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Campus: Geneseo

Author's Name: Joel Dodge

Name and Title of Campus Coordinator: Leonard Sancilio Jr., Dean of Students

Peer-to-Peer File Sharing on College Campuses

2011 Benjamin and David Scharps Award

Peer-to-peer file sharing is a considerable challenge faced by colleges and universities in the digital age. Students are widely proficient in the use of systems like Limewire and Bit Torrent, and this use regularly puts them in legal jeopardy. Federal law places limited responsibilities on colleges for their students' illegal file sharing which, along with government and industry pressure, has spurred colleges to implement antipiracy programs on their campuses. When well crafted, these programs can serve the best interests of the college, its students, and society at large, while providing educators with a valuable pedagogical opportunity.

Background: Illegal File Sharing, Universities, and the Law

Copyright doctrine is at the center of the legal issues surrounding file sharing. It is a constitutional right¹ of Congress to protect authors' original works from duplication, thus giving creators an incentive to create more.² Copyright does not protect ideas and permits some "fair use" of protected material, but the nuances of copyright law are generally immaterial with regard to file sharing. The very nature of sharing copyrighted material violates the core protection against duplication. According to intellectual property attorney Fred von Lohmann of the

¹ Article 1, Section 8, Clause 8 gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

² See Cornell University Law School Legal Information Institute, "Copyright: An Overview." August 19, 2010 <http://topics.law.cornell.edu/wex/Copyright>

Electronic Frontier Foundation,³ copyright law views every digital file as “fixed” to the CD, computer, or hard drive you originally have it on. Once you transmit that file to someone else, you have engaged in unlawful reproduction and distribution of a copyright-protected work.

College campuses are rife with this kind of copyright infringement. A survey conducted by the University of Richmond found that over half of all college students nationwide download music illegally.⁴ Despite this widespread illegal behavior, universities are not legally responsible for copyright violations committed by their students. According to the Digital Millennium Copyright Act of 1998 (DMCA), a service provider is not liable for copyright infringement committed by a user on its network as long as it is unaware of the illegal file sharing, does not gain any financial profit from the illegal file sharing, and once notified of it, acts promptly to disable access to the file sharing software.⁵ In short, a university as a service provider fulfills its DMCA responsibilities with an appropriate response after being made aware of piracy of copyrighted material on its network.

A separate law, however, requires colleges to go further in combating piracy on their campuses. The Higher Education Opportunity Act of 2008 (HEOA) mandates that universities proactively work to curtail student copyright

³ Fred von Lohmann, “Peer-to-Peer File Sharing and Copyright Law: A Primer for Developers.” Electronic Frontier Foundation. February 2003. <http://iptps03.cs.berkeley.edu/final-papers/copyright.pdf>

⁴ Mike Musgrove, “Music Industry Tightens Squeeze On Students.” *Washington Post*. March 9, 2007. <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/08/AR2007030801895.html>

⁵ DMCA § 512(c)(1)

infringement in order to receive federal aid.⁶ Schools are required to provide students with a description of copyright law and information on campus policies for those who infringe upon copyright law. Schools must also set up technology-based systems to prevent students from illegally sharing files on university networks. These systems commonly function by limiting student bandwidth consumption, monitoring student traffic to find suspiciously high bandwidth activity, vigorously responding to notices of network DMCA violations, and implementing available commercial software to block illegal file sharing.

If a university abides by the HEOA and DMCA guidelines, it will have protected itself from any liability springing from student copyright violations. Students will therefore be directly liable for their own illegal file sharing. On-campus students engaging in copyright infringing activities do so at their own risk and must understand that their university is not a legal parental figure in this regard. The student will be held wholly responsible for any online transgressions that are detected.

The Entertainment Industry's Approach to Campus File Sharing

Indeed, college students have felt the wrath of the recording industry's antipiracy campaigns in the past. The Recording Industry Association of America

⁶ Steven Worona, "Final HEOA Regulations Issued for P2P Provisions." *Educause*. October 29, 2009.
<http://www.educause.edu/blog/sworona/FinalHEOARegulationsIssuedforP/18900>
8

(RIAA), the leading music industry trade organization, has been at the forefront of the pushback against digital piracy. In 2007, responding to the high frequency of illegal downloading on campuses, the RIAA began targeting college students with “pre-litigation” letters.⁷ After catching an on-campus file sharer, the RIAA would send a letter to the college requesting that it be forwarded to the student with the implicated IP address. The letters threatened future litigation, but offered the student a twenty-day window to settle out of court at a reduced rate. Most colleges did forward the letters, believing it may be in the student’s best interest to pay the discounted settlement.

The RIAA quietly abandoned this litigious approach in 2008.⁸ Mass lawsuits against college students and the general public proved to be highly ineffective, as file sharing rates held steady while CD sales continued to fall precipitously throughout the legal campaign. The tactic was also a public relations debacle for the music industry, with stories about single mothers, grandparents, and children being sued for hundreds of thousands of dollars getting prominent play in the press.⁹ The RIAA, however, maintained that the lawsuit campaign was instrumental in educating the

⁷ Thomas Mennecke, “RIAA Announces New Campus Lawsuit Strategy.” *Slyck*, February 27, 2007. <http://www.slyck.com/story1422.html>
(An example of these pre-litigation letters can be found at:
<http://tech.mit.edu/V127/N24/riaa/letter.pdf>)

⁸ Sarah McBride, Ethan Smith, “Music Industry to Abandon Mass Suits.” *Wall Street Journal*, December 19, 2008.
<http://online.wsj.com/article/SB122966038836021137.html>

⁹ Associated Press, “Elderly man, schoolgirl, professor among file-swapping defendants.” *USA Today*, September 9, 2003.
http://www.usatoday.com/tech/news/techpolicy/2003-09-09-riaa-defendants_x.htm

public on the illegality of file sharing and kept illegal downloading from growing further.¹⁰

The RIAA now works with Internet service providers (ISPs) directly to identify copyright infringers and to restrict their Internet access. The organization also proclaims a kinder, gentler policy toward college students. It emphasizes educational programs, participation in campus forums, and working directly with schools to keep students engaged in legal media acquisition. The RIAA continues to patrol file-sharing systems for copyright infringing activity and sends DMCA notices when illegal sharing is detected on campus networks.¹¹ On the whole, however, the current RIAA strategy is more cooperative and less combative than its old tack of indiscriminate lawsuits. While it continues to monitor for illegal online activity, it relies heavily on moral suasion and student education. It also applies pressure to the universities to take the initiative of cracking down on student piracy, publishing lists of the most egregious infringing colleges to “shame” schools into action.¹²

¹⁰ See McBride, Smith, *supra* note 8

¹¹ See RIAA.com: “Q: What is your strategy with colleges now that you are no longer sending pre-litigation letters?” Accessed March 10, 2011.

<http://www.riaa.com/faq.php>

¹² Jacqui Cheng, “Forget party schools: The RIAA lists the top piracy schools in the US.” *Ars Technica*, February 22, 2007.

<http://arstechnica.com/old/content/2007/02/8900.ars> [The most violating colleges of 2007, with over 1,000 copyright infringement notices each, were Ohio University, Purdue University, and the University of Nebraska at Lincoln.]

College Policies: UCLA as a Model

Over the past decade, many schools have responded proactively to work against student piracy.¹³ The recording industry has pointed to the University of California, Los Angeles as particularly exemplary of how a college can effectively deal with student music piracy.¹⁴ Jim Davis, the university's associate vice chancellor, testified before the House Subcommittee on the Courts, Internet, and Intellectual Property in March 2007. Davis testified about UCLA's three-pronged strategy to combat student piracy: proactive technological deterrence, providing students with legal entertainment alternatives, and a strong student education campaign.¹⁵

UCLA's first approach is technology-based prevention. It operates a system called Quarantine that cuts students off from the campus Internet network for piracy offenses. When suspected of illegal file sharing, a student's residence hall access is disabled while on-campus computer resources are maintained during the due process period, recognizing that online access is essential to modern education. It treats a student's first offense as a "teachable moment," requiring the student to view an educational video and review UCLA's antipiracy policy. Davis notes that

¹³ The education nonprofit *Educause* provides a list of "role model" schools, available at <http://www.educause.edu/HEOArrolemodels>

¹⁴ See Musgrove, *supra* note 4: "UCLA, by comparison, is regarded by the recording industry as a school that has effectively discouraged music piracy on campus."

¹⁵ Jim Davis (Vice Chancellor of University of California, Los Angeles). "Testimony on Piracy on University Networks before the House Subcommittee on the Courts, Internet, and Intellectual Property." March 8, 2007. Available from <http://p2p.ucla.edu/related-material/jd-testimony-20070308.pdf>

since 2004, only 9% of the university's eighty-one infringement notifications have been second-time offenders.¹⁶ This suggests that UCLA has been highly effective at deterring illegal file sharing after a first offense.

Second time offenders at UCLA must complete an ethical decision-making workshop and write a five-page paper on acceptable file sharing behavior. The school provides technical assistance to review their computers for at-risk files and helps them remove file-sharing software. A second offense also results in sanctioning, placing offending students on one-year probation, with further offenses resulting in suspension. Davis notes that one of the strongest deterrents for students is the specter of having a tainted academic record from file sharing offenses for employment or graduate school—a consequence that causes “significantly greater anxiety” than monetary fines.¹⁷ In totality, this policy has proven effective. UCLA has only had two students repeat beyond a second offense. Both were suspended for one academic quarter.

UCLA also offers students legal entertainment services, but concedes that due to limitations in these services, they have had only limited success. These are services that contract with digital entertainment providers to give students access to free music. Only 20% of on-campus students utilize this service due to perceived problems with the program. The program suffers from compatibility issues that prevent students from transferring files to their iPods and other portable devices.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

UCLA finds the low levels of student participation disappointing, but understandable in light of the program's imperfections. Were legal entertainment offerings for campuses improved, they would have significant potential to alter a student's file sharing cost-benefit calculation.

As the third facet of its comprehensive antipiracy campaign, UCLA conducts a highly visible education campaign. Working with Student Affairs, school administrators hold workshops on copyright and ethics. Part of new student orientation is a Q&A period on intellectual property theft with the Dean of Students. Students are made aware that the university is "not a safe harbor," and that it would be "powerless to assist students should lawsuits ensue."¹⁸ The school tries to weave the piracy issue into broader teachings on core values and ethics, with the widely used drinking safety course Alcohol Edu as a model.

Because of their inherent educational emphasis, these awareness campaigns should be at the heart of any college's antipiracy strategy. There are both practical and pedagogical reasons for this. As Davis noted before Congress, only 20% of UCLA students live on campus, meaning an antipiracy solution that relied exclusively on technology controls would have an impact on only a fraction of the student body. Schools must look beyond the campus network to find ways to reach the whole college community. Moreover, online piracy presents schools with more than just an obligation to discipline offenders. It is an issue that can and should be seized by colleges to engage students in a discussion that is timely, relevant to their lives, and

¹⁸ *Ibid.*

laden with ethical thought. Social values can be applied to the digital age, and colleges should use online piracy as a catalyst to demonstrate this to students.

An Alternative Approach: Collective Licensing

The Electronic Frontier Foundation (EFF), a nonprofit digital rights organization, has proposed an alternative approach to the problem of online piracy.¹⁹ It proposes that an individual, ISP, or college could pay a monthly fee to have legal access to peer-to-peer networks. Under this scenario, a college would buy from the music industry the rights for its students to traffic on file sharing networks. Student file sharing would be brought above ground—and legalized.

While this seems like a radical concept, the EFF contends that it has precedent. Collecting societies (such as BMI and ASCAP) have long collected fees from radio stations, bars, restaurants, and music venues. Upon paying the fees, these venues are free to play whatever music is covered by the collecting society as often as they like. The EFF advocates extending this opportunity to individual music fans through unlimited downloading for a flat fee.

There is ample reason to be skeptical of this proposal. If the music industry were to form a collective society and offered this kind of service, what would a fair flat fee be to purchase unlimited downloading privileges? For an entire college, the

¹⁹ Electronic Frontier Foundation, "RIAA v. The People: Four Years Later." 2007. http://w2.eff.org/IP/P2P/riaa_at_four.pdf

fee is bound to be exorbitant. Perhaps the cost to a college would be less than the financial burden of monitoring network activity for illegal conduct. Still, colleges would suddenly be buying the rights for their students to engage in activity they had previously fervently branded as illegal. Worse, non-downloading students who had bought into the college's values-oriented advocacy would be subsidizing downloading students who resisted them. Further, P2P networks are commonly riddled with viruses and corrupted files, making them a suboptimal means of maximizing consumer welfare.

The idea, however, gets back to UCLA's disappointing experience with providing competitive legal entertainment alternatives to its students. If the music industry could provide a service that met consumer demands for easy, efficient access to music, it would have a tremendous market opportunity. The services currently available are inadequate and do little to draw students from the illegal P2P networks.

Such a service does not appear to be forthcoming. Schools, therefore, would be well advised to adopt a UCLA-type approach to student file sharing. Students should be encouraged to utilize free streaming music sites like Pandora or Last.fm and television sites like Hulu. Schools should also implement "traffic shaping" mechanisms on their networks to limit the bandwidth available for downloading files like MP3s. They should adopt UCLA's system for dealing effectively with copyright offenders, using sanctions but also treating the encounter as a teachable moment.

Most importantly, a vigorous education campaign should be at the center of any college's antipiracy platform. Today's students have come of age in a time where rapid technological advancement has momentarily overwhelmed social values. It is a college's responsibility to cultivate ethical minds. A student's growing to critically think through the vast implications of illegal downloading is more powerful than prohibitions and more meaningful than disciplinary action. This is the calling for colleges willing to fight copyright infringement. This is the avenue that will best serve their campuses, their communities, and their students.

Bibliography

Associated Press, "Elderly man, schoolgirl, professor among file-swapping defendants." *USA Today*, September 9, 2003.

http://www.usatoday.com/tech/news/techpolicy/2003-09-09-riaa-defendants_x.htm

Cheng, Jacqui, "Forget party schools: The RIAA lists the top piracy schools in the US." *Ars Technica*, February 22, 2007.

<http://arstechnica.com/old/content/2007/02/8900.ars>

Cornell University Law School Legal Information Institute, "Copyright: An Overview." August 19, 2010 <http://topics.law.cornell.edu/wex/Copyright>

Davis, Jim (Vice Chancellor of University of California, Los Angeles). "Testimony on Piracy on University Networks before the House Subcommittee on the Courts, Internet, and Intellectual Property." March 8, 2007. Available from <http://p2p.ucla.edu/related-material/jd-testimony-20070308.pdf>

Digital Millennium Copyright Act (1998), § 512(c)(1)

Educause, "HEOA Role Models." Accessed March 10, 2011.

<http://www.educause.edu/HEOARoleModels>

Electronic Frontier Foundation, "RIAA v. The People: Four Years Later." 2007.

http://w2.eff.org/IP/P2P/riaa_at_four.pdf

McBride, Sarah; Smith, Ethan, "Music Industry to Abandon Mass Suits." *Wall Street Journal*, December 19, 2008.

<http://online.wsj.com/article/SB122966038836021137.html>

Mennecke, Thomas, "RIAA Announces New Campus Lawsuit Strategy." *Slyck*, February 27, 2007. <http://www.slyck.com/story1422.html>

Musgrove, Mike, "Music Industry Tightens Squeeze On Students." *Washington Post*.

March 9, 2007. <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/08/AR2007030801895.html>

Recording Industry Association of America, "Resources for students." Accessed March 10, 2011. <http://www.riaa.com/faq.php>

Von Lohman, Fred, "Peer-to-Peer File Sharing and Copyright Law: A Primer for Developers." *Electronic Frontier Foundation*. February 2003.

<http://iptps03.cs.berkeley.edu/final-papers/copyright.pdf>

Worona, Steven, "Final HEOA Regulations Issued for P2P Provisions." *Educause*. October 29, 2009.

<http://www.educause.edu/blog/sworona/FinalHEOARegulationsIssuedforP/189008>

United States Constitution, Article 1, Section 8, Clause 8