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LEGAL ISSUES



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Legally Speaking — Why Talk About Legal & Ethical Issues?

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and **Herbert L. Carson¹** (Retired Professor of Humanities and Classics, Ferris State University)

In Plato's dialogue "Meno," Socrates is quoted as asserting that only knowledge can be taught. Since conduct (that is right or wrong conduct) may not be knowledge, can it be taught (or even discussed)? Perhaps not. But methods and vocabulary for thinking about conduct, about ethical behavior, can be taught. Learning such methods can increase our ability to make rational and intelligent decisions.

Those who use technology need to be aware of legal and ethical issues that underlie our use of modern equipment. But, isn't that the province of philosophers, lawyers, and scholars? Why is it important for technology professionals in the field to understand these issues? There are really two answers to this question. First, laws impact us on a daily basis, and ignorance of the law is no excuse. As a result, it is vital for those of

us who work with technology, instructional design, and librarianship to think about these issues *before* they arise. The second answer relates to the interaction among — and difference among — law, morality, and ethics. These three areas are often confused or used interchangeably, but in reality they are very different from one another. Defining these three terms might seem to be unrelated to technology, but they are the essence of how we use modern technological resources in legal and ethical ways.

Legal Reasoning in Technology, Librarianship, and Instructional Design

The following passage from my book *The Law of Libraries and Archives* explains why one needs to understand legal principles:

[Information professionals] should learn the basic legal principles that apply to our daily lives. Those who know the law are not just operating in the dark; they have an understanding of the legal forces that impact their profession. It is

my belief that . . . [information professionals] need to have a much deeper understanding of the principles of library law than most of us currently have.

Many people know a few rules that seem to provide quick answers. However, most people don't understand why the law is the way it is. . . . **Alexander Pope** (1717, 1961, § 1-15) once said, "A

little learning is a dangerous thing." Just knowing a few rules can be dangerous; understanding the law is not like applying a cataloging rule. When you apply a cataloging rule, "The rule is the rule." There are no exceptions, no "applications" to the situation. In the law, on the other hand . . . the policy and the

history behind the rule [is] more important than the rule itself. In the law, rules are flexible enough to apply to each particular set of facts. For that reason, [information professionals] need to know the policy and history behind the rules in order to stay within the law (Carson, 2007, pp. 1-2).

As technology becomes more widespread, all we face new challenges. Is it legal to use YouTube videos in your classroom? What is the role of copyright in the new millennium? What are the terms of use of the library's new database? Will I get sued if I place an article on BlackBoard for my class? These are important questions that must be answered on a daily basis. Some important issues that information professionals deal with regularly include:

- Copyright — This includes issues related to copyright and Fair Use, streaming audio, electronic course reserves.
- Trademarks — Instructional designers and information professionals not only use trademarked material on a daily basis, they also create material that could be trademarked.

- Cybersquatting
- The legality of linking and framing on Websites.
- Information malpractice — The duty of care we owe to our clients, as well as the possibility of legal liability for providing incorrect information.
- Issues of privacy and access to information, which are impacted by the *Family Educational Rights and Privacy Act (FERPA)*,² the *U.S.A. PATRIOT Act*, and provisions in codes of professional ethics related to privacy.
- Search Warrants and Criminal Investigations.
- Internet Use Policies and the Filtering Debate.

The important thing to remember is that information professionals do not operate in a vacuum. We are tied to the broader society, and the history (and policy) behind these laws serve as the basis for our own professional practice. In order to perform our jobs in a thoughtful and professional fashion, we must understand not only the rules, but also the reasons for these rules. That is the reason why it is important for information professionals to understand the law and, in fact, forms part of the difference between technicians and professionals.

Defining Law, Ethics, and Morality

The interaction between law and morality is more difficult to explain. According to the *Stanford Encyclopedia of Philosophy* (2008), morality can be either (1) a descriptive "code of conduct put forward by a society or some other group, such as a religion, or accepted by an individual for her own behavior," or (2) a normative "code of conduct that, given specified conditions, would be put forward by all rational persons." I'll dispose of the second definition quickly, as there are several problems with it. In reality, this is culture-bound, and has also changed over time. For example, Americans believe in the freedom, dignity, and worth of every individual, whether a man or

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a woman. Our Constitution begins with the following words:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

However, in 1787 when the Constitution was developed, the phrase "We the People of the United States" was usually considered to refer only to free white *men* who owned property. According to the code of morality in place at the time, women were considered to be subordinate to men. Even as late as 1923 — three years *after* women received the right to vote — a popular law school textbook informed students that "At common law the husband is the head of the family, and has a right to regulate control over his household" (Long, 1923, §101). The point is that what is considered moral at one time and in one place may not be considered moral elsewhere or elsewhere.

Returning to the first definition of morality, it is reasonable to ask about the difference between "a code of conduct put forward by a society or some other group" and the law. After all, law is defined as being "A rule of conduct, or a system regulating behavior, rules, and codes," or as "a system of enforceable rules governing social relations and legislated by a political system" (Carson & Carson, 1986). Aren't those the same thing as morality?

In fact, law and morality are not only different; they can at time be in conflict with one another. This can best be shown by some well-known examples from history. As Western Kentucky University philosopher Jan Garrett wrote:

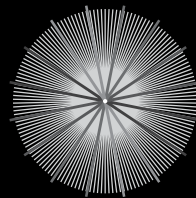
At first there seems to be no distinction between law and morality. There are passages in ancient Greek writers, for example, which seem to suggest that the good person is the one who will do what is lawful. It is the lawgivers, in these early societies, who determine what is right and wrong.

But it is not long before thoughtful people recognize the difference between what is actually legal, or legally right according to the political authorities and what should be legal. What should be legal roughly corresponds to what is really right or just, that is, what we would call morally right. We find, for instance, the distinction between what is legally or conventionally right and what is naturally (or as we would say today morally) right. ... **Plato**, for example, holds that knowledge of what is just or moral, and the ability to distinguish true justice or morality from what is merely apparently just depends on the full development and use of human reason. According to **Plato**, there is a very close connection between true justice or morality and human well-being or flourishing. Legal and political arrangements that depart too far from true justice should, if possible, be replaced by arrangements that better promote justice and thus well-being (Garrett, 2001).

In American history, slavery presents a classic example of the conflict between law and morality. It also shows how morality means different things to different people. In 1859, slavery was legal — but was it moral? Americans living in 2010, with a President of African-American descent and having lived through the Civil Rights era, would generally answer "no." This answer was shared by the radical abolitionist **John Brown**, but was not even considered a question by U.S. slaveholders. As historian **John Hardin** explained on the 150th anniversary of **Brown's** raid on Harper's Ferry:

As each of the **Brown** party died, they became larger in life and far more successful than they ever anticipated. ... [O]ne of the condemned men, **John A. Copeland** ... remarked "If I am dying for freedom, I could not die for a better cause...." **Brown** and his interracial band felt that they had no other realistic alternative. Death was no longer a deterrent to immediatist abolitionists whether white or black.... Yet, to cooperate with that system in any way made them collaborators

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with the same evil. Free blacks — especially those born free and possibly to be carried INTO slavery — reached the conclusion that unless all were free, no blacks were free. Apparently, **Brown** reached another conclusion — unless whites ended slavery of blacks, enslavement of whites by slavery's depravity and moral turpitude would continue (**Hardin**, 2009).

So if law and morality are not the same thing, what is the difference? Law is what we are obligated to do by society, while morality is what we believe is right. “[T]he law in its nature requires obedience regardless of one’s judgement about the merit of the obeying conduct, and that this is inconsistent with people’s moral autonomy which requires them to take responsibility for their actions and to act only on their own judgement on the merit of their actions” (**Wolff**, 1970).

Bernard Gert, in his work *Morality: A New Justification of the Moral Rules* (1998), explained four principles of a moral system. According to **Gert**, a moral system is:

- Public — The rules are known to all of the members.
- Informal — The rules are informal, not like formal laws in a legal system.
- Rational — The system is based on principles of logical reason accessible to all its members.
- Impartial — The system is not partial to any one group or individual (**Tavani**, 2010).

So how do we decide what is right? Is it what the law says? Is it what our religious leaders say? How do we handle this conflict? The answer is by understanding principles of ethical reasoning.

Ethics is the study of *how one decides* what constitutes moral behavior. This can be done as “either a formal and rational attempt to understand moral conduct, or an attempt to establish standards and principles of moral conduct” (**Carson & Carson**, 1986). Ethical formalism claims that “There are norms (standards or rules) which help us to differentiate right from wrong. Ethics is based upon the acceptance (or rejection) of authority” (**Carson & Carson**, 1986).

The terms *ethics* and *morality* are often used interchangeably, but they are very different from one another. **Tavani** (2010) uses the following example:

- Moral principle in a religious system: “From the point of view of institutionalized religion, stealing is wrong because it offends God or because it violates the commands of a supreme authority.”
- Legal principle: “Stealing is wrong because it violates the law. Here the grounds for determining why stealing is wrong are not tied to religion. If stealing violates a law in a particular nation or jurisdiction, then the act of stealing can

be declared to be wrong independent of any religious beliefs that one may or may not happen to have.”

- Philosophical ethical principle: “Stealing is wrong because it is wrong (independent of any form of external authority or any external sanctions). On this view, the moral ‘rightness’ or ‘wrongness’ of stealing is not grounded in some external authoritative source. It does not appeal to an external authority, either theological or legal, for justification.” That is, stealing breaks the implied social contract.

Unlike morality (or law), ethics does not tell us what is right and what is wrong. Rather, ethics provides a scientific framework for solving problems and making decisions about duties and values. Professional ethicist **Susan Wolcott** (2005) provides the following overview of ethical reasoning for decision making:

Step 1: Become more aware of ethical problems that can arise (i.e., Identify ethical problems).

- Identify reasons why the dilemma is open-ended, such as:
 - Conflicts of interest (potential conflict among or harm to people, institutions, society, places, or things).
 - Issues of fairness and honesty (e.g., truthfulness, integrity, trustworthiness, justice, equity, impartiality).
- Ask whether this is a topic, issue, or event that cannot be discussed openly without tarnishing one person or party.
- Discuss why the “ideal” ethical result might be impossible to achieve.
- Discuss reasons for behaving ethically.
- Identify potential courses of action.

Step 2: Objectively consider the well-being of others and society when analyzing alternatives.

- Explore the interests, assumptions, and values of important stakeholders.
- Explore the ethical dilemma from more than one moral philosophy, such as:
 - Teleology, egoism, virtue, utilitarianism, deontology or rights, relativism, justice or fairness, common good.
- Explore potential biases or rationalizations, such as: “If it’s necessary, it’s ethical;” “If it’s legal and permissible, it’s proper;” “It’s just part of the job;” “I was just doing it for you;” “I’m just fighting fire with fire;” “It doesn’t hurt anyone;” “Everyone’s doing it;” “It’s OK if I don’t gain personally;” “I’ve got it coming.”
- Evaluate the completeness, reliability, and credibility of information sources.

Step 3: Clarify and apply ethical values when choosing a course of action.

- Identify the best option and identify the values associated with that choice.
- Consider alternative ways to identify the best choice, such as:
 - Prioritize the moral philosophies explored in Step 2.
 - Ask what the most ethical person would do in this situation.

– Ask which values are most important for addressing this problem.

– Ask how important it is to maintain high standards for values and principles.

– For the best solution, describe the trade-offs that are made among the interests of important stakeholders.

Step 4: Work toward ongoing improvement in personal, organizational, and social ethics.

- Ask what the decision maker or others could learn from this dilemma.
- Describe methods for monitoring and continuously improving ethical values and principles.
- Identify types of ethical problems might occur in the future and plan how might they be addressed.
- Discuss why it is important to seek continuous improvement in ethical decision making [sic] (**Wolcott**, 2005).

Wolcott’s approach works in many contexts, both for individuals and for professionals in an organization. Ethical reasoning will not tell us the right answer to these questions. However, learning logic, critical thinking, and the principles of ethical reasoning will help us decide what is right and what is wrong.

Ethical Reasoning in Technology, Librarianship, and Instructional Design

Now that we have defined our terms and their distinctions, we can return to the question of why it is important to study ethics in the information professions. According to computer scientist and ethicist **Bilal Azmat**, cyberethics or information systems ethics provides a methodology for practitioners to answer the following types of questions:

- Privacy: What information about one’s self or one’s associations must a person reveal to others, under what conditions, and with what safeguards? What things can people keep to themselves and not be forced to reveal to others?
- Accuracy: Who is responsible for the authenticity, fidelity, and accuracy of information? Similarly, who is to be held accountable for errors in information, and how is the injured party to be made whole?
- Property: Who owns information? What are the just and fair prices for its exchange? Who owns the channels, especially the airways, through which information is transmitted? How should access to this scarce resource be allocated?
- Accessibility: What information does a person or an organization have a right or a privilege to obtain, under what conditions, and with what safeguards? (**Azmat**, 2006).

Within the fields of information technology, librarianship, education, and instructional design, issues will arise dealing with intellectual property, access to information, freedom

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of expression, censorship, filtering, electronic privacy, surveillance, and monitoring. While our professional organizations have their own basic codes of professional ethical conduct, these codes are often too general to answer such complicated questions. (Besides, not only are the codes often inconsistent with one another, principles *within* the same codes often conflict.) As a result, it is important for information professionals to learn not just a list of “thou shalt do” and “thou shalt not do.” Rather, we should use ethical reasoning as a tool in much the same way that we use books, computers, software, and databases as tools to get to our intended results. Ethics is a tool that helps us perform in our daily lives. An understanding of ethical conduct should underlie the making of decisions with which we can live in comfort.

Please note that we use a number of specialized philosophical terms in this essay, including some specialized forms of ethical reasoning. For more information on these terms, please refer to one of the following works:

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Endnotes

1. Dr. Herbert L. Carson (Bryan’s father) is a retired professor of humanities and classics. He taught classical civilization, humanities, philosophy, and ethics at Ferris State University from 1960 to 1994. Dr. Carson earned his B.A. from the University of Pittsburgh, M.A. from Columbia Teachers College, and his Ph.D. from the University of Minnesota.

2. FERPA is found at 20 U.S.C. § 1232g. Regulations related to FERPA are also found at 34 CFR Part 99.

Questions & Answers — Copyright Column

Column Editor: Laura N. Gasaway (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu> www.unc.edu/~unclng/gasaway.htm

QUESTION: A number of public library patrons ask for a copy of that day’s *New York Times* crossword puzzle. Is it permissible to photocopy the number of copies projected to be needed and make them available at the circulation desk for the patrons?

ANSWER: While it likely is fair use for patrons to make a photocopy of the puzzle for personal use, and even for the library to reproduce a copy of the puzzle for a patron upon request, there are restrictions on what a library can do. Section 108(d) allows libraries to make a single copy of an article, book chapter, etc., for a user upon request, but the library must provide notice of copyright, the copy must become the property of the user and the library must have no notice that the copy will be used for other than fair-use purposes. This subsection is further restricted by section 108(g), which says, among other



things, that the copying under section 108(d) cannot be systematic. Making multiple copies of the crossword puzzle each day is certainly systematic. The library could seek permission from the *New York Times* to make these copies in advance each day or continue to make single copies for users after the request of that user.

QUESTION: A librarian in a public high school is often asked for help by students who are completing class research papers and projects. When a student uses an image from the Internet in a research paper, how can he or she seek permission if it cannot be determined who produced the image? Would use of an image from the Internet most likely be permitted under fair use if the use was only for a research paper for one course? To cite to the origin of the image, is the url sufficient?

ANSWER: Actually, to include the photograph in a research paper that will be submitted

only to the teacher likely is a fair use, and the student would not be required to seek permission. If the paper were to be posted on a website or widely distributed, permission would be necessary. Attribution is not a copyright issue, but crediting the photographer or copyright owner is a good thing to do. Including the url tells someone where to find the photograph online, which is helpful to readers, but the attribution should be to the “author.”

QUESTION: A community college regularly films the lectures of speakers invited to speak on campus. In order to place a video copy of the talk online, must the institution seek permission? Is a Webinar the same thing?

ANSWER: In order to record the lecture of the guest speaker, the institution should obtain prior permission from the speaker. The release should also specify what the institution intends to do with the recording, such as podcast it. A Webinar also needs to have permission of the speakers and specify how the Webinar will be used, whether it will be repeated, etc.

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