

## **Why Are They Treating Us Like Criminals?**

### **The Campaign Against Illegal Downloading and its Academic, Legislative and Economic Impact**

On September 8<sup>th</sup> of this year, The Recording Industry Association of America (RIAA), the trade association for the recording industry, filed 261 lawsuits against users of file sharing systems accusing them of downloading “substantial” quantities of copyrighted music. The targets of these actions were discovered by using exotic computer hardware called Spybots to scan publicly available peer-to-peer (P2P) networks and identify the ISP (Internet Service Provider like AOL or Earthlink) of each user. The RIAA then used the powers granted under the Digital Millennium Copyright Act (DMCA), a 1992 amendment to the Copyright Law, to subpoena ISPs for each user’s name, address and other personal information. All the people sued reportedly had more than 1,000 songs available for download. With this aggressive litigation campaign, the RIAA is also offering an amnesty program under which file sharers who have not yet been sued but suspect that they are being targeted, can sign a “Clean Slate Program Affidavit” agreeing to delete all infringing files from their computers and to stop any further downloading activities.

The New York Times describes this campaign against online piracy as relying on both public relations and economics to attack the idea that everything in cyberspace can be free. Until the publicity surrounding the RIAA legal initiative, polls showed that 72% of people aged 18-29 didn’t think they were doing anything wrong, since file sharing was a private, non-commercial activity. With this bold and controversial action by the RIAA and others, the education process is well underway. Teachers, administrators, parents and of course the media are providing the unmistakably clear message that not only is it wrong, but penalties for violating the law are just not worth it.

In an excellent article entitled “Copyright Law and the Internet”, (NYSBA Entertainment, Arts and Sports Law Journal/Summer 2003, Vol. 14 No.2), Judge Jed S. Rakoff, United States District Judge for the Southern District of New York, makes the point that the Internet, like telephones, movies, radio and television, has had a profound impact on how Americans conduct their everyday lives. For example, email is different from writing a hardcopy letter and shopping on the Internet and obtaining news and information are totally different from shopping in person, or even watching television. The Internet lends itself to a casual tone and manner and provides greater immediacy (as well as greater inaccuracy). Judge Rakoff goes on to say that it is clear that Internet communication impacts everything from economic efficiency to personal privacy, in ways that only a truly new medium of communication can. Whenever this kind of technological shift occurs, it takes the laws of society quite some time to catch up and “harness the new medium to social values”. This could lead in the interim to extreme positions being espoused such as the RIAA suits against these defendants; many of whom are students who had no idea that there seemingly harmless non-commercial practice of file sharing would get them into this predicament.

Judge Rakoff by the way, was the judge who decided the MP3 case about three years ago which held that MP3's free service for beaming digital copies of songs over the Internet to anyone who possesses a hard copy of the song violated the copyright laws. Copyright is certainly one of those laws Judge Rakoff says must catch up to, "Harness the new medium to social values". In a way you could look at the RIAA campaign as just such an effort.

Why is the RIAA taking this extreme position? The answer requires a brief discussion of case law. After the MP3 case, which was the first to directly hold that the file sharing service itself (MP3.com) was deemed the infringing party, the next major case was Napster. Napster, by use of its software and system of centrally located servers, assisted its users in their efforts to infringe copyrights. Napster though liable for copyright infringement, was held to be a secondary infringer. The primary infringer was the person who did the uploading and the downloading. But at that time the RIAA and other plaintiffs didn't have to go after those people because they had Napster as a defendant and unlike the downloaders, Napster was making an economic gain from the process, mostly from banner ads on the site. There was also no doubt that Napster and its progeny were file-sharing services whose primary business was the facilitation and contribution to infringement on a massive scale. Napster had actual and constructive knowledge of the infringing activity; in fact it encouraged it and made money as a result.

After Napster was shut down, it was followed by a new generation of sites like Grokster, Morpheus and KaZaA. They learned from the Napster example and developed a different technical process to circumvent the Napster basis for liability. These services merely provided the software for file sharing. They had no control over the users conduct and had no role in the actual infringing download. While Napster had a central server that connected all users, Grokster used network technology supplied by a third party ("FastTrack") to enable peer-to-peer contact thereby permitting the request for the file to pass directly from user to user. Because of this, the courts ruled the other way, agreeing that these defendants had no control of the user's actions and could in no way interfere with or prevent their acts at the moment the infringement occurred. The court also said that these defendants are not significantly different from companies that sell home video recorders or copying machines, both of which can infringe copyright, but have other substantial other non-infringing uses, like distributing free songs, movie trailers and non-copyrighted works. Thus the RIAA was forced to proceed directly against the infringing party, the downloader or file sharer; an extreme remedy against what until that time had been a fairly acceptable public practice.

Judge Rakoff was also concerned about "harnessing the medium to social values". According to him, the fundamental issue lurking just beneath the surface in cases like Napster and MP3.com is whether copyright law should be applied *at all* to the exchange of otherwise copyrightable materials over the Internet.

On this issue, the opposite sides of this spectrum from the RIAA are espoused by people like professor Lawrence Lessig of Stanford Law School, who Judge Rakoff describes as "the great guru of copyright free cyberspace". In his view, "the Internet

serves as a worldwide public commune, exposing the people of the world to a dizzying variety of ideas, expressions, cultures and creations in a manner so free and easy that it sparks an immense amount of additional creativity and innovation”. To Professor Lessig, it is the large corporate interests like record companies who seek to narrow the freedom of the Internet for their own economic advantage. Therefore by attempting to wall off portions of cyberspace they are destroying the Internet’s potential to foster democracy and economic growth worldwide.

The RIAA initiative also raises legitimate public concern about rights of privacy. The information subpoena authority available under the DMCA was used by the RIAA and other copyright owners to compel Internet service providers to disclose to them the names, addresses, (including e-mail addresses) and phone numbers of their subscribers suspected of piracy. But this procedure, which requires only a court clerk’s signature and need not come before a judge to be effective, can be used by others just as easily to make possible some very disturbing scenarios. According to a press release from Senator Sam Brownback of Kansas, who is chairing full Senate Commerce committee hearings on Digital Rights Management, a hardcore pornographer, Titan Media, this past July, filed a subpoena against SBC Communications, an ISP, seeking the identifying information of 59 SBC Internet subscribers it claimed to suspect of copyright infringement. Senator Brownback has now introduced legislation, the Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003, to insure that the DMCA information subpoena cannot be used in this manner. In the Senator’s words:

“I support strong protections of intellectual property, and I will stand on my record in support of property rights against any challenge. But I cannot in good conscience support any tool such as the DMCA information subpoena that can be used by pornographers, and potentially even more distasteful actors, to collect the identifying information of Americans, especially our children.”  
(<http://brownback.senate.gov/record.cfm?id=211708>)

The battle lines therefore are drawn. On the one side are the people that say information should be free; it promotes progress of technology; too much content is controlled by too few anyway; an invasion of free speech will chill research and the ever increasing tendency to collect information about us seriously threatens our right to remain private and may even threaten our safety. Coming down on the side of copyright is the constitutional provision that grants copyright protection to the creators of intellectual property. Having this “monopoly” control of creative property for the limited period of time prescribed by the Constitution, is an incentive to the creative process and theft of that copyrighted property without paying creates massive financial losses, which in turn have the effect of restricting creativity even further.

Since a good portion of the defendants in these suits are students, these issues were of critical importance to the academic community, especially the higher education academic community who is also concerned with the issue of academic freedom and whether protecting infringement has a chilling effect on research.

In September of 2003 a joint committee was formed consisting of leaders from the higher education community and a group of significant business leaders, to develop collaborative solutions to address illegal file sharing on college campuses. Leading this effort from the educational community was President Graham Spanier, of Penn State University. According to the Collegiate Presswire (<http://www.cpwire.com>) the committee plans to provide a range of resources to school administrators in three basic areas: educational efforts (including practices surrounding the use of copyrighted works, student responsibility, and implications for peer-to-peer network file sharing), technological solutions (including computer network management technologies available to reduce illegal file sharing and the development of legal, campus-based music and movie/entertainment services), and examining differences and exploring prospects for collaboration on legislative initiatives. The committee promises to release a best practices document intended to serve as a resource to universities and colleges. They will outline some of the approaches other schools have taken in setting campus network use policies, and in educating students and staff about respect for copyrights, together with a caveat about the liability for illegal file sharing. The so-called "Spanier Plan" suggests that colleges pay a yearly industry approved blanket fee to the labels and music publishers. Another solution is a judicially prescribed, consent decree. This would create judicially set rates for a license, similar to the way broadcasting fees are administered by ASCAP and BMI, the two major performing rights societies. Also suggested are possible taxes on downloading software or on ISP access measured by bandwidth. This would in turn form the source of a royalty paid to artists. This is similar to the Audio Home Recording Act of 1992, which established a tax on the sale of digital home recording devices. This alternative is for the moment not available as Congress has just recently passed legislation in effect prohibiting tax increases on ISP's. Finally is the concept of a compulsory license with a rate set by Congress, in much the same manner as applies to the sale of phonograph records and Internet streaming of sound recordings.

The group also proposes the following specific projects:

- A Request for Information (RFI) about technologies offered by various companies that could help curb illegal peer-to-peer network file sharing on college and university campuses (<http://www.educause.edu/issues/rfi/>). The idea behind this RFI is to create a clearinghouse of readily-accessible information about technologies now available to reduce infringing use of P2P on campus networks, and a convenient and easy resource for school administrators to consult. That RFI was issued in April and the review is near completion. It is intended to lead to on-campus pilot projects beginning this academic year that will afford a practical demonstration and evaluation of the utility and effectiveness of the technologies.

- A Request for Information (RFI) about legitimate online music and movie services now available (<http://www.educause.edu/issues/rfi/>). The Joint Committee does not plan to recommend a particular service, nor can it negotiate any specific online licensing agreement with schools; rather, the goal is to create a knowledge base of information for university administrators and music and movie officials to help facilitate existing or future conversations between legitimate online content services and schools. That RFI

was issued in June and the review is underway. The goal of this effort is the implementation of pilot projects at a number of universities to implement campus-based legitimate online music and movie services.

A recently released white paper, "Background Discussion of Copyright Law and Potential Liability for Students Engaged in P2P File Sharing on University Networks," designed to help school administrators better understand the application of copyright law to peer-to-peer network file sharing and students' legal liability when they engage in this illegal activity (<http://www.acenet.edu/washington/legalupdate/2003/P2P.pdf>).

This fall, the Committee will release a best practices document intended to serve as a resource to universities and colleges by outlining some of the approaches other schools have taken in setting campus network use policies and in educating students, faculty and staff about respect for copyrights and the liability for illegal file sharing. The Committee believes that the diverse size and varied traditions of numerous universities and colleges precludes a "one-sizes-fits-all" policy. Rather, the document will offer a variety of policies and procedures of demonstrated effectiveness.

And the pressure from the RIAA and others has begun to be felt at the college administration level.

"Jeff Karp, a partner at Swidler, Berlin, Shereff, Friedman in Washington who specializes in copyright protection law and has counseled several institutions on file-sharing issues, said colleges were feeling the heat. 'If they're the ones operating the system and they're aware of infringement activities occurring and they fail to take steps to stop it, they could be facing a lawsuit for contributory or vicarious copyright infringement,' he said.

M.I.T., Northeastern and the University of California at Los Angeles are among the universities that have complied with subpoenas from the recording industry association to provide identifying information on those thought to be pirating music, and students on several campuses have been sued by the association and have settled. 'The stepped-up enforcement efforts of the R.I.A.A. are having an influence on student behavior, and they have undoubtedly raised the awareness level of university leaders as well,' said Dr. Spanier.

Possible legal jeopardy aside, there is another incentive for colleges to address the issue: file sharing puts a strain on servers, hindering other students from doing legitimate work. 'If this were a Wild West scenario without any rules, students wouldn't be able to do what they wanted to do academically," said Mr. Arps, citing sluggish access to distance-learning sites as an example of problems caused by server traffic.' (Campuses Move to Block Music Sharing, by Sam Lubell, New York Times, October 2, 2003).

What is the alternative to illegal file sharing? First there is PressPlay and similar legal file sharing websites like AOL Music Net and Rhapsody, which is owned and operated by Real Networks. You can join Pressplay for ten dollars a month, which will

give you access to the vast catalogs of the major labels and many independents. Type in the name Miles Davis under the artist search and in a few seconds you have a choice of hundreds of cuts from almost all Davis' albums, including the complete Columbia Records catalog and the treasure house of Prestige recordings now owned by Fantasy/Milestone. Most of this material is available to be downloaded to your hard drive at no extra charge, where it can reside as long as you pay your monthly membership fee. This download is not portable or transferable, but if you want to burn a CD or transfer to a portable device, much of the site content is available for that purpose at 99¢ a cut, or \$8 per album. The recording quality is excellent and there is accurate artist and album information, provided by allmusic.com. There's even a "Buy this CD" button, which will send you to Amazon.com where with one click you can buy the whole CD. I for one am a convert to Pressplay. With a \$50 set of bass woofer equipped, computer speakers, I am not only discovering some new music that I might hear about but probably never get around to listening to, but I have been happily reunited with much of the great Jazz I grew up with, but somehow stopped listening to.

So while the RIAA is demanding a penalty for illegal downloading, the record industry is making available legal alternatives, which are quite good now and promise to improve quickly and dramatically. The gap is definitely narrowing between the consequences of illegal downloading and the quality and accessibility of legal alternatives.

At the same time, the industry has other constructive alternatives. Record labels were certainly vulnerable to the criticism that record prices were too high and Universal's recent price reduction to \$12.95 will have a major impact on this. There is also a move to the AV/DVD format, with more features and extras and more products for consumers. A new release by Thelonious Records contains a previously unreleased audio CD of a Thelonious Monk Quartet concert in Europe in 1965 plus a DVD of a televised concert performance in 1966. Both of these are included in a nicely packaged, two CD set at a price of \$15.98. Other labels are following suit on this concept of coupling the CD and DVD formats in the same package with no increase in price.

The technological revolution in the processing and disseminating of information which is the Internet has required us to re-examine the balance between the basic issues which define our society. Issues of law and the constitution, moral and ethical considerations, economics and the changing marketplace and concern for privacy are all part of this discussion. The legal, legislative, and academic communities will help shape the future contours of copyright laws related to the Internet. I do not agree with those who favor eliminating copyright from the Internet. Neither does Judge Rakoff. With him I believe, that the immense power and increasing ubiquitousness of Internet communication mandates some caution in expanding copyright rights. We remain optimistic that great balances will be struck and the right solutions will be found.