Technology

Issues for

Educators
FOREWORD

December 2011

Dear OEA Member:

The impact of technology on educational institutions in recent years has been dramatic. Many of you have expressed concerns about how new technology affects your privacy, your safety, your liability, your rights as authors or inventors, and your effectiveness as educators. You have questions about how new technology may be used in our schools and colleges, and where to locate the increasingly blurred lines between "public" and "private" information. Your Association hopes that this booklet will answer many of your questions as you work with your school districts/community colleges to deal with these thorny issues, and to ensure that technology enhances, not undermines, the quality of education in Oregon.

Our thanks go to OEA General Counsel Mark Toledo as the editor of this handbook, the most recent in a series of publications OEA has prepared to help Association members grapple with the complex problems of modern education. We also extend special thanks to attorney Hank Kaplan and law clerk Ashley Boyle with the law firm of Bennett, Hartman, Morris & Kaplan for their work on this publication.

Sincerely,

Gail Rasmussen
OEA President
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INTRODUCTION

"Technology breaks the laws and makes the laws."
Frank Ogden, 1994

"Technology is just a tool. In terms of getting the kids working together and motivating them, the teacher is the most important." - Bill Gates, 1997

Technology has transformed the tools of many trades; education is no exception. The Internet has placed vast amounts of information and analytical power within the grasp of institutions whose resources once comprised a blackboard and a few textbooks. The educator today is expected to master not only his or her subject matter, but the modes of access to a resource base evolving more rapidly than the educator can track it.

Just as the technological revolution has transfigured the landscape of learning, it has also transformed the legal landscape of intellectual property, privacy, free expression, and social interactions. The courts and legislatures have been slow to adapt, resulting in a quagmire of restrictions and traps for the unwary.

This manual contains a summary of current law; it is intended to alert educators to recent legal issues arising out of the rapid development of technology, and its impact upon the education community. We hope that basic knowledge of the legal issues will help school employees better appreciate the boundaries between their own rights and those of employers, authors, publishers, and others. Nevertheless, experience has shown that where technology has the greatest impact, laws do not remain settled for long. In any rapidly-evolving field, that which is accepted today may be forbidden tomorrow, and vice-versa. Therefore, this overview is not, and cannot, be a substitute for current and competent legal advice.
This manual is limited to a synopsis of public law issues which may concern educators. To supplement this manual, it is often crucial to check school district or employer policies and collective bargaining agreements, because those documents often create a "private law" of the workplace that supplements the more general rules on these topics.

The manual is divided into six main topic areas. Chapter One covers employee-employer disputes over ownership of intellectual property, such as inventions or software. Chapter Two discusses classroom use of tools such as recordings, videos, and distance-learning technology. Chapter Three concerns some of the unique problems raised by the advent of computerized information in general, as applied to intellectual property. Chapter Four addresses the dark side of the internet and some of the unique dangers it presents to educators. Chapter Five explores the impact of technology on private information and records. Chapter Six addresses some of the unique problems and challenges raised by the phenomenon of social media. Resource materials appear in the Appendices.

SIMPLE QUESTIONS; COMPLEX SOLUTIONS

Can I video record classroom activities or school plays? To whom may I show it?
Can I use my home computer software on my school computer?
If I take my computer records to work at home, does that violate the software license?
Is it true that the School District can read my e-mail? Can the media ask to see it?
Can I use the internet for personal research?
May I use the school internet for entertainment or personal hobbies?
Can I copy material off the internet and hand it out in class?
How can I control what my students’ access on the internet? Am I responsible?
Can I market any instructional recordings or inventions I develop for my students?
Should I access students’ social media pages?
What are my responsibilities when I see illicit student behavior on the internet?
Should I have a Facebook page that my students can access? May I “friend” them?

These are just a sample of the issues that technological innovations raise for educators. The answers are not simple. Often the answer will depend upon a mix of standards found in intellectual property law, criminal law, school district policies, and collective bargaining agreements.

In order to address some of these questions, it is necessary for the educator to start with some basic concepts of intellectual property law. The following is by no means a complete summary of the law; it is intended only to alert you to the important issues. Contact your Association representative for further assistance if these issues arise.

CHAPTER 1

EMPLOYEE-EMPLOYER DISPUTES OVER INTELLECTUAL PROPERTY

The law encourages technological innovation by granting saleable property rights in those innovations. These rights generally take the form of patents and copyrights. Patents protect inventions; copyrights generally protect written or creative works. Both sets of rights have been the source of employer-employee disputes in the educator's workplace.
SUMMARY OF PATENT OWNERSHIP PRINCIPLES

A patent is defined as a government grant to an inventor, conveying an exclusive right to make, use, and sell an invention for a term of years. The three basic requirements of patentability are utility, novelty, and "nonobviousness." A variety of educators engage in innovation which may satisfy these criteria - for example, a sports coach may create a piece of training equipment; a shop teacher may devise a new tool attachment; or a science teacher may design a piece of lab equipment.

If there is no explicit agreement with the employer, the rights of employees to their inventions depends on the nature of the employment relationship. If someone is hired to make an invention or solve a particular problem, and succeeds during his term of employment, then the patent belongs to the employer. On the other hand, the mere fact that the invention was conceived and developed while the employee worked for the employer does not entitle the employer to any rights to the invention. In the examples given above, the employee will generally own the invention if the employee did not substantially use work time and equipment. However, whenever an employee creates his invention while on the job, relying heavily on the employer's facilities and resources, the employer acquires an unlimited license or "shop right" to use, manufacture, or sell the invention without paying any fees or royalties to the employee.

EXAMPLES: A college faculty member is hired to develop new lab techniques to use in medical lab work. For the purpose of his research, he devises a new type of microscope. If the project is successful, the college will own the patent on the lab technique, but not the microscope. However, the college may use the microscope without paying any license fee.

A welding instructor develops a new type of welding tool. The instructor owns the patent rights unless (1) the instructor was
hired for the purpose of developing such a tool; (2) a substantial portion of the development work took place on the employer's premises during working hours and that employee relied heavily on employer's materials; or (3) the welder’s employment contract with the college requires the transfer or patent rights.

Generally speaking, an employer's policy cannot overcome the presumption in favor of employee ownership of inventions; but an employment contract can. If the employee expressly assigns ownership rights in inventions to the employer, that assignment is enforceable, provided that the assignment is restricted to the employer and is not unreasonable in duration. However, if the employer engages in misrepresentation (such as misrepresenting the market potential of the invention), the contractual assignment may be avoided. On the other hand, an employee member may (unintentionally) agree to an assignment by allowing an employer to act as an owner (for example, by allowing the employer to pay expenses and market the invention). Failing to challenge an employer's exercise of ownership rights may cause the employee to lose ownership rights.

*RESOURCE TIP:* Model contract language for an employment contract or collective bargaining agreement is contained in Appendix B.

Schools and colleges generally try to claim ownership of inventions, but allow faculty to retain ownership in copyrightable work. The distinction between copyright and patent rights is less clear where the categories of mechanical and literary innovation intersect - in the realm of computer programs and information systems. Software is regarded as copyrightable, not patentable.
SUMMARY OF COPYRIGHT OWNERSHIP
PRINCIPLES

1. Definition of a Copyright

A copyright is a right granted to an author or originator of any literary or artistic production, which gives the person the sole and exclusive privilege of producing multiple copies of the work and publishing and selling them. No author may copyright the ideas or facts he or she narrates; copyrights protect only the author's "expression" of ideas or facts. Therefore copyrights can never be used to restrict freedom of speech, because anyone may take another's original ideas and express them differently.

Copyright protection extends to original works in any tangible (i.e., physical) medium of expression. The Copyright Act, 17 U.S.C. § 106, provides the copyright owner with the exclusive rights:

(1) to reproduce the copyrighted work,
(2) to prepare new (derivative) works based upon the copyrighted work,
(3) to publish (distribute copies of) the copyrighted work to the public for sale or other transfer of ownership, or by rental, lease, or lending,
(4) to perform the copyrighted work publicly, and
(5) to display the copyrighted work.

However, as we will see in the next chapter, there are some limitations to these rights.

2. What Creates a Copyright?

Copyright protection exists from the moment a work is created in a fixed form. The copyright belongs to the creator of the work, unless it is a work made for hire. For example, if a student composes a short story for a creative writing class, the student will
have copyright protection once it is written. If it is a work made for hire, ownership of the copyright initially belongs to the person or organization for which the work is prepared. 17 U.S.C. § 201.

When a copyrighted work is published by the copyright owner, each copy of the work which is publicly distributed must have a "notice of copyright," consisting of (1) the symbol ©, the word "Copyright," or the abbreviation "Copr.,” (2) the year of first publication of the work, and (3) the name of the copyright owner. (For example, "Copr. 1995 John Doe"). Registration of a work with the Copyright Office is not necessary, although such registration establishes a public record of a copyright claim.

Failure to include a notice of copyright results in a forfeiture of that copyright, unless:

(1) the notice has been omitted from a relatively small number of copies distributed to the public,
(2) formal copyright registration is made either before five years elapse after the first publication without notice, and a reasonable effort is made to add the notice to all copies already distributed, or
(3) the notice has been omitted in violation of the copyright owner's express written requirement that all copies of the work have the notice.

If a person who infringes a copyright relied on the absence of a notice of copyright, that person will not be liable for actual or statutory damages.

3. How Long Will A Copyright Last?

Copyrights created by an individual after 1977 will last for the life of the author plus fifty years after the author's death. If a work is created "for hire" the author does not own the copyright. In that case the copyright lasts for 75 years from first publication, or 100 years from date of creation, whichever is first. Copyrights
created before 1978 will generally last 28 years, renewable for an additional 47 years. 17 U.S.C. § 304.

4. Do Educators Have Copyrights in Teaching Materials They Develop?

Yes. Most educators are hired to teach, not write, and they generally are allowed to retain ownership in copyrightable work, unless a specific contract or policy restricts their copyright ownership rights. This applies to all instructional materials developed by the educator, including videos, computer programs, educational databases, lecture notes, audio recordings, and any other recording on any permanent medium, be it magnetic tape, photographic film, or computer disks.

As in the case of patents, copyrightable work developed on the job, using the employer's facilities and resources, may be used by the employer without restriction. However, widespread technological reproduction of educational programs has created many opportunities for such programs to become disseminated outside the workplace.

Thus, a teacher who videos his or her lectures, can control dissemination of those recordings outside the school. An employee who writes a software program on the school computer, and on school time, may sell it as his or her own. A wrestling coach who develops a new training program can record and market it, without obtaining permission or license from the school.

An educator who compiles a computer database using an off-the-shelf database program has a copyright interest in that particular application, whether it is something as mundane as an address directory or as sophisticated as a computerized atlas. The use of a copyrighted software format to create the particular application has no impact on the educator's rights; from the standpoint of copyright law, it is no different than a novelist who uses an off-the-shelf word processor to type a manuscript.
CHAPTER 2

THE ELECTRONIC TEACHER: VIDEO/AUDIO RECORDINGS AND OTHER MEDIA IN THE CLASSROOM

Many academic institutions now use internet and other technologies to distribute instructional programs, or "telecourses." Some may share research findings through such technology. All copyright principles discussed above apply to "distance learning" and telecommunications distribution of educational or instructional programs. Therefore, telecommunications organizations or academic institutions should obtain written permission from copyright owners in order to display, perform, or reproduce any visual, musical, or written materials incorporated within the program, or derived from the program.

As a practical matter, very few teachers and school districts are sued for copyright violations, even though violations are probably an everyday occurrence in primary and, secondary schools. Almost all of the reported cases involving educators arose at colleges and universities. Nevertheless, all educators should know the potential remedies available to copyright owners.

1. Penalties for Violation of a Copyright

The lawful purchaser or owner of a copy of a copyrighted work has the right to dispose of that copy as he or she pleases. Known as the "first-sale doctrine," the owner of the copy may sell it, give it away, lend it, throw it away, etc. However, the purchased copy generally may not be reproduced without permission.

When a person violates the Copyright Act, the copyright owner may seek the following remedies:
(1) injunctions. 17 U.S.C. § 502
(2) impound and dispose of infringing articles. 17 U.S.C. § 503
(3) actual damages for lost profits, or statutory damages. 17 U.S.C. § 504
(4) costs and attorneys' fees. 17 U.S.C. § 505

Because a copyright violation in the classroom will rarely produce any significant actual damages, a teacher's potential liability rests in the statutory damages, costs, and attorneys’ fees. Statutory damages can range from $200 to $30,000 for a non-willful violation or $150,000 for a willful violation. However, a court may absolve teachers of all damages if the teacher reasonably believed he or she was in compliance with the “Fair Use” exception to the copyright laws (see below).

If a violation was willful, and was committed for the express goal of making money, then the violator may be charged with a criminal offense. 17 U.S.C. § 506.

EXAMPLE: A teacher photocopies an entire copyright-protected work for students in his classroom, and requires each student to purchase a copy. If the teacher makes a profit off of this activity, the teacher potentially faces criminal sanctions. If the teacher distributes the materials free or at cost, there is no copyright infringement if it is a "fair use" of the material (see below).

Posting a copyrighted work to the internet, if to a student-only password-protected site, violates the exclusive right of the copyright owner to display and reproduce the work. The “first sale” doctrine is no defense because even if the “original” was in an electronic format, it must be copied in order to be viewed remotely. Furthermore, if the owner of a copyrighted work posts it to the internet, the owner does not place it in the public domain for unlimited duplication. Posting gives others an implied right to view the work, but not to copy it.
2. The "Fair Use" Limitation on the Copyright Owner's Rights

As noted earlier, a copyright owner generally has the exclusive right to control all means of transmission and duplication of the work's contents. However, these rights are subject to a number of limitations; otherwise it would be difficult to teach at all without violating the Copyright Act. The most widely-invoked limitation is known as the Fair Use Doctrine.

The Copyright Act specifically permits the "fair use" of a copyrighted work, including reproduction, for certain purposes including teaching, scholarship, and research. 17 U.S.C. § 107. "Fair use" is permitted based on a somewhat vague "rule of reason," which generally depends upon whether the unauthorized use would serve to defeat the Copyright Act's goal of promoting creativity. The Act lists four factors to consider:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,
(2) the nature of the copyrighted work,
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

A. Purpose and Character of Use

When a teacher uses a copyrighted work in a classroom, the use will almost certainly be for nonprofit educational purposes. If the teacher uses a copyrighted work to create something new, then the teacher may have transformed work by adding value, changing the aesthetic or adding new insights. The more transformative the work, the less likely there is a copyright infringement. This factor will almost always weigh in favor of fair use within the classroom.
EXAMPLE: If a publisher distributes a magazine article about a writer to sales representatives to aid in marketing the author's works, it is probably an infringement of the magazine's copyright. If a teacher hands out copies of the same article to students studying the author, for use in a class discussion, it likely is a fair use. However, if the teacher makes that article part of a regular curriculum program used from year to year, the teacher may lose the fair use defense.

EXAMPLE: A kindergarten teacher uses the refrain a copyrighted popular song in recording an educational song for learning the alphabet. This will probably be fair use, because the teacher is only using a small portion of the original work, and is transforming its character into something new. However, if the teacher uses the entire tune, but with new lyrics, the use would likely not be fair.

B. Nature of the Copyrighted Work

The more creativity involved in creating the original work (such as a song or a painting), the more this factor will weigh against a finding of fair use. On the other hand, use of educational, scholarly, informational, and factual works is more likely to be considered fair use. Personal and unpublished works generally receive greater copyright protection because of the policy that favors allowing the creator of the work to control its first public appearance.

EXAMPLE: A literature teacher copies a chapter of poems for an assigned reading; a history teacher copies a textbook excerpt; and a science teacher copies charts of the chemical elements. The literature teacher is probably in violation of copyright laws, the science teacher is probably not, and the history teacher's status depends on the length of the excerpt, the number of copies, the uniqueness of the work or other factors.
C. Amount and Substantiality of the Work Used

The larger the portion of a copyrighted work that is used, the less likely it is to be a fair use. The key question is the qualitative value of the portion used. Avoid copying entire books, tapes, CDs, computer programs, or television programs.

EXAMPLE: In the previous examples, copying the entire textbook, or a complete article in a scholarly periodical, would likely be a violation of fair use guidelines. Video copying and distribution of entire educational programs for delayed student viewing is probably also a copyright violation, though copying short excerpts is allowed. Copying of an entire news broadcast or other non-educational program for one-time student viewing soon afterwards is allowed.

D. Effect of Use on Potential Market for the Work

This factor goes to the heart of the Copyright Act: the creator's right to distribute and profit from the work as he or she sees fit. Any use which would affect the potential market for the work will not be a fair use.

EXAMPLE: The copying and distribution of a few pages of a novel to illustrate some lesson would likely be considered fair use, because it is unlikely to diminish the market for the work as a whole. However, copying a single short story out of an anthology is less likely to be a fair use.

3. The Classroom or Instructional Performance Exemption

Another exception to exclusive rights of copyright owners is for classroom or instructional performances. 17 U.S.C. § 110(1). There are four requirements:

(1) the copyrighted work must be performed or displayed by an instructor or student,
(2) in the course of face-to-face teaching activities, 
(3) in a nonprofit educational institution, and 
(4) in a classroom or similar place devoted to instruction.

If the work is a motion picture or other audiovisual work, the copy must be an authorized, not a "bootlegged" copy.

For the purposes of this exemption, the term "instructor" is narrow. It includes guest lecturers, but does not include outside persons brought into the classroom to perform or display a copyrighted work. For example, a music teacher who performs a copyrighted work would be exempt, but a guest musician brought into a classroom to perform a copyrighted work would not. Furthermore, instruction by outside persons must be related to the curriculum. Otherwise the display is illegal, regardless of its educational worth.

*EXAMPLE:* A guest lecturer who uses copyrighted videos to illustrate the dangers of tobacco and drugs would be exempt under the Fair Use Doctrine if the lecture was given in a health class, but probably not otherwise. A regular instructor could use the same videos in any class.

4. **Fair Use Guidelines for Teachers**

Although the factors listed in the Copyright Act provide some guidance for educators, they nevertheless leave many grey areas. In particular, they do not adequately address (1) the extent an educator may use copyrighted materials in scholarship or class preparation, and (2) use of copyrighted materials in classroom teaching activities. To that end, educators and copyright owners developed certain "fair use" guidelines. These guidelines are not law; they codify commonly-accepted practice.¹

¹ The Guidelines are contained in the Copyright Office's Circular 21 (Reproduction of Copyrighted Works by Educators and Librarians). A copy may be located at [http://www.copyright.gov/circs/circ21.pdf](http://www.copyright.gov/circs/circ21.pdf)
Guidelines for written materials will not be discussed here. Following are guidelines for electronic reproductions of copyrighted materials.

A. Music

The guidelines for educational uses of music are less restrictive than for books and periodicals. The primary purpose of the guidelines is to prevent copying for performance purposes. The following activities are permissible:

(1) Emergency copying to replace purchased copies which for any reason are not available for an imminent performance, provided that purchased replacement copies shall be substituted as soon as possible.

(2) Single or multiple copies of excerpts of works may be made for academic purposes other than performance, provided that the excerpts do not comprise a performable unit (such as a section, movement, or aria), but in no case more than ten percent of the whole work.

(3) Printed copies which have been purchased may be edited or simplified, provided that the fundamental character of the work is not distorted, and no lyrics are altered or added.

(4) A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the school or teacher, and

(5) A single copy of a sound recording may be made from sound recordings owned by the school or teacher for the purpose of constructing aural exercises or
examinations, and may be retained by the school or teacher.

The following uses of music are prohibited under the guidelines:

(1) Copying to create, replace, or substitute for anthologies, compilations, or collective works,
(2) Copying of or from works intended to be "consumable" in the course of study or teaching such as workbooks, exercises, standardized tests, answer sheets, etc.
(3) Copying for the purposes of performance, except where required by emergency,
(4) Copying for the purpose of substituting for the purchase of music, except where required by emergency and for academic purposes, and
(5) Copying without inclusion of the copyright notice which appears on the printed copy.

B. Recordings and other Performances

The fair use guidelines for educators include guidelines for the educational use of video recordings of television broadcasts. These guidelines do not concern the use of prerecorded educational videos in the classroom.

Recording for the purpose of time-shifting is permitted by the Fair Use Doctrine. The recording guidelines generally allow teachers to show recordings of broadcasts within ten school days of the original broadcast, provided that the showing is part of a systematic course of instruction, and not for recreation or entertainment (e.g., a teacher cannot show a video as a "reward"). Retention of the recordings after the classroom showing is limited to 45 calendar days. After that time, the recording must either be erased or destroyed.
The recording may be shown once by a teacher, with one additional showing where reinforcement is necessary. It must be shown only in the classroom within the ten school day limitation. A program may only be recorded once at the request of the same teacher, regardless of the how often it is broadcast. Once a copy is made, a limited number of copies may be made from the recording to serve the needs of other teachers.

The recording may not alter the broadcast program from its original content, although the program need not be used in its entirety. The recording may not be used to create a teaching anthology or compilation.

Where an educator purchases videos, the "first sale" doctrine applies. Under the doctrine, the purchaser may sell or lease the videos and they can be shown as often as desired. The only restriction is that the video not be performed for the public.2

The same rules apply to a student group that may wish to show a recorded broadcast at a meeting. Although the school is generally not liable for the actions of its students, a school could be liable where the school is in a position to control the use of copyrighted materials. For example, if the meeting is attended by a faculty advisor in charge of the group, the school would probably be responsible for any copyright infringement that occurs at the meeting.

**EXAMPLE:** If a student organization shows a bootleg copy of a movie, the school which sponsors the showing will be in violation of the Copyright Act. However, the school will not incur financial liability if it derives no financial benefit from the exhibition.

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C. Instructional Broadcasts

Another exclusion concerns the instructional broadcasting of the performance of a "nondramatic" literary or musical work. The requirements for this exemption are:

(1) the performance or display is a regular part of the systematic instructional activities of a nonprofit educational institution,

(2) the performance or display is directly related to the teaching content of the transmission, and

(3) the transmission is made primarily for classrooms or similar places normally devoted to instruction, or for reception by persons to whom the transmission is directed because of disabilities or other circumstances which prevent their attendance in classrooms.

For example, a cable channel which is directed to schools for educational purposes is exempt from the Copyright Act (except when it shows dramatic or musical works).

Educators may play a radio or television for classroom viewing of any public broadcast, provided that (1) no charge is made to see or hear the transmission, and (2) it is not further transmitted to the public.

The previous discussion is a brief survey of the application of copyright and patent principles to some electronic teaching tools. Many issues are still unresolved. Contact your Association representative if you encounter a situation which raises a serious issue of copyright or patent law.

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3 17 U.S.C. § 110(2). The limitation to "nondramatic literary or musical work" was intended to exclude performances of opera and musical comedy. The line between drama and musical composition still requires clarification in the courts.
CHAPTER 3

COMPUTER SOFTWARE AND THE INTERNET

1. Software Piracy in the Schools

For the same reason that software development is a big-money industry, software piracy is a big money-saver. An educator who permits or encourages this form of "white-collar" theft exposes himself and his employer to substantial liability for copyright violations.

Under Federal law, the owner of a copy of a computer program may make or authorize the making of another copy of that computer program, provided that (1) such copy is created as an essential step in the use of the computer program (for example, loading it onto the hard drive of a computer), or (2) such new copy is for archival purposes only (i.e., backups) and that all archival copies are destroyed when continued possession of the computer program ceases to be lawful. Such copies may be transferred when the software is sold, provided that no copies are kept by the seller. If a consumer copies software onto his or her hard drive for personal use, that copy must be destroyed if the original copy is sold or given away.

Most software is "licensed" rather than sold. Terms of such licenses often exceed the protection offered by copyright law. For example, many licensing agreements purport to restrict so called “first sale” rights of purchasers to prevent the purchaser of software from selling the software to a third party. The extent to which a vendor may, via licensing, restrict "first sale" rights of purchasers is still an open question.

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4 17 U.S.C. § 117
The following examples are violations of the Copyright Act:

(1) A school which owns a single copy of a computer program installs the program on multiple hard drives for in-class use or school use generally.
(2) A teacher who owns a computer program transfers or loans the original copy to another person without destroying any copies on his or her own computer.
(3) A teacher copies school-owned software for his or her personal use.

The following examples are not violations of the Copyright Act:

(1) A teacher who owns a copy of a computer program installs that program onto a school-owned computer for his or her own personal use. (However, it is unclear whether a person may copy a computer program onto multiple computers where each computer is only for that person's personal use).
(2) A teacher who owns a copy of a computer program displays the program before a class for educational purposes.

In addition, there are many circumstances in which a student may copy school-owned software for personal use, or install the student's own copy of software on school computers. An educator may become liable if the educator knows that a
student is copying software onto or from school equipment, even if
the educator is unaware that these activities are unlawful.

Besides legal restrictions, many government employers
restrict the installation of personal software on the computers used
by the government, for a variety of reasons, including: (1) concern
over inadvertent importation of viruses into the system; (2)
conflicts with existing software which may generate costly
maintenance issues; and (3) defeat of monitoring systems intended
to regulate the use of electronic resources. Furthermore, the use of
public electronic resources for personal use implicates issues of
government ethics, and exposes potentially personal information to
scrutiny as a public record. Nowadays, almost all school districts
have written use policies which apply to all electronic resources.
These policies should be consulted whenever there is a question
about permissible uses of school equipment.

2. Copyright Perils and Pitfalls of the Internet

The application of copyright law to internet
communications was never contemplated by the framers of that
law. Therefore, the answers to many common questions are still
not answered:

a) Some courts have held that the electronic input of a
copyrighted program into the memory unit of another
computer constitutes the making of a "copy" in
violation of the Copyright Act. Thus strictly speaking,
the mere retrieval of a document through electronic
media involves "copying" and distribution. However, if
the copyright owner knowingly placed the document on
an electronic bulletin board or website, it may imply
permission for limited copying and distribution. Are
web publications fair game for unlimited reproduction?
The scope of copyright protection for internet
distribution of copyrighted documents is still uncertain.
b) Ordinarily, the copyright owner may prevent someone from posting an unauthorized copy of his or her work to an electronic bulletin board or website. However, it is less clear whether the copyright owner would have the same remedies against a person who owns an authorized electronic copy of the work, and who posts his or her only copy on the internet; under the "first sale" doctrine, the owner of a copy may freely transfer it without permission, so long as the owner does not make duplicates.

c) A copyright owner probably has no legal remedies against a person who innocently retrieves information posted to the internet without the copyright owner's authorization. In such circumstances, the copyright owner's permission cannot be implied; and "innocent" infringement is nonetheless unlawful.

d) To the extent that information retrieval may involve school resources and educational supervision, such activity puts both educator and the educational institution at risk. Both teachers and students extensively use internet resources. Whenever there is doubt about the legality of duplication, the user should seek the author’s permission before engaging in a potentially infringing activity.

**PRACTICAL TIP:** One of the advantages of the internet is that communication with the author of a work posted there is almost effortless; typically, the internet or e-mail address will accompany the document or image. A request for permission should specify (1) title, author or editor, and edition; (2) the exact material or excerpts to be used; (3) number of copies to be made; (4) use to be made of duplicated materials; (5) format of distribution (classroom, newsletter, etc); and (6) method of duplication (photocopy, electronic, etc.).
CHAPTER 4

THE TOOL THAT BITES: DANGERS OF THE INTERNET

By far the largest information resource for virtually every profession or academic discipline is the "information superhighway" known as the internet. Perhaps only the invention of the printing press had a greater impact on the global dissemination of information. School districts throughout the country provide internet access to both educators and students as an integral part of everyday learning. This vast reservoir of unfiltered and uncensored information is both a blessing and a challenge for educators, because through the computer resources of the educational institution students are exposed to material that may be unhealthy, or at least non-educational. The internet is also the greatest communicative invention since the telephone. However, both the information and communication power of the internet presents new challenges never faced by previous generations of educators. Generally speaking, the challenges for the educator can be broken down into two categories – those that flow from the internet’s vast reservoir of information, and those that flow from its communicative power.

1. Pandora's Cyberbox: Student Use and Abuse of the School Internet

There are at least five widespread areas of concern arising from student internet use: (1) student victimization resulting from involvement with an "online stalker" who develops a relationship with the student that leads to prurient involvement or personal contact; (2) student abuse of internet resources to harass and defame others, commit crimes, or violate copyright restrictions; (3) student acquisition of dangerous information which the student acts upon (such as bomb-building instructions); (4) student use of the internet which generally undermines the educational purpose of
providing the resource (such as access to pornographic images); and (5) students use of the internet to harass and bully other students.

Educators who participate in or condone such activities are potentially liable for the consequences, but where the educator merely provides the tool for such abuses, liability is unlikely. How students access and use the internet is dictated more by school policy than law. A clear policy regarding acceptable use of the internet and consistent enforcement of rules and regulations is important. Although there are very few reported cases holding educators responsible for student misuse of internet access, the fear of such misuse, and potential liability drives the development of policy in this area.

In order to receive federal funding for technology programs through the Children Internet Protection Act (CIPA), schools are required to develop internet safety policies. Educators should look to these guidelines whenever issues emerge regarding student internet use. Moreover, federal policy places responsibility on the educators to guide students in proper internet use. The policies generally apply to both minors and adults; they require use of an internet filtering mechanism to, at a minimum, block access to the three categories of visual depictions specified by CIPA — obscenity, child pornography, and depictions harmful to minors. The policies emphasize staff responsibilities in educating minors on appropriate online behavior, and in supervising such activities.

CIPA requires that school districts address the following:
(1) access by minors to inappropriate matter on the internet;
(2) the safety and security of minors when using e-mail, chat rooms, and other forms of direct electronic communications;
(3) unauthorized access, including so-called "hacking," and other unlawful activities by minors online;
(4) unauthorized disclosure, use, and dissemination of personal information regarding minors; and
(5) measures designed to restrict minors' access to harmful materials.

Because school computers provided for educational purposes are not a public speech forum, schools have leeway to monitor and control the information students are allowed to access without implicating constitutional free speech issues. Using filters, schools may block access to certain websites based on concerns reasonably related to legitimate educational interests, and any site that is vulgar or harmful to students. However, schools may not block or filter educational access to information on the internet on an ideological or political basis.

In 2007, the Oregon legislature enacted a law requiring school districts to formulate policies defining cyber-bullying, its consequences for students, and procedures for remedial discipline. The statute defines cyber-bullying as actions that substantially interfere with a student’s educational benefits, opportunities, or performance. However, the Oregon law limits in school consequences to incidents that occur on school property or at a school function. Although this law empowers local schools to establish protocols for appropriate punishment, it does not cover most bullying that occurs off-campus, even if such bullying has detrimental effects in the classroom. Out-of-school online communication can only be punished when it creates a “substantial disruption” in the classroom. (See Cyber-bullying discussion below).

In addition to the measures required by the CIPA and the Oregon statute, schools should have Acceptable Use Policies ("AUPs") which include a written agreement between the school district, the student, and the student's parent or guardian. However,

5 ORS 339.351
whenever these AUPs apply to employees, they may trigger bargaining rights.

The use of an AUP to govern student behavior raises several constitutional concerns involving freedom of speech and expression. However, the limited purpose for which the school provides internet access (i.e., to enhance educational opportunities) should allow most schools substantial license to restrict use of these resources to purely educational purposes. That is because the school does not control this medium of expression; students or teachers who want greater freedom of expression than the school allows, are free to acquire their own personal internet account through a private provider.

**PRACTICAL TIP:** Every educational institution which provides employee or student access to internet resources should have a written AUP which outlines each of the following areas of concern:

(1) **Purpose.** The reason the institution provides the internet access, with explicit discussion of commercial use, political lobbying, employee use, and student use. May the internet access be used only for specific school projects, for any educational and professional development purposes, for reasonable "self-discovery" activities, for purely personal correspondence, or for games? May teachers or students offer to sell or purchase goods or services over the internet? Are political lobbying activities permitted (provided that such activities are restricted in a manner consistent with constitutional free speech protections as well as state law restrictions on political activities of public employees)?

(2) **Technical services.** Define what services are available. These may or may not include the web,
e-mail, newsgroups, internet chat rooms, file transfers, blogging, and social network sites.

(3) **Degree of supervision.** If the school permits students to maintain individual e-mail addresses, will each user's e-mail be subject to inspection? Are students or teachers permitted to have password-protected personal files? Will students or faculty have remote access to the school's system from their home computers? What kind of filtering software does the district use? What is accessible and what is blocked? Who has authority to override the block, to access innocuous resources that may be inadvertently blocked? Will the school impose discipline for off-campus postings? What will be the punishment and what is the standard?

(4) **System security issues.** What safeguards are necessary to avoid computer viruses, account security, and excessive individual use of system resources? Are reasonable precautions taken to curtail using school facilities for computer crimes or unlawful invasion of other systems?

(5) **Disciplinary Policies.** What are the consequences for abusing internet privileges? This is needed for reasons related to school district and instructor liability, as well as educational values. An educational institution that disciplines students who violate written school policies governing internet abuse is less likely to be held responsible for the actions of such students.

Institutions that offer school-sponsored internet access (especially where students are provided with individual accounts) may require both students and parents to sign an internet use agreement. Some schools have required "sponsoring teachers" to sign agreements affirming that they will supervise a student's internet use. However, such sponsorships should be addressed in
collective bargaining, because they potentially expose the teacher to vicarious liability for student misuse of the internet.

Many employers write AUPs to cover both students and employees. These should be carefully scrutinized. Many provisions written for students either cannot, or should not, apply to school employees. Often, rules written for employees are unnecessarily harsh. Of particular concern are provisions which invade employee privacy, shift liability exposure onto the employee's shoulders, restrict the employees' intellectual property rights, or restrict free speech or information access of employees. Whenever an employee is required to sign an agreement related to internet policies, the local Association representative should be consulted to determine if bargaining issues are involved.

**RESOURCE TIP:** A detailed discussion of these and other AUP issues and examples of school board internet policies may be found at websites noted in Appendix A.

2. **Cyber-bullying and Cyber-threats by Students Outside of School**

When students misuse technology at school, a teacher should look to the school’s AUPs for guidance. Student’s use of technology outside of school that disturbs the educational process is more problematic. Two types of harassment are of particular concern: (1) students posting messages or creating fake online social networking profiles for teachers or school administrators and (2) students bullying other students using the internet. The Oregon cyber-bullying statute only covers harassment that occurs on school property or at a school event, and most school policies are inadequate to address these problems.

Because students possess rights of free speech and expression, it is difficult to discipline a student for his or her off-campus internet postings about a school official or teacher. Generally, in order for a school to take action, the student must
have fair notice that his or her conduct outside school could subject the student to discipline, and the expression must cause a foreseeable risk of “material and substantial” disruption of the work or discipline in the school. In determining whether the expression may cause substantial disruption, the court will consider the age and maturity of the student audience. However, the “material and substantial” threshold is very high. Generally speaking, the offensive speech must be threatening, violent, or defamatory to lose its First Amendment protection. The recognized exceptions are:

(1) True threats where the student means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.

(2) Fighting words, which are words that by their very utterance inflict injury or which incite immediate breach of the peace.

(3) Speech designed to incite immediate lawless action or likely to produce such action.

(4) Offers to engage in illegal actions. A common example for students is drug use.

(5) Obscenity, which is defined using a three-part test: (a) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

(6) Child pornography. This includes a sexual or pornographic display of any child under the age of 18.

Although teachers are not insurers of student safety from unforeseeable harm from third persons, teachers are expected to
take reasonable steps to protect the safety and statutory rights of students. If a teacher knows about student bullying, but does nothing to help protect the victimized student, the teacher could potentially be held liable. However, it is difficult to identify the line between free speech and bullying. Generally, bullying is a combination of speech and actions that is likely to impede the targeted student’s academic performance.

Teachers or school administrators can theoretically be held liable for not interfering with harassing behavior that affects a student’s ability to learn. No cases involving cyber-bullying have been reported, but other cases provide some guidance. In general, civil liability may be based on “deliberate indifference” by the teacher to a threat or harassment. Deliberate indifference constitutes: (1) actual knowledge of the harassment, (2) a reasonable belief that it posed a serious risk to the student, (3) the teacher or administrator failed to take readily available measures to address the risk or took measures knowing they would be ineffective to protect the student and (4) there was no excuse or justification of acting or failing to act.

3. Liability of School Employees for "Techno-torts"

Although the law governing technology-related tort claims (i.e., claims for injury or damages) is still evolving, individual damage claims against school employees based on abuse of these resources will be regulated by well-established principles governing liability between employer and employee. Generally speaking, an employer is responsible for the acts of any agents done in the "course and scope" of employment. By statute, whenever a claim is brought against a public employee, the employer has an obligation to investigate and make its own determination whether the act complained of occurred in the course and scope of employment. Generally speaking, this determination will depend on (1) whether the employee was motivated by a desire to perform his or her duties, or further a goal of the employer; (2) whether the employer actually derived benefit
from the employee's activities; (3) whether the employee derived, or sought to derive, financial benefit or personal gratification from the action; (4) whether the employee acted contrary to the employer's instructions, or simply failed to act as the employer desired; (5) whether the employee's conduct grossly deviated from accepted practice; and (6) whether the conduct complained of occurred on the employer's premises or during regularly scheduled hours of work.

If a public employer determines that the activity occurred during the course and scope of employment, then the employer may substitute itself for the employee as the defendant, and (depending on the nature of the claim) may release the employee from the suit. Whether or not the employee remains a party, the employer must agree to defend and indemnify the employee (i.e., pay any resulting damages that are awarded).

A thorough discussion of the consequences and implications of employer-employee agency and indemnification principles is beyond the scope of this manual. Any school employees confronted with claims related to their employment should promptly contact their association representative.

CHAPTER 5

TECHNOLOGY IMPACTS ON PRIVACY AND INFORMATION ACCESS

1. Student Records

Student records, or "education records," are those which directly relate to an individual student and are maintained by a school district, school, or employee. The disclosure of student records means permitting access to, releasing, transferring, or otherwise communicating any personally identifiable information

6 OAR 581-21-220(6)(a).
in those records.\textsuperscript{7} "Personally identifiable information" encompasses such mundane details as the student's name, the name of the student's parents, the student's address, and other personal characteristics,\textsuperscript{8} as well as private information such as medical information, IEP's, student discipline, etc. Because the definition is so broad, it likely covers videos or other electronic recordings of classroom activities made for evaluative or educational purposes.

With a few minor exceptions, personally identifiable information from student records may \textit{not} be disclosed to any third parties without the written consent of the student's parent.\textsuperscript{9} Federal laws concerning the disclosure of student records are similar to the state laws.\textsuperscript{10} \textit{Violations of these rules are potential grounds for discipline, dismissal, and revocation of your teaching license.}

Schools may disclose, without consent, "directory" information such as a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. However, schools must tell parents and eligible students about directory information and allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information about the student.\textsuperscript{11}

The definition of student records is alarmingly broad. Class pictures, classroom videos, signed art projects, and many other seemingly innocuous items are technically "student records" within the meaning of state law. Displaying pictures, classroom videos, art projects, and other such "records" without permission of the student or parents could be a violation of state law.

When student records are kept in a central computer with internet access, the school has an obligation to take reasonable

\textsuperscript{7} OAR 581-21-220(3).
\textsuperscript{8} OAR 581-21-220(12).
\textsuperscript{9} ORS 326.565; OAR 581-21-330(1).
\textsuperscript{10} See 20 U.S.C. § 1232(g).
\textsuperscript{11} 20 U.S.C. §1232g(a)(5).
precautions to prevent unauthorized access to those records. Even unintentional dissemination of confidential student records may render the school liable for invasion of privacy, defamation, or other torts. Maintenance of a grossly inadequate security system may be considered reckless, subjecting the institution and educators to statutory liability for reckless disclosure of education records.\(^{12}\)

If defamatory statements or embarrassing private information is contained in a student's electronic records, then the student has a potential claim for defamation or invasion of privacy if that information is communicated to any third party. The communication need not be intentional; it is sufficient that communication to a third person was likely. Therefore, an inadequate security system exposes any educator using computers to maintain student information to serious potential liability.

2. **Personnel Records**

School employee personnel records are not as tightly protected as student records. For example, the public has the right to disclosure of names and addresses of public school employees unless an individualized showing is made that the disclosure would constitute an unreasonable invasion of privacy. However, public records law does not require disclosure of evaluations, reprimands, and other sensitive information to an unauthorized person.\(^ {13}\) Many

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\(^{12}\) ORS 30.864(1) provides:

"Any person claiming to be aggrieved by the reckless disclosure of personally identifiable information from a student's education records as prohibited by rules of the State Board of Education . . . may file a civil action in circuit court for equitable relief or . . . for damages, or both."

\(^{13}\) ORS 342.850(8) states:

The personnel file shall be open for inspection by the teacher, the teacher's designees and the district school board and its designees. District school boards shall adopt rules governing access to personnel
collective bargaining agreements and school board policies restrict access to personnel records.

Obviously, personnel records kept on a central computer with an inadequate security system invites unauthorized disclosure of private information. As in the case of student records, a breach of such security can provide the basis for a claim for defamation or invasion of privacy against the school district. Moreover, the absence of proper safeguards may violate the personnel records provision of collective bargaining agreements, and is therefore subject to remedy through the grievance process.

Any computerized records which are neither personnel records under Oregon law nor records of a private nature are subject to disclosure under the public records law. An educator's e-mail is not considered a personnel record, so it is subject to public disclosure, unless its contents place it within one of the other exemptions to the public records law (such as the student records or "invasion of privacy" exemptions). See ORS 192.502(2). As a rule of thumb, e-mail is less protected than regular mail.

3. School Website Information

Thousands of businesses, groups, associations, and educational facilities create websites as a forum for the dissemination of information. Many school websites contain copious information about the school, its programs, and its students; often the school newspaper is available online. Such pages often contain "hyperlinks" to a news group or e-mail, which provides the opportunity for third parties to post information, and to otherwise communicate with students and parents. Teachers use password-protected links on the school websites to post assignments and grades.

files, including rules specifying whom school officials may designate to inspect personnel files.
Unlike the school newspaper, the contents of a website are not constricted by space concerns. Consequently, there is a natural tendency to be more expansive in the use of this medium as a forum for dissemination of information. As a rule of thumb, information that could be printed in school newspapers, announcements, and publications may safely be included in the school website. However, educators should be especially cautious that the website does not contain any student records or defamatory statements.

If a website link allows third persons to post information to it, some vigilance is appropriate. Students are often slow to develop a good understanding of what practices are illicit. Criminal charges may be brought against website operators who permit the posting of illicit credit card numbers. Website owners can be held responsible for copyright infringement when third parties upload copyrighted materials without authorization (a copyright infringer's "innocence" will mitigate damages, but will not avoid liability).

Any interactive webpage that allows third parties to post content could be considered Online Service Providers (OSP). Under the Digital Millennium Copyright Act, an OSP can limit liability by developing, implementing, and publicizing a protocol for removing copyrighted information and terminating access to repeat copyright offenders. Just as a newspaper vendor is not responsible for libel appearing in a publication it sells, a provider of information services is not responsible for defamatory material posted by third parties; however, unlike the news vendor, the information service provider has an obligation to remove defamatory and illicit material once notified of it.

One way to avoid these perils is to have a "moderated" forum link. This means that third parties seeking to post material

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14 17 U.S.C. 512(a)
must first submit the posting to a teacher-moderator, who exercises discretion in determining whether to allow it. Any educator who is responsible for supervision or monitoring of such an internet site should require development of written guidelines, and should seek thorough training in these issues, as well as free speech issues that may arise. It is essential that the school district be involved in developing guidelines and policies. Your Association representative may be able to direct you to further resources on these topics.

4. **Links to Student Organizations**

If student extracurricular organization information is linked to a public secondary school's website, and if school "premises" include cyberspace, then the Equal Access Act, 20 U.S.C. § 4071, may apply. This Act requires that public secondary schools which provide their students with a "limited open forum" may not discriminate among student groups based on religious, political, philosophical or other content of speech in such forums. A "limited open forum" is created when a school gives student groups an opportunity to "meet on school premises" during non-instructional time.

5. **Employee Personal Use of School-Owned Computers**

Where schools provide computers for employee use, it is inevitable that some employees will use them for personal functions, ranging from personal correspondence to maintenance of personal records or photographs. Where such personal use does not interfere with legitimate school needs, there should be no difficulty. However, the district has the ultimate right to restrict the use of its resources as it wishes; always consult the district's policy to determine whether a personal use of computers or other equipment is authorized. Violations of those policies are grounds for discipline.

Regardless of the district policy, the educator should
always consider how private the information is, because the employee may have little or no ability to restrict third-party access to such information. Even though some courts have held that public employees have a reasonable expectation of privacy in their desks and personal effects, courts have generally subordinated those expectations to any legitimate interest of an employer. If the employer can claim a greater interest in the contents of a networked computer than the contents of a teacher's desk drawer, the teacher may expect little or no privacy for personal records, e-mail, or other data stored on school-owned computer equipment. A prudent school employee should never leave anything stored on a school computer that he or she does not wish the employer to see. The only reliable source of privacy rights in an employee's private data is through a clear union contract provision that grants such a right.

Although the employer may access private employee data stored on school computers almost at whim, police agencies do not have the right to review such files unless the employee consents. The district probably does not have the right to consent on behalf of its employees; but since the district may lawfully obtain the information, and then turn it over to the police, the law of search and seizure offers no reliable protection from police scrutiny of a teacher's private computerized information stored on school equipment.

Like most records stored on a computer, e-mail communications are similarly unprotected. While the use of an electronic device to eavesdrop on a third-party conversation (commonly known as “wiretapping”) violates both state and federal law,\(^\text{15}\) the federal wiretapping protections only apply if the e-mail was intercepted during the moment of transmission.\(^\text{16}\) Courts have found the protections of the wiretapping statutes do

\(^{15}\) 18 U.S.C. § 2701(c)(2); ORS 165.540.

\(^{16}\) Konop v. Hawaiian Airlines, Inc, 302 F.3d 868, 878 (9th Cir. 2002); there is no ruling on whether non-consensual interception of stored emails would violate the Oregon statute.
not apply when a third party reads an e-mail that has been electronically stored.\textsuperscript{17} As a result, an employer’s access to an employee’s e-mail communications will likely occur through a legal search of an employer’s electronic storage system under the Stored Communications Act (SCA). Educators must therefore assume that e-mails sent on school equipment or through the school’s internet are accessible to the employer.

If school policies permit personal use of school-owned computers, employees may have a reasonable expectation of privacy in web-based, password protected e-mail communication. However, if the school provides the actual email account, the SCA protections do not apply and the employer can access the account.

Despite the potential liability, employer recording of employee internet communications is remarkably widespread. Such recording is typically un-detectible and unknown to the employee. Unless privacy rights for school employees are expressly granted, prudence dictates that educators assume all of their e-mail communications and internet site visits are recorded and monitored. Educators who engage in internet activity which their employer may deem offensive, abusive, unlawful, or dangerous, run the risk of discipline, dismissal, and license revocation actions, depending on the nature of the alleged abuse of school resources.

\textbf{CHAPTER 6}

\textbf{SOCIAL MEDIA}

\textbf{1. Social Networking and Blogging: What Can Teachers Say?}

Social networking and social media have exploded in the past decade, creating a highly connected and interactive community forum. This new forum expands the speed and depth

\textsuperscript{17} Id.
in which individuals can connect with one another. On the positive side, social networking helps people reconnect, exchange ideas, build and expand their business, and disseminate information. On the negative, social networking exposes a vast amount of formerly private information to the public, which generates a host of perils, especially for traditional role models such as educators. Examples of social networking sites include Facebook, MySpace, LinkedIn, personal blogs, website forums, and listservs.

The standards for acceptable use of social networking sites for teachers are in flux. In general, a teacher’s internet posting will not be protected by the First Amendment right to freedom of speech unless the teacher is speaking as a private citizen on a matter of public concern. Speech that is a “public concern” relates to matters of political, social, or other concerns to the community. Even if a teacher speaks as a matter of public concern, the interests of the school district may nonetheless trump his or her constitutional rights. An example of a teacher speaking on a matter of public concern would be a posting regarding support of a certain political party or social program, or a political poem. Examples of matters that are purely of private concern are videos posted for entertainment value, photos, criticism of colleagues, supervisors or students, and supporting non-political groups.

In general, if a teacher posts something online that reflects poorly on the teacher as a role model or could be disruptive to the classroom or the school, the teacher does not have any constitutional protection for that “speech.” Teachers have been disciplined for online activities such as: an inappropriate online conversation with a student where the teacher communicated with the student “as a peer” and not as supervisor; a teacher posting picture of herself with an alcoholic beverage and a caption reading “drunken pirate”; a teacher posting critical comments about another teacher; and a teacher maintaining a website that contained “adult art.” Indeed, teachers can even be disciplined for online activity that they themselves did not post, if the posting reflects negatively on their ability to conduct themselves professionally in
the classroom, or their ability to maintain the respect of their students.

Teachers may garner more protection from the collective bargaining agreements and school policies. If the collective bargaining agreement requires “just cause” for discipline, the school district must prove that the teacher’s off-duty posting materially and adversely affected his or her ability to teach or perform the function of the job. Additionally, the agreement may contain language specific to off-duty speech unconnected to employment duties.  

Of course, in today’s culture it is unreasonable to expect teachers to refrain entirely from using social media sites. However, because teachers serve as role models for their students, they will be held to a higher standard of conduct than might apply to other public employees in communicating on personal matters. Understanding that employers can use the content of a personal website in disciplinary proceedings, a teacher should carefully consider what he or she posts online, and who has access. If a teacher does maintain a website, the teacher should consider strict privacy preferences and maintain online distance from students.

2. Employer Access to Social Networking Sites

School districts and teachers may access all publicly-posted information on social networking sites and evaluate the information in making hiring and firing decisions. However, social networking sites fall under the purview of the Stored Communications Act, which prohibits accessing a private website without authorization or to exceed authorization. This means that employers cannot use covert means to gain access to private internet sites for such purposes as monitoring employees or checking references for potential employees. For example, a

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18 Model contract language concerning off-duty private conduct may be found in Appendix B.
school may not coerce a third party into disclosing his or her login
information to access a private social networking page. Even
permission from a person with full access to the website to use his
or her website may not exonerate the employer from accessing a
private employee webpage.

Furthermore, employers risk violations of the Fair Credit
Reporting Act if they use a third party to screen blogs and social
networking sites. It also appears that teachers and schools may not
request private password or access information from students for
the purpose of monitoring their websites. Finally, it is still
unsettled whether employers may legally access an employee’s
password-protected social networking site if the employee
accessed the site from a work computer.

3. “Friending” Students

Unless school policies prohibit social networking with
students, teachers can decide whether or not to “friend” or connect
with students online through social networking sites. Engaging in
online contact with students can be beneficial in terms of
disseminating information and connecting with students on a
personal level, but it is fraught with legal and school policy
landmines. Teachers should consider the following pitfalls of
friending students.

**Mandatory child abuse reporting laws.** Social
networking sites can provide an uncomfortable intimacy
with students regarding the student’s home and private life. Children and teens are less likely to exercise restraint in the
information they choose to post online. This combination
can often result in teacher who friends a student procuring
substantial information regarding the student’s home life.

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20 Konop v. Hawaiian Airlines, Inc. 302 F. 3d, 868, 879-881 (9th Cir. 2002)
Teachers are mandatory child abuse and neglect reporters; this is a 24-hour commitment. By law, mandatory reporters must report suspected abuse or neglect of a child regardless of whether or not the knowledge of the abuse was gained in the reporter’s official capacity. Failure to report can result in both criminal and civil liability.

*EXAMPLE:* A teacher visiting a student’s home page sees that the underage student has posted pictures, or status updates, relating to sexual relationships with partners over 18 years of age that could qualify as statutory rape, or evidence of sexual abuse or child neglect in the home. As a mandatory reporter, the teacher must report the information to the local child protective services office.

**Your Friends.** Friending students on sites such as Facebook may provide the student with access to the teacher’s friends’ profiles. Although the teacher may have strict privacy preferences on his or her account, the friends may not. In these circumstances, the students can gain access to photos, videos, posting, and other information the teacher may want to keep private, and could lead to disciplinary issues if the posting reflect on the teacher’s professionalism.

**Potential Liability for Cyber-bullying.** Although the threshold for imposing liability on educators for not preventing online bullying is high, a teacher increases the risk of liability for deliberate indifference if the teacher is friends with the students online and may view the bullying as it transpires.

**Flirting and Inappropriate Behavior.** Teachers need to maintain a professional relationship with students, and the online atmosphere, especially in social networking sites, often renders teachers susceptible to allegations of inappropriate contact and conduct with students.
4. **Practical Tips: Social Networking Recommendations For Teachers**

**Friends:** Only accept friend requests from people you know. If you maintain a purely personal social networking site, refrain from “friending” students or accepting “friend requests” from students.

Be aware that some social networking sites, such as Facebook and MySpace, have minimum legal age. If you are teaching students 13 or under, check the applicable policies before interacting with students online because you may be required to obtain parental consent.

**Privacy Preferences:** When creating online profiles consider the following: (1) not listing your profile as “public,” (2) creating a profile strictly for academic use, (3) employing “filters” that restrict who can access your personal information, or (4) if you do allow students and colleagues to become friends, consider creating “groups” on such sites as Facebook that allow you to control what information each “group” can access. Also, be aware that sites such as Facebook often change their privacy policies. Currently, unless a user opts out, information posted on Facebook will be available through search engines. Until recently, information such as location, pages the Facebook user likes, and lists of friends was available. To ensure only a limited group has access to your profile, each user must manually change the privacy settings.

**Monitor:** If visitors can post on your website, monitor your postings constantly and remove those that are inappropriate. Remember, what a “friend” posts on your page can reflect on your professional status.
**Be Careful What You Post**: Do not blog or post about your job duties, colleagues, supervisors, or students. This will reduce the danger that you may disclose confidential information, share information about a private workplace complaint, or otherwise unintentionally engage in speech that could affect your future employment.

Posting information about students, the school, and colleagues may be against your school’s internet policy and could lead to discipline. Postings about students could potentially violate the Family Educational Rights and Privacy Act (FERPA). Furthermore, to qualify for CIPA federal funding, schools must have a policy regarding unauthorized disclosure of personal information regarding minors. Check this policy before posting anything about students, no matter how discrete or indirect.

Teachers should exercise extreme caution when posting photos of students. If a teacher decides to post photos of students, the teacher should obtain parental consent to (1) have the student photographed and (2) have that photo posted online.

Anything posted online is permanent and can be accessible to the entire world. Refrain from comments that could be inflammatory. Exercise caution with regards to exaggeration, colorful language, or derogatory remarks or characterizations.

5. **Cell Phones and “Sexting”**

Explicit sexual expression among adolescents is hardly new; but the recording of those expressions in “sext” messages, and the transmission of sexual images of underage students, creates some difficult problems for educators and schools, especially in light of student constitutional rights and statutory rights under the
Stored Communication Act, and conflicting laws and policies concerning child pornography.

Educators often learn about sexting through school rumors, and school administrators must determine whether to search the student’s phone. This is almost always a decision that should be made at the administration level, not by the teacher or other school employee. Typically, it will require the student’s or parents’ consent, preferably in writing. Without such consent, school officials risk violating the Fourth Amendment and the federal SCA.

When a teacher discovers sexting, the teacher should take the following actions:

- Contact the student’s parents immediately
- Report the incident to the school administration and law enforcement
- Report the sexting as suspected abuse or neglect
- Do not have the student forward or send the information directly to the teacher; in this way, the teacher and school administration are shielded from child pornography liability. Generally, teachers should not store the image as evidence.
- Consult the school policies violations (i.e., cell phone use, bullying and harassment)

Anti-sexting policies should be clearly explained to teachers, students, and parents. Such policies should address the following issues:

(1) Possession of sexually explicit digital pictures on any device is prohibited, regardless of whether a child pornography law is implicated
(2) Who will be disciplined? Anyone in possession of the images? Anyone who viewed the images? Or will there be
exceptions for those who view the image inadvertently and then immediately delete them?

(3) The policy should make students and parents aware that the police will be contacted and sexting may be reported as suspected child abuse or neglect

(4) The policy should explain the consequences for engaging in sexting and how sexting can relate to harassment and bullying.

The application of age-old legal principles to the emerging realm of technological innovation has generated much heat and a little light. Lawmakers in the past decade have attempted to address some of the most troublesome questions, but in such a rapidly evolving area, new solutions will always lag behind the new problems. Laws governing privacy, intellectual property, employee records, telecommunications, crimes, etc., are certain to evolve quickly in the coming years. Your education Association will continue to monitor these developments and create strategies to address them.

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APPENDIX A -- RESOURCE MATERIALS

INTELLECTUAL PROPERTY RIGHTS FOR EDUCATORS:


ON-LINE RESOURCES:
CYBERSPACE AND TECHNOLOGY LAW

*General Legal Research*

Find law
http://www.findlaw.com
General legal research on any topic, using internet sites and resources.

*General Cyberspace Law Resources*

Rights and Laws of the Internet
http://www.epiphanyssolutions.co.uk/article-index/rights-and-laws-of-the-internet/

Center for Democracy and Technology @
http://www.cdt.org/

*Legislative Documents and Sources*

CDA in the Supreme Court - from the Electronic Privacy Information Center
http://www.epic.org/cda/
Cases and analysis of the Communications Decency Act
Telecommunications Act of 1996 [fcc.gov]
http://www.fcc.gov/telecom.html
Especially good for source documents and legal conferences.

Children’s Internet Protection Act
http://www.fcc.gov/cgb/consumerfacts/cipa.html
Federal Communication Commission

Stored Communications Act

Family Educational Rights and Privacy Act (FERPA)
http://www2.ed.gov/print/policy/gen/guid/fpco/ferpa/students.html

Classroom Copying Fair Use Guidelines
http://www.utsystem.edu/ogc/intellectualproperty/clasguid.htm
http://www.halldavidson.net/chartshort.html
http://www.aaup.org/AAUP/issues/DE/
AAUP Resources and Model Contract Language
Reproduction of copyrighted works by educators

Software Copyright Guidelines
http://www.webster.edu/technology/copyright/

Internet Acceptable Use Policies
Center for Safe and Responsible Internet Use
http://csriu.org/
APPENDIX B:

MODEL CONTRACT LANGUAGE FOR BARGAINING OR EMPLOYMENT AGREEMENTS

Following is a proposal which would seek to retain ownership of all copyrights or patent rights for the employee, to avoid the "work for hire" exception to intellectual property principles. This should be considered a mandatory subject of bargaining.

Copyrights and Intellectual Property

The parties recognize that employees retain authorship or patent interests in all works created outside the scope of employment. In addition, the parties wish to encourage increased creativity and productivity of employees in producing materials for the classroom or for the benefit and use of the Employer. The Employer hereby agrees to waive and relinquish to the employee any copyright or patent interests for works created by individual employees using Employer-provided equipment or created in the course of their employment. However, the employee must allow the Employer an unlimited license for the use of such materials or inventions in Employer classrooms and on
Employer premises without any charge or fee.

Following is a proposal recommended by the Association designed to protect educators from discipline for their own expression, not directed at students, in an off-duty setting:

**Off-Duty Conduct**

The personal, religious or political life of an employee is not a matter of appropriate concern or attention of the Board. The personal life of a unit member is not an appropriate concern of the Employer for purposes of evaluation or disciplinary action unless it prevents the unit member from performing his or her duties. A unit member shall be entitled to full rights of citizenship, and no religious, political or personal activities, or lack thereof, of any unit member shall be used for purposes of evaluation, transfer, disciplinary or dismissal action.