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TOPIC:

COPYRIGHT, PEER-TO-PEER FILE SHARING AND DMCA SUBPOENAS

INTRODUCTION:

This past summer saw developments relating to peer-to-peer ("P2P") music file sharing. Of most significance, on June 25, 2003, the [Recording Industry Association of America \("RIAA"\)](#), a trade group that represents U.S. record companies, announced it would seek out the heaviest P2P service users and sue them for copyright infringement [\[1\]](#). Subsequently on September 8 the RIAA filed suit against 261 individuals in federal courts across the country. In order to identify these individuals, the RIAA issued over 1600 subpoenas under the [Digital Millennium Copyright Act](#). The RIAA has since issued lawsuit notification letters to an additional 204 individuals.

In connection with the recording industry's enforcement effort, colleges and universities have been served with DMCA subpoenas seeking the identity of students engaged in file sharing on educational networks and should be aware of their rights and responsibilities in this regard. This Note will describe P2P file sharing, identify some campus policies to respond to or prevent inappropriate activity, and suggest possible responses by institutions in receipt of a DMCA subpoena seeking the identity of alleged copyright infringers using the institution's computer network.

DISCUSSION:

What Is Peer-to-Peer Sharing?

Peer-to-peer networks consist of users who share information directly with each other over the Internet without having to log onto a central computer. In 1999, a Northeastern University student created a software program called Napster, which allowed its users to trade music and other data online. In February 2001, however, the United States Court of Appeals for the 9th Circuit held that Napster, Inc. had committed contributory copyright infringement by maintaining a central database of available files and their locations for the program's users [\[2\]](#).

Following the *Napster* case, the recording industry targeted the other major peer-to-peer file sharing services, including KaZaA, Grokster, Aimster and Morpheus. While these services are also designed to let people exchange music, movies, videos and other files over the Internet,

they, unlike Napster, are not themselves directly involved in the actual process of sharing, but instead merely provide programs that permit the sharing to occur. A recent federal decision concluded that the companies that provide these programs are not engaging in infringing activity, because the programs can also be used for legitimate file sharing – just as a VCR may be used for both legal and illegal acts [3].

In its effort to protect the intellectual property of its members, the recording industry is now attempting to pursue directly individuals who share files of copyrighted material. Some (though by no means the dominant) percentage of file sharing occurs in the college and university environment, [4] and many of the first subpoenas were issued to educational institutions. Colleges and universities should be prepared to respond if they receive such subpoenas and should take steps to protect themselves – and their students – from potential lawsuits.

Peer-to-Peer Sharing Issues for Universities and Colleges

In the current legal climate, universities should be aware of the following P2P file-sharing issues.

Intellectual Property Issues

Distribution of copyrighted materials over the Internet without the copyright owner's permission can be a violation of the [Sec. 106](#) of the Copyright Act. The DMCA generally protects colleges and universities from liability for illegal file sharing by their students on university networks. However, the institution must register with the Copyright Office and comply with certain other requirements in order to obtain this “safe harbor” immunity [5]. Moreover, the institution can lose its immunity in some cases if it knows or should know about specific infringing activity [6].

Other Network Issues

Peer-to-peer sharing can adversely affect the performance of the computing network in several ways. File sharing can consume a large amount of bandwidth -- some studies have shown that as much as 60% of all traffic/storage on university networks may be devoted to file sharing, leaving little room for more important traffic [7]. Large scale file sharing may also render a network more susceptible to viruses and privacy violations and may open the door to hackers. Moreover, excessive P2P sharing on an institution's network may result in a large volume of DMCA subpoenas, the processing of which requires use of limited institutional resources.

Recording Industry Concerns

In an October 3, 2002, letter to nearly 2,300 college and university presidents, the RIAA expressed concern over student “piracy of copyrighted creative works” and addressed the need for academic institutions to develop policies to prevent online copyright infringement [8]. Specifically, the RIAA requested that colleges and universities adopt and implement policies that:

- (1) Inform students of their moral and legal responsibilities;
- (2) Specify what practices are and are not acceptable on your school's network;
- (3) Monitor compliance; and
- (4) Impose effective remedies against violators.

While these requests go beyond the requirements of the DMCA – which, in particular, does not require an ISP to monitor its users' compliance with copyright law – they are an important indicator of the recording industry's expectations.

What Should A College or University Consider When Implementing Policy?

Whether for legal, bandwidth management or other reasons, institutions attempting to deal with these issues should consider taking some or all of the following steps:

- Adopt and inform students and other users of a policy terminating the network privileges of those found to be infringing copyrights repeatedly and actively enforce that policy when infringements are identified. Doing so is a prerequisite to the DMCA safe harbor.
- Post the policy on the institution's website where it is easily accessible to the university community. In addition, institutions may wish to implement a mechanism that requires users to prove they have read the policy prior to obtaining initial access to the institution's network [\[9\]](#).
- Educate users about copyright law and give them examples of what they can and cannot do [\[10\]](#). Let them know that it generally is best to assume that all but the oldest material is copyright protected unless explicitly stated otherwise and that copyright infringers could face up to \$150,000 per infringement, as well as potential criminal penalties in some cases.
- Recognize that not all P2P file sharing is copyright infringement; some P2P sharing may have legitimate academic use, and your policy should acknowledge the academic benefits of legitimate P2P sharing.
- Consider implementing packet-shaping or other technical means of limiting the amount of file sharing that can occur on the network.

What If An Institution Receives a DMCA Subpoena?

The DMCA gives copyright owners the ability to subpoena internet service providers (including colleges and universities operating computer networks) for "information sufficient to identify the alleged infringer" [\[11\]](#). Copyright holders need not file a lawsuit first; the copyright holder need only apply to the clerk of any United States district court (see discussion at footnote 15 below). The application must include the following:

- a signature of a person authorized to act on behalf of the copyright owner;
- identification of the copyrighted work claimed to have been infringed;
- identification of the material claimed to be infringing (including information reasonably sufficient to allow the service provider to locate the material);

- information reasonably sufficient to allow the service provider to locate the complaining party;
- a statement that the complaining party has a good faith belief that the use of the material is not authorized;
- a statement that the information in the application is accurate;
- a proposed subpoena; and
- a sworn declaration that the purpose of the subpoena is to identify the alleged infringer and that the information obtained will be used only to protect copyright rights [\[12\]](#).

A college or university that receives such a subpoena must “expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law ...”

[\[13\]](#). Before doing so, however, the institution should confirm that the subpoena complies with the requirements listed above. If it does not, compliance with the subpoena would not be required by the DMCA and therefore presumably would be prohibited by the Family Educational Rights and Privacy Act (“FERPA”) [20 U.S.C. 1232(g)(b)(2)(B)] [\[14\]](#). Whether a subpoena that does comply with the DMCA requirements must also comply with the additional requirements of FERPA – including notification of the affected students in advance of compliance – is an open question [\[15\]](#). Institutions would be wise to continue to insist on compliance with FERPA until this issue is resolved.

[FOOTNOTES](#)

RESOURCES for COUNSEL:

Statutes:

[17 U.S.C. § 512](#)

Copyright: Limitations on Liability Related to Material Online

[20 U.S.C. 1232\(g\)](#)

Education: Family Educational and Privacy Rights

[34 C.F.R. § 99.31](#)

Education: Family Educational Rights and Privacy

Cases:

- [A&M Records, Inc. v. Napster, Inc., 239 F.3d 2004 \(9th Cir. 2001\)](#)
- [In re Verizon Internet Services, Inc., 257 F.Supp.2d 244 \(D.D.C. 2003\)](#)
- [Metro-Goldwyn-Mayer Services, Inc. v. Grokster, Ltd., 259 F.Supp.2d 1029 \(C.D.Cal. 2003\)](#)

Policies:

- [Cornell University](#)
- [Duke University](#)
- [Loyola University Chicago](#)
- [University of North Carolina, Chapel Hill](#)

Web Sites:

- [United States Copyright Office](#)
- [Recording Industry Association of America](#)

Additional Resources:

- [Copyright, Civil Rights, and the Middle Ages](#), September/October 2003 (Tracy Mitrano, Educause Review)
- [RIAA Letter to U.S. Senator Norm Coleman](#), August 14, 2003
- [American Council on Education: Background Discussion on Copyright Law and Potential Liability for Students Engaged in P2P File Sharing on University Networks](#), August 8, 2003
- [Copyright and Digital Media in a Post-Napster World](#), August 2003 (The Berkman Center for Internet & Society, Harvard Law School)
- [Letter to Institutional Presidents](#), October 8, 2002
- [RIAA Letter to College and University Presidents](#), October 3, 2002

AUTHORS:

[Darren S. Cahr](#), [Nicole Murray](#), and [Howard Zweig](#) (NACUA Member). Gardner Carton & Douglas.

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*National Association of College and University Attorneys
One Dupont Circle N.W., Suite 620, Washington, D.C. 20036
voice: 202.833.8390 – fax: 202.296.8379*