “Ownership” means having total control.
 - A person with a license to use a copyrighted work has not acquired “ownership” of the work.
- “License” means having permission to use.
 - A third party who has been granted a license by the copyright owner has acquired permission to use the work for a limited use.



When dealing with software-related issues and other areas of intellectual property, you should also be aware of the difference between ownership and a license.


When you purchase a package of Microsoft® software, Microsoft retains total control of the software; you have not obtained ownership of the program. Rather, depending on the circumstances under which you made the purchase, you have been granted permission, also known as a “license,” by Microsoft to use the software, and Microsoft has been compensated for your use.

On the other hand, if you were to download that program from someone's Web site or if you were to install that program on more than one computer, Microsoft would not receive the compensation to which it is entitled. This is known as piracy, and it is a violation of Microsoft's copyrights.

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Applying Copyright Law to Software

- Is copying a computer program during installation an "essential step"?
- It is illegal to make or distribute additional copies without authorization
 - Exception: a single backup copy for archival purposes.




Applying the basic principles of copyright law to software raises issues. Take, for example, that when you purchase new software, you need to install the contents of the CD-ROM onto your computer. Technically, this violates the copyright owner's exclusive right of reproduction. On the other hand, you are not able to use the software without that initial copying.

The United States Copyright Act resolves this issue by specifically allowing for the copy if it is an "essential step" in the program's use.* Your initial installation of the program is not considered copyright infringement. In addition, the end-user of the software is permitted to make one copy of the software for archival purposes only; the user is not permitted to make or distribute any other copies of the software. Further, if the user's permissible use of the software expires, then the archival copy must be destroyed.
* See 17 U.S.C. § 117(a)(1).

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**Digital Millennium
Copyright Act**

- Enacted October 28, 1998
Pub. L. 105-304, 112 Stat. 2860.
- Purpose
 - To legislate changes in copyright law caused by the Internet
 - To protect against digital piracy of the copyright industries




However, even with this provision, the original copyright laws did not contemplate the innovation and proliferation of software, much less the growth of the Internet. It became clear that the United States Copyright Act required revisions, and on October 28, 1998, President Clinton signed the Digital Millennium Copyright Act, or the “DMCA,” into law. The specific purposes of the DMCA were to legislate changes in copyright laws caused by the Internet and to protect copyright owners from digital piracy.

Do you remember the one archival copy? What about a copy that is made by a computer specialist during routine maintenance or repair? The DMCA expands copyright protection to that single copy if it is made solely for purposes of maintenance and repair. However, this copy must also be destroyed immediately after the maintenance or repair is completed.

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**Digital Millennium
Copyright Act**

- Anti-circumvention provisions
 - Exception for nonprofit educational institutions



Two focuses of the DMCA are anti-circumvention and limiting liability for third-party Internet service providers, or “ISPs”. First, the DMCA prohibits the decryption or descrambling of protected works.* There is, however, an exception for nonprofit educational institutions. For purposes of preservation, scholarship or research, an educational institution may make a digital copy of a particular literary work or sound recording if it applies a three-part test in good faith. Contact your district’s attorney to evaluate whether your copying of a particular work might fall under this


exception.

* 17 U.S.C. § 1201(a).

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**Digital Millennium
Copyright Act**

- Limits liability of Internet service providers
 - Application to nonprofit educational institutions



Second, the DMCA limits the liability of ISPs based on the posting of infringing materials on their Web sites and their caching of infringing materials. Subject to specific “notice and take down” provisions, an ISP will be free from liability for infringement if it does not have actual knowledge of the infringement, if it is not aware of the facts or circumstances from which the infringing activity has arisen, or if upon obtaining knowledge or awareness of the alleged infringement, it “responds expeditiously” and takes the material down or blocks access to it.*

Special provisions of the DMCA apply if a nonprofit educational institution acts as an ISP.** Depending on whether certain conditions are met, the institution may or may not be held liable for a faculty member or graduate student’s infringing conduct. If your school functions as an ISP, you should contact your district’s attorney to evaluate your potential liabilities. But, in all cases, you should be sure to provide users of

your computer systems and networks with information about the United States copyright laws.

* *See* 17 U.S.C. § 512(c).

** *See* 17 U.S.C. § 512(e)

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Business Software Alliance

- <http://www.bsa.org/>
- "Voice of the world's software and Internet industry. . . ."
- Members include:
 - Adobe
 - Dell
 - Hewlett Packard
 - Microsoft
 - Novell
 - Symantec



The Business Software Alliance ("BSA") serves as a watchdog group to prevent copyright infringement and to ensure that schools, businesses and individual users have the proper licenses for their software. BSA touts itself as the "voice of the world's software and Internet industry before governments and with consumers in the international marketplace."* Among others, BSA's members include Adobe, Dell, Hewlett Packard, Microsoft, Novell and Symantec. BSA's purpose is to locate copyright violators and obtain compensation for the infringing use.

BSA encourages the general public to report instances of software piracy, and the "Report Piracy" link on its Web site is just one way it accomplishes this. Software piracy is especially important to educators because students, whether knowingly or not, are most susceptible to copyright infringement via the Internet. Similarly, a disgruntled former employee could easily report a school's software licensing violations.


Accordingly, schools should establish use policies for their faculty and students with regard to unauthorized downloading of software, music and computer games. Using a knowledgeable computer specialist, schools should also conduct routine audits of their computers for illegal copies of software.

* *See* BSA's Web site at <http://www.bsa.org> (July 16, 2002).

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Impact on Educators

- BSA and Scholastic, Inc.'s "Reboot Your Attitude" program
–<http://www.bsa.org/nopiracy/reboot>
- BSA and Weekly Reader Corporation's "Play It Safe in Cyberspace" program
–<http://www.bsa.org/usa/press/newsreleases/2002-04-24.1067.phtml>



You may be familiar with BSA's "Reboot Your Attitude" curriculum which was launched in 1998. It focused on the ethical uses of software, and it attempted to explain to students why they should not share computer disks.

BSA's newest program entitled, "Play It Safe in Cyberspace," is expected to launch in August 2002. Aimed at children from ages 8 to 14, this program will focus on teaching respect for copyrighted works as well as understanding the economic effects of software piracy. *See* BSA Press Release, "New Software Use, Cyber Ethics Curriculum Announce," April 24, 2002.

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Resources

- <http://www.portical.org/>
 - On Portical's home page, click "FIND" and enter the keyword "copyright" or the phrase "software licensing".



Software licensing is serious business. Copyright owners deserve to be compensated for their works, and students should be taught the importance of respect for copyrights. It would be a burdensome and expensive undertaking for your school to be audited by BSA or a similar organization in search of copyright violations. It is to your benefit to make students aware of the basics of copyright law. You should instill in them the ethics of software licensing.

Additional information on software piracy and the DMCA can be found at Portical's Web site. For Portical, this is Melissa McGann.