Higher education finds itself in an exciting and often turbulent period of technological transformation. At the fore of the technological explosion is online distance education: teaching and learning via the Internet. The new virtual classroom—a digital version of the familiar traditional classroom—is having a genuine effect on faculty work in more ways than the obvious revision of teaching methods and adaptation to computer-mediated learning. The traditional roles of faculty member and student are being reshaped and altered in fundamental ways as a result of changes in how, when, and where people learn.

There exists on most campuses today a growing recognition of policy issues surrounding distance education and online learning. This awareness is reflected in the Statement on Distance Education released by the American Association of University Professors (AAUP) in 1999. It noted that "distance education...presents administrative, technical, and legal problems usually not encountered in traditional classroom settings," and "the teacher's academic and legal rights may not be fully or accurately understood or may be in dispute in this new environment" (1999b, 1).

However, despite the awareness of the changes underway, much of the law and policy needed for sound practice of distance education has been left unattended or, worse, unevenly and unfairly applied to the emerging world...
of college online learning (Tiwg 2000). In today’s complex
higher education environment, where information technology
is reshaping the nature of faculty work and is viewed as
the source of productivity gains, it is increasingly important
to sort these types of issues out. Only limited literature
exploring these issues exists. Gellman-Danley and
Fetzer’s (1997) “seven operational areas” for developing
cohesive policy for distance education includes information
about governance, ownership, and copyright, as does

We explore in this article three key issues emerging from
a myriad of questions concerning distance education law
and policy. First, we discuss the role of shared governance
in distance education policy formulation. The control of
distance education courses and their content is a concern
for faculty members, campus leaders, policy makers, and
planners. Second, we review the ownership and control
of online courses. Berge (1998) identified the ownership
question as the most frequently cited concern of faculty
when asked about distance education and online course
policies. These concerns, mostly reconciled in the courts
for application in the traditional brick-and-mortar classroom,
remain largely unresolved for the virtual classroom. Finally,
we explore the educational use of copyrighted material on
the Internet. Legal issues involving the subtleties of copyright
law, as well as seeming contradictions between the concept
of educational fair use and language in the Technology,
Education, and Copyright Harmonization (TEACH) Act of
2002, are reviewed. The discussion of these three issues
is based on an e-mail survey conducted in 2002 of more
than 180 faculty and administrators representing 60 U.S.
colleges and universities. We conclude with a discussion of
the lessons learned from this research that will be helpful
to planners.

A Study of Distance Education Policies

Our goal here is to give the campus administrator, policy
planner, or faculty leader an overview of the current state
of distance education policy at colleges and universities.
We asked, via e-mail survey, 180 faculty and administrators
for their feedback about the three issues discussed in the
previous section: shared governance in distance education,
ownership and control of online courses, and educational
use of copyrighted material. Additionally, we looked at
existing distance education policies, many of which were
available at college or university Web sites, for evidence of
language addressing issues of ownership, copyright, and
governance. Follow-up phone calls and qualitative responses
were used to better understand the nature and type of
governance used in drafting and approving distance education
policy. Survey participants were very cooperative and
forthcoming with information about their own school’s
policies or the absence thereof. Administrators and faculty
representing 43 institutions offering online distance courses
responded to our survey.

Sample institutions were selected at random from a
population of more than 2,500 public and private colleges

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**Figure 1** Online Distance Education Courses

<table>
<thead>
<tr>
<th>Does your institution offer online education courses?</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Original random sample)</td>
</tr>
<tr>
<td>---</td>
</tr>
<tr>
<td><strong>Carneige Classification</strong></td>
</tr>
<tr>
<td>Doctoral/Research Universities — Extensive</td>
</tr>
<tr>
<td>Yes: 6</td>
</tr>
<tr>
<td>No: 0</td>
</tr>
<tr>
<td>Totals: 6</td>
</tr>
<tr>
<td>Doctoral/Research Universities — Intensive</td>
</tr>
<tr>
<td>Yes: 1</td>
</tr>
<tr>
<td>No: 0</td>
</tr>
<tr>
<td>Totals: 1</td>
</tr>
<tr>
<td><strong>Subtotal for Group 1</strong></td>
</tr>
<tr>
<td>Yes: 7</td>
</tr>
<tr>
<td>No: 0</td>
</tr>
<tr>
<td>Totals: 7</td>
</tr>
<tr>
<td>Master’s Colleges and Universities I and II</td>
</tr>
<tr>
<td>Yes: 11</td>
</tr>
<tr>
<td>No: 5</td>
</tr>
<tr>
<td>Totals: 16</td>
</tr>
<tr>
<td>Baccalaureate Colleges</td>
</tr>
<tr>
<td>Yes: 1</td>
</tr>
<tr>
<td>No: 14</td>
</tr>
<tr>
<td>Totals: 15</td>
</tr>
<tr>
<td><strong>Subtotal for Group II</strong></td>
</tr>
<tr>
<td>Yes: 12</td>
</tr>
<tr>
<td>No: 19</td>
</tr>
<tr>
<td>Totals: 31</td>
</tr>
<tr>
<td>Associate’s Colleges</td>
</tr>
<tr>
<td>Yes: 16</td>
</tr>
<tr>
<td>No: 6</td>
</tr>
<tr>
<td>Totals: 22</td>
</tr>
<tr>
<td><strong>Subtotal for Group III</strong></td>
</tr>
<tr>
<td>Yes: 35</td>
</tr>
<tr>
<td>No: 25</td>
</tr>
<tr>
<td>Totals: 60</td>
</tr>
<tr>
<td>(58.3%)</td>
</tr>
<tr>
<td>(41.7%)</td>
</tr>
</tbody>
</table>

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March-May 2004
Distance Education and Digital Intellectual Property Issues

Pressures on Faculty and Shared Governance

The movement by colleges and universities to organize around information technology and deliver education via the Internet has implications for the future of the faculty-institutional relationship (Burbules and Callister 2000). Market forces in higher education, including the re-emergence of the for-profits and student demand for distance education, may give college administrators additional incentive to secure a position in ownership and control of faculty-produced digital intellectual property. They likely regard online courses as offering the promise of long-term institutional cost savings because "once a distance course exists...it costs little more to deliver it to hundreds of students" (Chambers 1998, 88). In this section, we attempt to familiarize the reader with governance issues surrounding distance education policy. In addition, we include survey results about how policy was crafted at sample institutions.

Simonson (2002) describes a situation where professors at a Midwestern public university "were required to sign a policy statement dealing with intellectual property and the development of online courses" (p. v). Online courses at this school were considered works for hire—products produced specifically and contractually for an employer and thus property of the employer—according to the policy. Failure to sign the statement would signal "that the professor was intending to resign his or her position" (p. v). With respect to shared governance principles, this is an extreme example of policy crafted with little or no faculty input. Also consider, for example, the increasingly commonplace scenario in which a new faculty prospect is offered a two- or three-year, non-tenure-track contract that contains language defining ownership of some or all of his or her academic work, including online courses, as works for hire. Certainly prospective faculty are free to refuse an offer or take issue with contractual language, but is it not possible that a chilling effect can emerge, with distance education becoming part of a new governance equation?

Shared governance principles normally also grant the responsibility for initiating academic programs and new courses to the academic department and faculty. What about decisions affiliated with a distance program and course development, such as those involving how an online program is introduced or the purchase of a software platform (also known as courseware) for the delivery of online content to students? Today, more and more of these decisions are
made at the highest levels in administration, with little or no traditional faculty involvement. For example, in the case of "Virtual Temple" (Temple University's now defunct for-profit distance education venture), administrators sought little or no faculty input for the formulation of the business model or shaping of marketing strategy for Internet course offerings (Carr 1999). Similarly, San Diego State University faculty threatened a lawsuit because of a decision by administrators to cancel some very popular online courses. In this case, school officials were concerned with contractual issues of course ownership because an outside courseware company assisted faculty in the creation of courses (Carr 2001). Policy planners can easily see that this area is fraught with possibilities for unintended consequences and stakeholder dissatisfaction.

Although sample sizes are small and more research needs to be done in this area, our survey results provide some clues regarding a relationship between the amount of faculty involvement used in distance education policy formulation and the subsequent decision about who has ownership rights for distance education course content. As an illustration of this point about shared governance, one faculty respondent indicated that her college administration used very little faculty input in the formulation of such policy and, not surprisingly, the subsequent policy has strong language favoring institutional ownership of Internet courses. Figure 2 provides data regarding the governance structure used in the formulation of distance education policy.

One respondent characterized the status of his institution's online distance education policy in an e-mail response as follows:

We have had university level faculty/administrative committees that basically went nowhere. The existence of draft language has been alluded to in the academic [faculty] senate in recent years past, but I cannot recall language that has been circulated to the academic senate for discussion and response.

Interestingly, the vast majority of respondents were grouped into the "not applicable" category in figure 2 because they had indicated either that their school had no policy, they were unsure of the existence of policy, or they were unsure of the level of faculty involvement. For those schools that have a distance education policy, an effort led by the administration was the most frequent response.

Ownership of Distance Education Course Content

Although questions of ownership and intellectual property rights appear complex, the basic premise is simple: according to the Copyright Act of 1976, ownership initially resides with the author or authors of the work. The author is the person who actually translates an idea into a tangible expression and is thus entitled to copyright protection (Holmes and Levin 2000). Although the Copyright Act of 1976 is quite clear that a college or university cannot unilaterally transfer authorship from faculty without consent, it does not specifically address whether the institution has a legitimate claim as a coauthor, especially if the production

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**Figure 2 Level of Faculty Involvement in Distance Education**

<table>
<thead>
<tr>
<th>What level of faculty involvement was used in creating distance education policy at your school?</th>
<th>n (all groups)</th>
</tr>
</thead>
</table>
| None (administration or system created policy...no faculty input) | 2 (3%)
| Administration (or system) led the effort, with some faculty input | 12 (20%)
| Faculty led the effort, with some administration input | 8 (13%)
| 100% faculty-created policy | 3 (5%)
| Not applicable (there is no policy) or unsure | 35 (58%)
| **Total** | 60 |
of such work incorporates the use of institutional resources and personnel. AAUP's Statement on Copyright (1999a) points out that the "prevailing academic practice [has been] to treat the faculty member as the copyright owner of works," and that "this practice has been followed for the most part, regardless of the physical medium... whether on paper or in audiovisual or electronic form" (p. 1). Survey results, including relevant comments from respondents, are presented here to give the reader a perspective on how different schools view the ownership question.

Campus administrators argue that online course development is not the singular endeavor of a faculty member.

It is reasonable to assume faculty members will take a policy position that academic intellectual property should include both faculty authorship credit and faculty ownership of online academic and scholarly works. Academics may argue that works produced by faculty are an investment in the professor's vitae—the "profit-loss statement" for the academy (Lentour and Woolgar 1979). However, many college and university administrators will approach this issue from another viewpoint: they see distance education efforts as requiring significant commitment of institutional staff and other resources to create and maintain Internet courses. Campus administrators argue that, unlike traditional scholarly research and article publication, online course development is not the singular endeavor of a faculty member. Any such project probably requires the creative initiative and technical support of others at the college or university.

Which perspective on digital academic intellectual property and online course ownership drives policy development, the faculty-oriented perspective or the administration-oriented perspective? Does either position provide a good starting point for planners to use in initiating the creation of sound institutional policy? These "questions continue to fascinate, and none more so than this area (intellectual property on campus). Campuses are squarely in the center of this revolution" (Olivas 2000, 1).

Faculty members interested in incorporating the Internet in their pedagogy are becoming increasingly aware of their own school's policy, or missing policy, regarding ownership and control of online course content (Burk 1997). Administrators and faculty should be aware that distance education policies vary widely by institution and type. Generally, a policy continuum exists across higher education, with total faculty ownership or total institutional ownership presented as endpoints. Some institutions adopt rules favoring faculty rights to ownership and control of the online course content they create (University of Nevada, Las Vegas 2003), whereas other schools take a middle ground position—assigning joint ownership according to levels of individual and/or university contribution (University of North Texas 2000). Still others hold a view that distance education courses are the property of the institution, unless otherwise contractually noted in writing (Indiana University-Purdue University Indianapolis 2002).

Figure 3 shows a majority of survey respondents with distance education programs said their institution had no written policy addressing distance education and online courses. Although not statistically significant, there appears to be a relationship between institution size and type and the likelihood of there being a written distance education policy. Group I (doctoral/research) institutions are most likely to address issues of ownership and copyright for online courses in writing, whereas Group III (associate's) schools are least likely.

<table>
<thead>
<tr>
<th>Does your institution have a written policy addressing the &quot;ownership&quot; of distance education courses?</th>
<th>Yes</th>
<th>No</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total for Group I (Doctoral/Research)</td>
<td>7</td>
<td>5</td>
<td>12</td>
</tr>
<tr>
<td>Total for Group II (Master's/Baccalaureate)</td>
<td>9</td>
<td>10</td>
<td>19</td>
</tr>
<tr>
<td>Total for Group III (Associate's)</td>
<td>9</td>
<td>20</td>
<td>29</td>
</tr>
<tr>
<td>Totals</td>
<td>25 (42%)</td>
<td>35 (58%)</td>
<td>60</td>
</tr>
</tbody>
</table>
With respect to the question of ownership of online distance courses, survey results indicate that policies vary widely and no single policy is favored across higher education institutional groups. The most frequent response indicates institutions appear to favor policy that leans toward faculty ownership of distance education courses. A detailed inspection of the data reveals that most of the larger institutions tend to lean toward faculty ownership policy, whereas associate’s/two-year colleges (Group III) tend to favor institutional or works-for-hire ownership policy.

Some colleges and universities take a different policy approach: ownership of online course content is dependent on the level of technical support and institutional resources used in creating the course. This policy of using proportional measures of ownership can be a bit tricky as described by the following e-mail response from an administrator at a large public university:

Faculty own the copyrighted works unless they involve the use of unusual university resources or are commissioned. Most distance education courses would probably fall under commissioned. [Even] if the faculty member created online course material at their own initiative and with no unusual resources... the policy also "contains a conflict" of principle that would prevent a full-time faculty member from selling the course to another institution.

There was at least one case in which colleges within the same university had differing policies for ownership of online courses as characterized in this e-mail response (specific college names are withheld for confidentiality):

It is a COLLEGE policy, not a university-wide one. In fact...I know that our College of—has a different policy from the College of—. I would not develop online courses without full ownership of the course, which is why I chose to offer my courses through our College of— rather than the College of—or the College of—.

Does the concept of academic intellectual property extend to include academic works produced by faculty for use in their online courses, or is such work the property of the college or university acting as employer (McSherry 2001)? Case law and legal interpretations aside, the policy answer to this property-ownership question will likely vary from institution to institution.

Copyright and Fair Use

Although the survey portion of this study was conducted just prior to the TEACH Act being signed into law in November 2002, issues surrounding the fair use of copyrighted materials in the virtual classroom continue to linger. The goal of the U.S. Congress in passing this act was to clarify and update the Copyright Act of 1976 for use in the context of online learning and the widespread use and acceptance of the Internet in education. TEACH is intended to amend copyright law to permit faculty, under certain circumstances, to use copyrighted works in their online courses in much the same manner as in the traditional classroom setting (Carnevale 2003). One problem with TEACH is its stipulation that faculty use "reasonable efforts" to prevent the unlawful reproduction and dissemination of the copyrighted works used in the virtual classroom. However, "reasonable efforts" are not defined, thus making some faculty and administrators uncomfortable with the new law.

Gaps in current campus policy likely exist because many on campus are unaware that fair use tenets of the venerable Copyright Act of 1976—allowing for the noncommercial use of copyrighted material for educational purposes—do not wholly extend to distance education on the Internet (Carnevale 2002). Faculty who teach online need to obtain written permission to use almost any copyrighted material, including the posting of articles, photos, or videos (McDonald 2003). Moreover, congressional efforts to keep Mickey Mouse and other commercially lucrative icons out of the public domain by extending copyright protection for an additional 20 years sends a message to everyone about the future of copyright, including in the digital realm (Carnevale 2002). When copyright protection is extended for decades at a time, older materials that should move into the public domain remain unavailable for use without permission.

Another law to be considered, which perhaps gave schools a sense of immunity from copyright litigation, is the Digital Millennium Copyright Act (DMCA) of 1998, enacted by Congress to address a broad range of copyright concerns for the World Wide Web. DMCA primarily addresses the culpability of Internet service providers (ISPs),
including college and university computer servers that host academic Web sites, for the copyright infringements of their subscribers. Of course, on campus, the subscribers are student and faculty. Generally speaking, under provisions in DMCA, ISPs are not responsible for the deeds of subscribers as long as the material in question is removed in a timely manner (U.S. Congress 1999).

It is debatable whether or not DMCA actually protects academic institutions. The question centers around the nature of the relationship between the school as ISP and faculty member or student as subscriber, which is markedly different from a traditional commercial relationship, such as between America Online and a paying subscriber. Moreover, ambiguities between TEACH and DMCA have arisen. The concern here: DMCA states that if a print-only version of a copyrighted item exists, it should be used in lieu of the digital version (Foster 2003), whereas TEACH does not specifically advise instructors to use print-only versions as a first option.

Responses to the survey question about copyright reveal that a large majority (64 percent) of the faculty who teach via the Internet were unaware that fair use provisions for copyrighted materials used in education did not necessarily directly extend into the online classroom. One respondent avoids using copyrighted materials for any online courses and addressed the issue in this way:

My course materials consist almost exclusively of public domain materials, or materials that I have authored...because my Web sites are open Web sites, not restricted to students in the course. I have always tried to limit myself to public domain materials.

Another respondent, who was unaware of the online copyright issue, describes a common theme for several of the responses:

Our vice provost for faculty affairs has been preparing a list of legal tips for faculty members. This point [about fair use online] might be included there.

Harper (2000, 5) states that "not every educational use is a fair use. It is not that simple."

We hope further discussion and case law delineating the implications of TEACH, coupled with additional research in this area of technology and teaching, will help clarify as higher education goes forward.

Distance Education and Digital Intellectual Property Issues

Lessons Learned

Information provided thus far reveals some complexities and deficiencies associated with online distance education and digital intellectual property issues. What does this all mean for the college administrator or faculty leader charged with institutional planning and policy in this area? In this section, we suggest ideas to keep in mind while moving forward.

Absence of policy at many colleges and universities.

Our data suggests, for a majority of schools in the study, that both administrative planning and campus policy formulation have not kept pace with rapid advances in online teaching and learning. For those schools that do not currently have policies in place to guide their distance education programs, it is important to create policies soon. As Crews (2000, 15) notes, "the growth of distance education...has brought with it a rapid expansion of the potential for large-scale copyright infringement and the civil and criminal penalties that may be imposed on instructors, administrators, and the institutions themselves."

Of course, there exist shared governance procedures deeply embedded within colleges and universities that both regulate and impede rapid change. Light-speed technological changes (such as online teaching and learning) and the glacial pace of shared governance (used to ensure integrity and stability in higher education) appear to be frustrating polar opposites. It is not necessarily the role of a campus administrator or planner, such as a chief technology officer, to initiate policy discussion and debate in an area such as distance education. Issues such as these are normally allowed to percolate up through committee work and move forward toward the faculty senate, sometimes taking years.

If urgency exists, what can be done to expedite the development or updating of sorely needed policy for online distance education? Obviously, tackling the question of how to navigate the complexities of shared governance is beyond the scope of this article, but one suggestion may help: disconnect the copyright and fair use questions from the other policy issues, such as intellectual property, ownership, and control. In this way, the most pressing issues of copyright infringement, fair use, and the impact of TEACH can be brought to campus constituents immediately. Rolling out a solid informational campaign in these areas separately may actually act as the catalyst to initiate the larger debate and committee work.
Misunderstandings about fair use, TEACH, and copyright. A general lack of awareness about digital copyright issues revealed by our research is alarming but understandable. Even some college personnel normally considered campus experts in this area are looking for clarity. “I have to admit, I get pretty confused with what you can and can’t do,” says the library director from a large Midwestern university who is speaking about digital copyright issues (Carnevale 2003, A29). For those schools who have not done much in this area, we are recommending a campuswide information effort be used as a vehicle to get the word out about digital copyright infringement, fair use, and the impact of TEACH.

Disconnect the copyright and fair use questions from the other policy issues (i.e., ownership and control).

A campus copyright committee, including faculty leaders, campus administration, legal counsel, and library personnel, should be assembled to lead this effort. Some institutions have invited guest knowledge experts to campus and shed light on the do’s and don’ts of copyright for online distance education, including updates on the latest about TEACH and DMCA. These issues are a source of immediate concern for administrators who may wonder how many faculty and student Web sites currently residing on their own campus servers contain serious copyright infringements. Faculty, students, and staff must take special care to obtain written permission to use dramatic performances and commercially available creative works, such as motion pictures, plays, music videos, and songs. Both the Recording Industry Association of America and the Motion Picture Association of America are aggressive in policing this activity and, under provisions in TEACH, failure to obtain permission may result in a faculty member, student, or institution being liable for up to a $150,000 fine per incident.

Chilling effect on faculty? The choice many higher education institutions are facing in establishing intellectual property policies is to determine whether an online course is viewed simply as a technical utility or as scholarly aesthetic work (McSherry 2001). Fair use issues aside, this ownership question may signal an emerging conflict between faculty and administrators. “I’ve been here 25 years, and this has got to be one of the hottest topics I’ve ever seen. It’s pushed a lot of buttons with people,” remarked a professor who had a role in the creation and approval of the distance education policy at San Diego State University (Carnevale 2000, A49).

Although primarily an issue of intellectual property rights and control, it is possible that higher education faculty confronted with a policy stating that the institution “owns” their online works could feel a strong disincentive to create new courses. If one subscribes to the notion that faculty should have an unencumbered ability to teach what needs be taught in a manner complementary to today’s technologies, then such a disincentive has implications for an interesting new “digital age” twist to the subtleties of academic freedom. Because virtually no college or university would ever likely lay claim to a professor’s course notes for a traditional class, why should a digital version of the same course have different intellectual property implications? Perhaps this is too fine a point. However, campus policy makers should consider all of the implications and unintended consequences of any academic intellectual property policy that overtly favors institutional ownership and control of online courses and their content.

Our research hints at a campus cultural phenomenon: the mores present at the community college can perhaps better accommodate a works-for-hire philosophy for institutional control and ownership of Internet courses, while university faculty may not be as agreeable. No doubt some will argue that the idea of a chilling effect is overstated because of the limited commercial value of a scholar’s lecture notes. However, when presented in an online course, the commercial value of the scholar’s work may indeed increase. Ultimately, it appears there is tension between a works-for-hire policy and the conditions of academic production.

Future faculty legal strategies. There has been some recent discussion suggesting professors may actually be better served if they abandon the notion of copyright protection for their works and employ instead a privacy-celebrity legal strategy (McSherry 2001), whereby they assert that their online lessons and lectures are part of their public persona. In this way, distance education instructors may attempt to protect a digital version of intellectual property rights through defense of their own property rights and, thus, the works-for-hire issue is moot. AAUP’s Statement on Copyright (1999) contains language supporting certain tenets of the privacy-celebrity legal strategy because (much like the artist or musician)
"the faculty member rather than the institution determines the subject matter, the intellectual approach and direction, and the conclusions" (p.1). Perhaps this strategy will go nowhere, but it is useful for planners to consider all the ramifications of intellectual property policy. Columbia University's Arthur Levine put it best when he called this "the Hollywoodization of academia...I'm waiting for the first academic agent" (Carnevale and Young 1999, A45).

Final Thoughts

Information technology, specifically in the form of online distance education, has the potential to transform higher education in new directions that we are only beginning to understand. But along with this transformation come the requisite growing pains, including in the area of campus policy and administrative planning. Issues of digital intellectual property and control of online courses will be worked out in time, but more pressing matters such as the proper use of copyrighted materials in online classes must be addressed as soon as possible.

Notes

1. Descriptions for each classification can be found at www.carnegiefoundation.org/Classification/CIIHE2003/defsNotes/Definitions.htm.
2. Classification and groupings for the final sample of 60 institutions, known as the "Has DE" sample, are shown in a table found at www.highereddata.org/PHEdata.pdf.
3. The data table showing results from the ownership levels question can be found at www.highereddata.org/PHEdata.pdf.

References

AAUP. See American Association of University Professors.
Digital Millennium Copyright Act (DMCA) of 1998. Public Law 105-304, 17 USC Sec. 512.
Loyal students might not only stay themselves, but also have a role in encouraging other students to stay. This means that strategies for relationship building need to extend to all students, and not be restricted to those in a potential withdrawal situation.


Noteworthy Quotes

Whether a program is offered or not must be the result of a thorough analysis of revenues and expenses. Only then can an institution make an informed decision.