

From Jefferson to Metallica to your Campus: Copyright Issues in Student Peer-to-Peer File Sharing

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If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine receives light without darkening me.

--Thomas Jefferson, 1813

When Lars Ulrich, drummer for the rock group Metallica, testified before Congress about his group's lawsuit against Napster in 2000, many people who followed copyright issues in the music industry were not surprised (Ulrich, 2000). Ever since downloading audio files became as easy as clicking a few buttons on a personal computer, charges of copyright infringement have been alleged and played out in the courts. The real surprise came when Indiana University, Yale University, and the University of Southern California also were named in the suit for allowing students to use their university computer networks to illegally downloading music files. The idea that colleges and universities could be held liable for their students' actions in this way was unsettling at the time, and to this day, questions linger about the role higher education should play in this arena from both legal and ethical perspectives.

Recent court decisions have not provided any greater insight and the legislative actions seem as informed by lobbyists as best practices on how to actually prevent and deter illegal activity while allowing legitimate and potentially innovative activity. Kaplin and Lee (2007) clearly outline the need for students and faculty in the higher education community to be informed and proactive, both individually and collectively, in these matters:

Until recently, copyright law merited little attention within the academy, but the rapid inte-

gration of digital technologies into American life has increased the relevance of this body of law and made necessary a broader understanding of its basis, how it works, and the role it plays in the controversies that are shaping how faculty and students will use technology and information in the future. (p. 616)

Although the relevance of this topic within higher education is clear, interpretations of legislation as well as court decisions have not provided much clarity on the balance between fair use and copyright infringement of digital media, regardless of whether the digital media in question was audio, video, or text. In addition, there has been much disagreement within the higher education community as well as on individual campuses about the role institutions should play in pursuit of copyright infringers, both intentional and unintentional, some of whom may be the institution's own students, faculty, and staff. In a 2000 press release written in response to the Napster lawsuit, officials at Indiana University claimed that "... technology has leaped well ahead of clear legal issues" (Indiana University, 2000) and as such, Napster would be banned from their campus network until the issue could be further investigated. As a result, both Indiana University and Yale were dropped from the suit once that it was announced that Napster would be banned on those campuses as well (Carlson, 2000).

Other campuses effectively banned Napster by means such as packet shaping (sometimes referred to as "traffic shaping" or "traffic engineering"). Regardless of whether a student attempts to share vacation photos with a friend or one of Metallica's latest tracks, the information transmitted over the network is broken down into small bundles, or "packets," identified by the type of data. So, by way of certain types of network management software, these packets essentially can be identified by their genre: Email traffic, course management traffic, general web surfing traffic, and peer-to-peer (P2P) file sharing traffic. By deploying a program such as Pack Shaper or Packeteer, an institution can manage network traffic by throttling down the available bandwidth for certain types

of packets, while throttling up the bandwidth for other types (SearchNetworking, n.d.). Packet shaping has largely become the default method for dealing with P2P file sharing in higher education, but in 2000 it was probably considered a fairly new and obscure technology by end-users of such networks, and students largely greeted it with contempt. At Bowling Green State University, for example, photocopied flyers proclaiming “Save Napster!” were plastered throughout the campus, with particular emphasis given to the building that housed the Information Technology Services department.

At the time, Napster was the only P2P file sharing application, so banning that one application (either via packet shaping or by other means) was a relatively simple solution. As the name implies P2P file sharing allows individual users to share files without a centralized server. The Napster network added another dimension: Simply put, users share files through an intermediary where the network served as a centralized database (McCormick, 2006; Tech Encyclopedia, 2008). Since Napster in 2001, numerous applications have existed and used various protocols for sharing and distributing files, making it more difficult to restrict on a campus network. Eight years later, many campuses still struggle with the very same issues.

Copyright and Intellectual Property over the Years

While ultimately the issue of intellectual property involves legal issues of copyright, trademark, and patent laws, this discussion will focus on copyright law and the widening gap between it and advances in information and communication technologies. An important component of copyright law affecting higher education is that of fair use, which Kaplin and Lee (2008) describe as “one of the most misunderstood copyright issues” (p. 617).

According to the Copyright Act, four considerations are used to determine fair use: (a) the purpose of the use: whether it is for commercial or educational use, (b) the nature of the copyrighted work, (c) how much of the work is used in relation to the entirety of the copyrighted work, and (d) the impact of the use on the potential market or value of the work (Kaplin & Lee, 2007). Because the fair use doctrine applies to both published and unpublished works, in hard copy, on the Internet, or when used as part of an online course (Kaplin & Lee, 2007), this is

an important factor when considering the legality of using or downloading digital files regardless of whether the user is on a P2P network. Response to two legal suits in 1987 and 1989 severely restricted the definition of fair use in unpublished materials to the point of essentially not allowing any use of the work. Congress passed the Copyright Amendments Act of 1992 (Kaplin & Lee, 2007), which returned to the original fair use standards.

Hilton (2006) asserted that the most disruptive force facing higher education relating to information technology is that “we live in a culture and society that increasingly views the world of ideas as pure property” (p. 64). He claims we should be very weary of this perspective and cites John Perry Barlow’s analogy of someone stealing your car versus someone stealing your idea. If your car is stolen, you cannot use it but if someone steals your ideas, they are still available for your use. The notion of “ideas as property” is not a recent phenomenon in American society. In 1939, noted author and futurist Robert Heinlein wrote in his short story entitled *Life Line* about the confusion regarding property rights:

There has grown up in the minds of certain groups in this country the notion that because a man or a corporation has made a profit out of the public for a number of years, the government and the courts are charged with the duty of guaranteeing such profit in the future, even in the face of changing circumstances and contrary public interest. This strange doctrine is not supported by statute nor common law. Neither individuals nor corporations have any right to come into court and ask that the clock of history be stopped, or turned back, for their private benefit. (p. 21)

The notion of intellectual property and copyright issues has been a part of our legal history for as long as the United States has been a country. In the United States Constitution (1787), Congress is charged with the Copyright Act “to 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” (art. I, § 8, cl. 8). According to Kaplin and Lee (2007), the goal of the Copyright Act “simply stated, is to increase knowledge” (p. 616). At first glance, this view may seem remarkably consistent with the basic tenets of higher education, but in the instance of

copyright issues it often seems at cross purposes.

The phrase in the Constitution “for limited times” has been the source of much debate as it is applied to the issue of intellectual property rights and fair use of digital media. Some researchers believe that the timeframe for ownership should not be limited. In her 1998 Congressional testimony, Rep. Mary Bono indicated that she agreed with her late husband who wanted the “term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution” (Bono, 1998, para. 3). In her remarks, Bono also quoted former actor and Recording Industry Association of America (RIAA) President Jack Valenti who proposed that the term for copyright protection should be “forever less one day” (Valenti in Bono, 1998, para. 3).

While the RIAA and those it represents may feel entitled to the profits from their work and the ability to control how their work is used, many feel the approaches used by the RIAA in pursuit of illegal downloading are questionable and perhaps even illegal. McCormick (2006) describes the scenario as “college and university students downloading digital files are perceived as pirates and thieves by the content industry, while the students perceive the recording industry as greedy philistines, and thus ignore intellectual property rights” (p. 682).

In 2003, the RIAA began suing direct infringers of copyrighted audio files, creating even more ill will as well as involvement of campuses who were requested to turn over the names of any students accused of violations. Their approach was to identify users internet protocol (IP) addresses and send those users to their institution as the ISPs. The institution then forwards the pre-settlement letter to the student/user allowing the student to pay thousands of dollars to avoid any further legal action (Cornell, 2007). If a student does not settle, then the RIAA files suit as part of a “John Doe” case, which results in a subpoena for the institution to reveal the name of the student (Cornell, 2007). The RIAA's case was not helped when the following wording was posted on its website and used in many of its media messages: “No black flags with skull and crossbones, no cutlasses, cannons or daggers identify today's pirates. You can't see them coming; there's no warning shot across your bow. ... Today's pirates operate not on the high sea but on the

Internet...” (RIAA, 2003, para. 1). This quote created so much attention that it became a sort of rally cry for many users of P2P file sharing applications as well as those students, faculty, and fair use activists who feel the enforcement of copyright law has been taken to an extreme.

Hilton (2006) believes this type of approach is excessive and remarks that “as originally enacted, copyright was designed to balance the limited property rights of the author/creator with the long-term rights of the public. The problem is that over the years, copyright has changed in ways that have consistently increased the protection granted to authors without providing increased benefit to the public” (p. 66). It is easy to see how such comments by the RIAA, Bono, Valenti, and others, such as the Motion Picture Association of American (MPAA), fuel this ongoing feud which, combined with the relative ease and anonymity of downloading media files, has culminated in the current situation.

Legal Precedence: Clear as Mud

The landmark copyright case related to digital media was the Supreme Court ruling in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). In this case, Universal City Studios brought suit against Sony, then a manufacturer of Betamax-based video cassette recorders (VCRs) for copyright infringement because the VCR owners were taping movies and shows off of their televisions. According to Kaplin and Lee (2007), the Supreme Court ruled that Sony was not liable for the infringement of its customers because “the recorders had substantial non-infringing uses, namely timeshifting of television programming” (p. 620). Further, the Court ruled that taping a television show and viewing it later was considered fair use. McCormick (2006) suggested that the United States Supreme Court should revisit its decision in Sony since the precedent set by this over broad ruling in the 1984 case is outdated, yet continues to be applied.

Fast forward seventeen years to the next significant case of copyright involving the use of media files between with *A&M Records v. Napster*, 239 F.3d 2004 (9th Cir. 2001). McCormick (2006) shared the district court's view of this case as: “The matter before the court concerns the boundary between sharing and theft, personal use and the unauthorized worldwide distribution of copyrighted music and sound recordings” (p. 689). In this case, A&M

Records alleged that Napster was knowingly allowing (and even encouraging) customers to illegally download audio files. In 2001, the 9th Circuit court, based on *Sony*, rejected Napster's defense, which focused on claims of fair use (Kaplin & Lee, 2007, p. 620). The primary difference between Sony and Napster was that there was no further contact once Sony sold the VCR to a customer, but Napster did have contact with its subscribers and could bar them from using the service at any time. According to Hall (2006), "because the centralized indexing system allowed Napster to have actual knowledge of specific infringement and control over the infringement, the court found that . . . Napster was liable for contributory and vicarious infringement" (p. 390).

Shortly after *Napster*, another case was heard in the Seventh Circuit Court of Appeals. In *Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003), the court applied both *Sony* and *Napster* and found that even though *Aimster* was used for many noninfringing uses, the proportion of infringing uses to noninfringing uses was enough that "Aimster was required to proffer evidence that its network was actually used for . . . the stated noninfringing purposes to avoid contributory liability" (McCormick, 2006, p. 718).

The next significant case took place in 2004, when the 9th Circuit court heard *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004). Grokster was a network that became popular after the *Napster* ruling essentially ended operations. Grokster's network merely served as a distributor for its P2P software since the files shared by its users were not indexed in any centralized manner. In its ruling, the court did not find Grokster liable as a contributory infringer that "specifically contradicted the probable noninfringing use standard articulated by the Seventh Circuit in *Aimster*" (McCormick, 2006, p. 718).

The plaintiffs appealed to the Supreme Court in *MGM, Inc. v. Grokster (Grokster III)*, 125 S. Ct. 2764 (2005), and even requested that Congress consider legislation that would overturn *Sony*, which as mentioned above has been controversial because much of the legal and technological landscape in this country has changed during the ensuing twenty years. In 2005, the Supreme Court vacated the 9th Circuit's ruling and remanded it for further con-

sideration based on four factors: (a) Grokster was promoting itself as a means to illegally download media files, (b) Grokster targeted former Napster users, (c) Grokster made no attempt to install filters to prevent illegal downloading, and (d) that most of the profits that would have gone to distributors who be from acts of copyright infringement (Kaplin & Lee, 2007). The Court's decision "did more to muddle the contributory infringement 'water' than to purify it" (McCormick, 2006, p. 719). Hall (2006) agrees that the Court's decision only compounded the confusion and went even further to say that the Supreme Court's decision ". . . added more fuel to the fire by . . . allowing the existing *Sony* test to apply where a product is used to infringe but there is no evidence of intentionally inducing the infringement" (p. 392).

Legislative Approaches

The Digital Millennium Copyright Act (DMCA) of 1998 was "the foundation of an effort by Congress to implement United States treaty obligations and to move the nation's copyright law into the digital age" (DMCA report, n.d.). One provision of the DMCA that applies to higher education is that of "anti-circumvention" clause which was an attempt to reinforce copyright holders' rights by not allowing them to "succumb to the unique threat posed by digital technologies" (McCormick, 2006, p. 716). Although this clause was written to protect the rights of copyright holders, some in higher education and those familiar with copyright issues view it as a "threat to civil liberties, the free exchange of information, and . . . academic freedom" (McCormick, 2006, p. 716).

Another relevant provision of the DMCA for institutions of higher education is that of safe harbor (DMCA, n.d.), which can limit the liability of Internet service providers (ISPs). Colleges and universities are considered ISPs and as such, this safe-harbor status can protect colleges and universities from monetary damages awarded if users of their computer network are found guilty of copyright infringement (McCormick, 2006, pp. 716-717). However, this protection is only extended when ISPs have and enforce a policy that informs all users of the legal issues surrounding electronic files and terminate from their network anyone who is a repeat offender (DMCA, n.d.).

The newest legislation proposed on this topic is the Higher Education Act

Reauthorization that would actually block federal financial aid for all students at an institution where a student repeatedly and illegally downloads media files. The American Council on Education (ACE) promptly reacted on behalf of 12 other higher education groups (ACE, 2008). While the groups were supportive of requiring campuses to inform their campus communities of their copyright infringement policies and possible consequences, they were not in favor of requiring institutions to “provide alternative music and movie services and implement technological measures to deter file sharing” (ACE, 2008, para. 3). The vagueness of this provision is problematic for two reasons. It does not specify what “provide” means; thus, it is unclear if an institution could simply make the free iTunes application available to students, or if institutions are required to purchase a legal streaming service license such as Yahoo! Music for their campus. In addition, requiring institutions to implement technological measures to block file sharing has not been cost effective or efficient.

In the letter written to the two ranking senators, ACE President David Ward assured the senators that “colleges and universities take illegal file sharing very seriously. Institutions deal with illegal file sharing through the education of their students, network management, and institutional policy enforcement” (ACE, 2008, para. 4). He challenged the 2005 MPAA statistics cited in the legislation that 44 percent of its domestic losses were due to illegal P2P file sharing by college students. According to Ward, the MPAA itself recently revealed after reexamination that the actual loss due to college students was only 15 percent and since only 20 percent of college students live on college campuses, only 3 percent of MPAA losses can be attributed to college students using campus networks. Given this small percentage and current technologies, it would be burdensome and ineffective to require campuses to purchase software that not only restricts network activity as well as students legally accessing digital media (Ward in ACE, 2008).

While institutions of higher education should not be complicit in the illegal downloading of files by their students, some academics and lawyers question if it is the role of higher education to be the enforcer of these laws and if, at public institutions, taxpayer dollars should be used to further support this seemingly outdated

business model by purchasing detection and legal downloading software. According to Adrian Sannier, university technology officer at Arizona State University, in his testimony before the House Committee on Science and Technology in June, 2007, colleges and universities must be careful not to commit institutional funds in antipiracy software lest they “end up caught in an expensive ‘arms race’ between technology companies and enterprising file swappers” (Read, 2007, p. A34). Sannier’s point is particularly relevant given that higher education information technology offices are already engaged in numerous other technological arms races, combating ever-increasing volumes of junk email, viruses, spyware, malware, and so forth. Opening up a new front in this arms race would likely prove costly on a variety of levels.

During that same hearing, Gregory A. Jackson, vice president and chief information officer at the University of Chicago, and Cheryl A. Elzy, dean of libraries at Illinois State University, testified that colleges and universities “would benefit at least as much from educational programs and improved legal-downloading services as they would from technological tools” (Read, p. A34). In response to these comments, Florida Representative Tom Feeney told the college administrators that he was “disappointed” that they had “minimized the potential of technological solutions” to piracy (Read, 2007, p. A34). He further warned that colleges and universities take “aggressive steps” to address illegal file sharing and insisted he would push institutions to use some type of antipiracy technology, “whether you like it or not” (Read, 2007, p. A34).

Delicate Balance of Student Rights and Institutional Liabilities

Although there are legitimate and legal means for P2P file sharing, the vast majority of press on this topic has been about the illegal file sharing, specifically by college students. Within the discussion on the legal rights of students to access digital media, there are essentially three main considerations: the definitions of downloading versus piracy, balancing content restriction with bandwidth issues, and the notion of creativity and innovation.

Often when the topic of downloading digital media is discussed, the first thought is that this is being done illegally. This illegal practice is commonly called piracy since it is viewed as

essentially stealing content rather than paying a price to use or own it. However, downloading digital media has many legitimate, noninfringing uses both inside and outside of higher education. P2P file sharing is typical in small organizations where there is not a centralized server so that any user can use and share any file with another user within their network (“Tech Encyclopedia,” 2008).

Other examples might include students in a band wanting to share their own music with known friends or unknown fans; students working on a group project in class sharing files with each other; students or faculty who have created original works – even commercial works – but want to allow “mash-ups” (creative reinterpretations) of it; or students who have filmed their own movies and have no other means for distribution. A recent example of noninfringing use of P2P includes fan-produced films, such as the user-created “new” episodes of the original *Star Trek* series, called “Star Trek: New Voyages” (recently renamed Star Trek: Phase II). Each of the current episodes available, all done via volunteers and strictly not-for-profit, rely on P2P as one of several distribution mechanisms since “bandwidth and storage are at a premium” and P2P makes more efficient use of both (“Star Trek: Phase II FAQ,” 2008). Downloading and accessing these episodes represents a very clear, noninfringing use of P2P that could be used by students and faculty in assignments related to media studies, theater, film, popular culture, and others.

Another example would include computer enthusiasts wanting to share the newest Linux distribution or similar free/open source software (FOSS). Open source software, while in many cases has sponsorship from large technology companies such as IBM and Google, is still ultimately community driven with ISO disk images often being distributed by way of BitTorrent and similar P2P methods. Having this option available is not merely helpful; it is critical.

Dr. Louis Suarez-Potts serves as community manager for the OpenOffice.org project, an office productivity suite compatible with Microsoft Office and one of the largest open source projects in the world. Potts (2008) argues that P2P distribution is essential for this and numerous other open source efforts, “but for many, downloading [free and open source software] from fixed servers via fat pipes is impos-

sible. These informational conduits are liable to be overused, and other strategies, such as the relatively slower but steady trickle of P2P, are required.” He also stresses that the relationship between P2P and FOSS is not one purely associated with distribution of a final product. Rather, P2P also provides much of the critical connectivity needed to facilitate collaboration on such projects:

[P2P] depends on a floating and often in visible public whose nearly automatic sharing of material bypasses and renders nearly irrelevant the older model of static servers. And for free software, whose license not just allows but encourages the free distribution of the commodity and code, P2P not only is the natural vehicle but also grows the community upon which the software is built. (personal communication, September 3, 2008)

Hilton (2006) encourages colleges and universities to participate in the open source movement in support of the notion of free exchange of ideas. Open source software (such as Linux and OpenOffice.org) is primarily available through P2P filesharing since this shares the bandwidth overload and thus does not overburden any one network.

Creative Commons is another example of efforts to support copyright while supporting the public access to information. On the Creative Commons website, the claim is made that ends are cooperative and community minded, but the means are voluntary and libertarian (Creative Commons, n.d.), because it allows authors to choose a license that allows both commercial as well as non-profit use of work. Similar to open source software, many of the works licensed through Creative Commons are accessible through P2P networks. According to Morrill (2006), Creative Commons and P2P are ideally suited, and the piracy-related stigma surrounding P2P neglects the “hundreds of creative commons works that are in the [P2P] distribution channel” (para. 7). Examples of this would include sites like LegalTorrents, an “online digital media community” with the following goals:

We discover and distribute high quality open-license (Creative Commons) digital media and art, and provide support to Content Creators. We host creative content in its entirety, ensure fast, reliable downloads, and enable users to directly sponsor Content Creators and their

work. We distribute content with the full permission of the rights holders and use the peer-to-peer file-sharing technology called BitTorrent. (2003, para. 1)

According to Hilton (2006), Creative Commons “provides a mechanism for sharpening the blunt instrument of copyright” (p. 70). P2P has become an important distribution means for this mechanism.

Hilton’s (2006) assertion is admittedly more complex as it deals with the notion of creativity and dissemination of knowledge in society as well as the academy. This author states that “most people think that the primary purpose of copyright law is to protect an author’s intellectual property or idea. In fact, the primary purpose of copyright law is to promote learning through the spread of ideas” (p. 66). Though not the typical response if one were asked about copyright, this definition is very much consistent with the academic values on which our colleges and universities were founded. As such it seems that higher education should strive all the more to balance the individual incentive to create new ideas with the sharing of and collective access to information. Without this balance, many future innovations could be stifled or at the very least delayed. According to Hall (2006), “P2P shaped the Internet as we know it today. If Internet service providers were initially aware of the possibility of being liable for online copyright infringement, the Internet might not be the wealth of ideas it is today” (p. 392).

Even though proposed legislation in Congress as well as the threat of lawsuits require institutions do more than merely hope students use P2P networks appropriately and legally, any institution would rather deal with such issues proactively, educating students and hopefully preventing them from committing illegal acts. As outlined earlier, judicial deference toward higher education has not been extended on this particular subject, making it critical for colleges and universities to take this issue seriously.

The first step for institutions may very well be to craft and enforce “acceptable use” policies. Kaplin and Lee (2007) asserted that the policy should be made available to the campus community online and that the policy should be posted in computer labs and copy centers in plain view of users. With the relatively recent and evolving nature of the legislation, as well as the fervor

with which these illegal acts have been pursued, a direct and widely communicated institutional policy must be available to students, faculty, and staff. In March 2008, Temple University was yet another institution to inform all faculty, staff, and students of such a policy through a campus email entitled, “Policy Reminder on Copyright Violations.” This memo focused on the legal ramifications of illegal downloading and offered individuals assistance in removing illegal files from their computers (Temple University, 2008). Realistically speaking, this will be an ongoing challenge for administrators on campuses to ensure all users are informed of this policy, especially given the pervasive nature of accessing digital files via the internet and the ease with which students can access this medium.

In addition, institutions must hold inclusive discussions of not only the legal implications of illegal file sharing, but also the ethical considerations of how to respond to requests for students named in lawsuits for illegal file sharing. These discussions also should include how to educate members of the campus community about fair use as part of a greater conversation on intellectual property, and legal ways to download and use digital files. Given students’ relative immaturity and the potential consequences, an educational focus on ethical behavior along with the legal details of file sharing seems quite appropriate.

Through its Digital Citizen project at Illinois State University (ISU), a partnership of individuals and units from across their campus are involved in a research project to learn more about their students’ use of P2P file sharing software. Through this research project, the authors attempted to turn anecdote to facts through research, and assert that illegal downloading is a symptom not the problem that is not incubated in higher education but inherited from K-12 (Illinois State University, 2007). Though in the early stages of their study, ISU researchers found that most students are somewhat aware of the legalities downloading digital media. Many students claim they would stop doing so illegally if caught, but would only stop for a few days. Although ISU chooses not to use packet-shaping software such as Packeteer to limit bandwidth to certain types of network activity, many campuses do just that in an attempt to curtail illegal P2P file sharing. One of the other hallmarks of this project is that ISU is partnering with RIAA,

MPIAA, as well as corporations that have a vested interest in reducing illegal file sharing by college students (Illinois State University, n.d.).

According to McCormick (2006), many colleges and universities are creating educational campaigns to inform their campus communities of the potential consequences of illegal P2P file sharing as well offering “free music download services to students as a legitimate, legal alternative to illegal P2P file-sharing” (p. 724). As mentioned, the question of what type of free downloading service and who should pay is still in question. It is difficult to define “offering,” at least in terms of whether or not offering access to legal music services will be enough to placate the recording industry. Would it be enough if institutions simply had iTunes installed on all university-owned systems, both Mac OS X-based and Windows? On one hand, the institutions in question would provide easy access to the iTunes Store, which offers a wide variety of commercial audio and video content and numerous free songs, free episodes of television shows, and thousands of free audio and video podcasts. This strategy would require no additional costs, beyond the time needed to update the disk images of these systems. But, would such an undertaking be enough, or would institutions be required to actually purchase massive subscription plans for their students to services like the Microsoft Zune Marketplace, or the MTV URGE store? If so, wouldn’t such an action effectively amount to a massive subsidization of the business model of a private industry by (in many cases) public institutions? Again, it goes back to how seemingly innocuous terms like *access* and *offer* are defined, and by whom. From a purely pragmatic perspective, Kaplin and Lee (2007) indicated that these efforts might be a good investment because, in their estimation, more colleges and universities have not been sued over the years because of their good-faith efforts to inform campus communities and respond to allegations of file-sharing infringement.

As one example, administrators at the University of South Florida (USF) recently informed users of a change to their campus network. Instead of completely blocking all P2P software from this campus network, or resorting to Draconian packet shaping measures, when a user attempts to use the university network to access P2P software, he/she is redirected to a web page, which reviews appropriate and legal

P2P file sharing uses and to pledge they will not illegally download media files (Emerson, 2008). The university's vice president for information technology, Michael Pierce, said that instead of blocking all traffic to the P2P sites, USF wanted to make students aware using P2P software, because it can be used for legitimate purposes. If students violate this agreement and if they are named in an RIAA letter, they will be processed through the campus discipline process in which their sanction may be as serious as a suspension, as well as any legal penalties from their RIAA case. In addition, USF provides new students with information about this campus policy during orientation programs, in the residence halls, as well as through direct communications (Emerson, 2008).

This new system costs USF about \$75,000 per year, which some argue should instead be spent for educational purposes. Other academics add that colleges and universities should not be coerced into spending taxpayer dollars in an attempt to stave off future law suits. Steve Worona, Director of Policy and Networking Programs for Educause, agrees with both arguments, saying that the time and money spent on blocking illegal downloads, which could be “tens of millions of dollars” nationwide, should be spent on educational needs as determined by individual institutions (Worona, in Emerson, 2008).

Many students and professors applaud these educational approaches as a means to stay ahead of the legislation and, they hope, lessen institutional liability. Though these approaches still allow the legitimate and beneficial uses of P2P software for faculty and students alike, some members of university communities are concerned that the overly restrictive measures regarding their campus networks could undermine the very foundation of academe. McCormick (2006) states, “Unfortunately, the collective effort of these measures, along with current statutory law, may have the unintended consequence of chilling the academic discourse vital to higher education's central goal and the technological innovation on which private industry has come to rely” (p. 725).

Slippery Slope

Colleges and universities will thrive to the extent that they foster innovation and the free exchange of ideas. The ability to do so is threatened by the emerging view of ideas as pure

property and by a shift in focus from serving the public good to serving the bottom line. If we want to preserve innovation, we have to begin asking how we can share, rather than how we can protect. (Hilton, 2005, p. 73)

It is clear that institutions cannot permit or allow students to use campus networks to commit illegal acts of downloading digital media. The potential liability demonstrated in recent legislation and legal cases has made this painfully clear. However, institutions also have obligations to defend core values and be informed participants in this ever-important societal conversation. Harrison (2006) suggests the issues inherent in this conversation are timeless, and focus on “questions of ownership, intrusion into private lives, and ethical actions in the face of choices” (p. 708). McCormick (2006) echoes these thoughts: “Higher education must react to the changes in technology and the changes in laws in very technical ways, but our starting place should be grounded in basic fundamental questions, and with a goal to foster our academic purposes” (p. 682). It is critical for administrators and faculty in higher education to consider the ethical perspective in spite, and perhaps in the midst, of pressing legal threats.

Since 2000 when Metallica included three universities in its lawsuit against Napster, higher education has been reacting to and running from potential legal threats, often regardless of the

infringing or noninfringing use of P2P software. Rather than taking an either/or position as many extremists have done, it is time for educators to do what we do best: respond to this societal issue by being true to our beliefs, which includes engaging interested parties in discussions on the protection of intellectual property, how technology has changed, and the way people view it, while maintaining a commitment to educate students along the way. Too much is at stake not to carefully consider the consequences of these threats. Harrison (2006) states: if higher education maintains a role to “educate first and discipline second, we can encourage and reinforce habitual respect for ownership and fair use” (p. 708).

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