August 8, 2003

Dear Colleagues:

The problem of unauthorized peer-to-peer (P2P) file sharing is receiving increasing attention on college and university campuses, within the entertainment industry, in the media, and in the U.S. Congress. The Joint Committee of the Higher Education and Entertainment Communities (membership list enclosed) was formed last December to work collaboratively toward solutions to this problem. The committee is working on three basic approaches to reducing or eliminating unauthorized P2P file sharing: (1) campus education policies and practices concerning copyright rights and responsibilities and their implications for P2P file sharing, (2) the use of computer network management technologies to control inappropriate file sharing, and (3) the development of legal, campus-based online music subscription services.

As part of the Joint Committee's education effort, the Committee's Education Task Force has prepared the enclosed paper on copyright law and the potential liability of students engaged in P2P file sharing on campus networks. As discussed in the paper, the P2P file sharing software is not itself unlawful, but its use for unauthorized downloading and uploading of copyrighted music and other works likely constitutes copyright infringement. Copyright owners are expanding their efforts against such infringement through a variety of legal means. The enclosed paper is intended to assist campus administrators in understanding the application of copyright law to P2P file sharing and the potential serious liabilities that may be incurred by students who engage in that activity; we encourage you to share this paper with appropriate members of your administration.

We intend to distribute another document shortly that will describe a number of approaches that various institutions have taken to educate students, faculty, and staff about copyright rights and responsibilities and P2P file sharing. In the meantime, we hope that you will find the enclosed paper to be helpful in thinking about this issue and framing your own institutional policies.

Sincerely,

John Hennessy, President, Stanford University and
Chair, Education Task Force
Graham Spanier, President, The Pennsylvania State University and
Co-Chair, Joint Committee of the Higher Education and Entertainment Communities

Background Discussion of Copyright Law and Potential Liability for Students Engaged in P2P File Sharing on University Networks[1]

EXECUTIVE SUMMARY

Although peer-to-peer ("P2P") file sharing on university networks *per se* is not unlawful, many students have used popular P2P software such as KaZaA and Morpheus to engage in extensive infringement of copyrighted works (including music, movies, computer software, video games, and photographs). As shown by the recent multi-million dollar lawsuits filed against four individual university network users, copyright owners are increasingly taking the offensive against infringements of their protected works. Students clearly need to know their rights and responsibilities, and their potential liability for unlawful P2P activities.

The basis for copyright law is found in Article I of the U.S. Constitution and codified in Title 17 (the "Copyright Act") of the United States Code. The Copyright Act lists exclusive rights of copyright holders, including reproduction and distribution of the copyrighted work, both of which are implicated in P2P file sharing. Being a strict liability statute, the Copyright Act does not require a showing of intent in order to find liability for infringement.

There are three types of infringement. Under *direct infringement*, a person is liable for his own infringing conduct; under *contributory infringement*, a person may be liable if he or she knows of the infringing activity, and induces, causes or materially contributes to the infringing conduct of another; under *vicarious infringement*, a person may be liable if he or she has the right and ability to supervise the infringing activity and also has a direct financial interest in the activity. Most users of P2P networks will fall under the direct infringement category. Absent directly infringing conduct, however, students who operate or encourage the use of such networks may nonetheless be open to contributory or vicarious claims.

There are several limitations on the rights of copyright owners, including the important doctrine of "fair use." In addition to six enumerated purposes of fair use of copyrighted works (criticism, comment, news reporting, teaching, scholarship, or research), courts have held time shifting of broadcast television to be fair use and have suggested that space shifting of previously purchased sound recordings to different platforms may also be fair use. The Copyright Act identifies four factors to be weighed by a court in determining whether the fair use privilege applies. The factors do not present a bright-line test, and determinations are made on a case-by-case basis. Several courts, however (including the one in the *Napster* case), have held that unauthorized P2P file sharing of copyrighted works typically does not merit a fair use defense.

[1] Paper prepared by Michael J. Remington, Esq., Drinker Biddle & Reath LLP, Washington, DC, for the Education Task Force of the Joint Committee of the Higher Education and Entertainment Communities. It may be reproduced, distributed, and shared without permission for personal and noncommercial use.

Another important limitation, the "first sale" doctrine, states that once a copyright owner consents to the sale of a particular copy, it may not exercise its distribution right to those copies. (For example, once an individual CD is sold, the copyright owner cannot prevent a purchaser from re-selling or otherwise distributing that particular CD.) A "first sale" defense in a P2P case is not likely to be successful for the simple reason that file sharing causes duplication in addition to distribution of the work.

Remedies for infringement allow for the recovery of actual damages and the award of any profits of the infringer. To avoid an often difficult accounting, the Copyright Act provides the alternative of statutory damages if the copyright was registered before infringement began. These damages range from $750 to $30,000 per infringed work. The amount may be raised to $150,000 per infringed work in cases of "willful" infringement (*i.e*., the user knew, or had reason to know, or recklessly disregarded the fact, that his conduct was infringing activity). The amount may be reduced to $200 per infringed work where the defendant did not know and had no reason to know that her conduct was infringing. In addition, recovery in an infringement suit may include costs and, where the copyrights were registered prior to infringement, attorney's fees. Injunctive relief, such as temporary restraining orders, preliminary injunctions and final injunctions are common, and impoundment of equipment used in the infringing activity, including computers, may be granted. In a criminal action, serious penalties, including imprisonment, may also be imposed on persons who willfully infringe copyrights for commercial advantage or private financial gain, or in the instances of reproduction and distribution, when the value of infringing copies is more than $1000. To date, instances of criminal prosecutions are rare, however.

P2P file-sharing activities may also implicate other laws. These include Chapter 11 of the Copyright Act (prohibiting the unauthorized fixation and trafficking – "bootlegging" – of recordings of live performances); the federal Lanham Act (covering trademark law); state laws regarding unfair competition and misappropriation; laws that protect the personal interests of individual creators, performers and artists, including privacy and publicity concerns; and laws of foreign countries.

Colleges and universities are under no legal obligation to defend, or accept responsibility for, the illegal actions of their students in the P2P context. A major step toward ending unlawful P2P activities on college and university campuses lies in education. Ultimately, it is important for institutions to provide information about students' rights and responsibilities with regard to copyrighted works on P2P services.

WHITE PAPER

The record industry recently filed lawsuits against four individual university network users, claiming hundreds of millions of dollars in damages based on their peer-to-peer ("P2P") file-sharing activities and consequent violations of federal copyright laws. The students each agreed to pay as much as $17,500 to settle the lawsuits. Other students who engage in P2P file-sharing activities clearly need to know their potential liabilities for such activities.

File sharing *per se* is not unlawful. P2P technology can be used in lawful and constructive ways as, for example, when professors place their lectures on university P2P networks, when researchers share the results of their studies and analyses with each other, or even when a band decides that it will authorize the sharing of its music.

However, the potential "on-paper" liability of students who engage in unlawful file sharing of copyrighted works (including recordings, musical works, movies and television programs, software, video games, and photographs) on university networks is substantial. The basis for liability in P2P file sharing is rooted in federal copyright law, which protects the intellectual creations of others. Liability also may arise based on other legal theories, but they are likely to be over-shadowed by copyright liability. Copyright law provides for "statutory damages" for *each infringed work* in amounts that typically range from a minimum of $750 for each work to a maximum of $30,000 per work, with a possible increase to $150,000 *for each infringed work* in cases of willful infringement. Moreover, each sound recording of a song typically includes not one, but two copyrighted works – the recording itself and the underlying song. Rights in the underlying songs were not even raised in the record industry suits. Nor were rights in sound recordings not owned by record companies represented by the Recording Industry Association of America (the "RIAA"). Others who have rights in a work (*e.g.,* software companies, movie studios, and photographers) or who represent creators could bring credible lawsuits against students for infringements of their respective works. Finally, P2P file sharing may also involve rights under other laws (state, federal, and international) that protect intellectual property and the personal rights of creators, performers and artists. In short, students who engage in unlawful P2P file-sharing activities could be subjected to significant liabilities.

I. SUBSTANTIAL LIABILITIES ARISE UNDER U.S. COPYRIGHT LAW.

Individuals sued in the United States for copyright infringement often state that they did not know that they were doing anything wrong. However, copyright is a strict liability tort, and does not have an intent requirement. A showing of "willfulness" operates to augment statutory damages; in some cases, a showing that the defendant had no reason to believe his or her conduct was infringing could operate to reduce them. And copyright law does contain a number of limitations (the most important of them being "fair use," as discussed below) on the rights of copyright owners. The U.S. Constitution authorizes Congress to enact copyright laws "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors … the exclusive Right to their respective Writings …." Art. 1, section 8, clause 8. In the exercise of its authority, Congress often balances proprietary rights and the public interest.

Subject matter of copyrighted works. U.S. copyright law – found in Title 17 (the "Copyright Act") of the United States Code – covers the broad expanse of creativity and culture, including sound recordings, musical works, photographs, literary works, dramatic works, motion pictures and other audiovisual works, and computer software. 17 U.S.C. § 102(a). To qualify for copyright protection, a work must be original and fixed in a tangible medium. P2P file sharing clearly implicates works protected by copyright law.

Exclusive rights. U.S. copyright law establishes exclusive rights in the author or copyright owner of the work. 17 U.S.C. § 106. The word "copying" is often used as shorthand for the infringement of any of the copyright owner's six exclusive rights. The exclusive rights are: reproduction, distribution, public performance of musical works, public performance of sound recordings (by means of a digital transmission), public display, and adaptation. Exclusive rights operate in a "bundle" but are readily divisible among various copyright owners. In the Napster litigation and the recent record industry lawsuits against individual students, at least two exclusive rights are clearly identified: reproduction and

distribution. It is possible that unauthorized P2P file sharing could implicate other exclusive rights (for example, the uploading and downloading of copyrighted photography could implicate the public display right).

Limitations on rights. The Copyright Act contains several important limitations on the rights of copyright owners. The most important to students is the "fair use" privilege. 17 U.S.C. § 107. Fair use gives users the opportunity to use copyrighted materials and to engage in certain activities with those materials, notwithstanding the wishes of the copyright owner. Fair use has been described by the U.S. Supreme Court as "an equitable rule of reason." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984). Section 107's first sentence sets forth six exemplary purposes of fair use: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research." These examples are not exclusive. For example, the U.S. Supreme Court has held that the recording of broadcast television for later viewing ("time shifting") also is a fair use. *Sony Corp. of America v. Universal City Studios, Inc., supra.* Section 107's second sentence identifies four factors for a court to weigh in deciding whether a use that falls within the general scope of fair use is, in fact, "fair":

> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work."

17 U.S.C. §107. The factors, each of which has elasticity, are not an exhaustive enumeration and do not present bright-line rules. The statute calls for a case-by-case analysis. Certain P2P file-sharing activities among and between faculty and students may, therefore, qualify for fair use.

Nonetheless, based on the facts known about most of the systemic and extensive P2P file sharing by students in order to avoid purchases, including the copying of entire works and the widespread making available of those works, and the possibility of a showing of adverse market effects, a successful fair use defense is not likely. Such file sharing involves essentially exact copying of entire creative works, typically in ways that do not add to the store of knowledge or the creation of new works. Although there is some conflicting evidence, courts that have considered the issue have accepted the recording industry's evidence and arguments that file sharing is damaging the market for copyrighted works. *See, e.g., A&M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004 (9th Cir. 2001). A current argument, not completely settled, posits that "space shifting," which allows one to transfer a copyrighted work from one medium to another, is "fair use." *See RIAA v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999). New issues, such as space shifting, will continue to arise. For example, not yet resolved is whether it is fair use for a student who has already purchased a CD to download the CD from the Internet simply as a convenient way personally to enjoy the music on a different platform or in a different format. Similarly, a download of a CD for a classroom demonstration may qualify as fair use. In the final analysis, any successful fair use defense for P2P file sharing by a student will be based on the facts and circumstances of that situation within a legal framework of judicial decision-making and evolving case law.

Under the "first sale" doctrine in copyright law, another important limitation on exclusive rights, once a copyright owner consents to the sale of a particular copy, he or she may not thereafter exercise the distribution right to those copies. 17 U.S.C. § 109(a). The first sale doctrine permits a lawfully purchased CD to be given or resold to someone else. It also allows the physical mutual exchange of CDs. Students may contend that digital networks merely permit the "swapping" of previously purchased copyrighted works that, in the analog world, can be bought and later shared or given away. In the digital environment (depending on the technology), files typically are not just exchanged. They are copied through a downloading or uploading process. Although debate already rages about whether there is a digital first sale defense for the transmission of a copyrighted work when the sender's work disappears, any argument that a *bona fide* purchaser of a copyrighted work (such as a CD) can share P2P copies of that work with many others is not likely to be successful.

Other statutory limitations on exclusive rights in the copyright law such as those that apply to classroom teaching activities (17 U.S.C. § 110(1)), distance education (17 U.S.C. § 110(2)), or that are contained in the various compulsory licenses (*e.g.*, 17 U.S.C. § 111, § 112, § 114, § 115, § 118, § 119, § 122) appear unavailing for P2P file sharing. These statutes are drafted and construed to apply to particular facts and circumstances that typically do not apply in the P2P file-sharing context.

Finally, copyright law "contains built-in First Amendment accommodations." *Eldred v. Ashcroft*, 123 S. Ct. 769, 774 (2003). Through the fair use privilege and the idea-expression dichotomy (which permits free use of facts and ideas, while still protecting an author's specific creative expression), free speech values are preserved and protected. Copyright itself is deemed the "engine of free expression." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985). Debate occurs about the appropriate balance between the conflicting interests in copyright and free speech. Under current law, it is very unlikely that the First Amendment will provide any defense for copyright infringement in typical cases of P2P file sharing by students.

Types of infringements. Under the copyright law, there are three types of infringement: (1) direct infringement; (2) contributory infringement; and (3) vicarious liability.

Direct infringement. Direct infringement may be alleged against an individual or entity for engaging in conduct that violates one or more of a copyright owner's exclusive rights. Section 501(a) of the Copyright Act is crystal clear in scope and message: "anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 …, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of copyright …." Any complaint by a copyright owner against students who engage in P2P file sharing is likely to be rooted in the concept of direct (or primary) infringement under section 501(a) of the Copyright Act. As stated above, strict liability is the rule. It is not a defense for a defendant to say that a work was copied unknowingly, unconsciously, or innocently. As discussed further below, a defendant's innocence may, however, circumscribe the remedies available against the infringer.

Only the copyright owner has the right to do or authorize others to do those things that are included within the bundle of rights enumerated in Section 106 of the Copyright Act. Use of the phrase "to authorize" has been construed to incorporate liability of secondary infringers through two distinct theories of liability: contributory infringement and vicarious liability.

Contributory infringement. Contributory infringement liability may be asserted against "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another …." *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F. 2d 1159, 1162 (2nd Cir. 1971). To prevail on a contributory or vicarious copyright infringement claim, a plaintiff must show direct infringement by a third party. *See, e.g., Sony Corp. of America v. Universal City Studios, Inc., supra*, 464 U.S. at 434-436 (1984). Contributory infringement stems from the notion that a person who directly contributes to another's infringement should be held accountable. Two factors come into play in determining liability for contributory infringement: (1) knowledge; and (2) inducing, causation, or material contribution. The *Sony* case held that one could not be liable as a contributory infringer for distributing a device that is capable of substantial non-infringing use. The federal courts have not finally determined whether the distribution of P2P software or the operation of a P2P service qualifies for this protection. Depending on how these factors are decided, contributory infringement liability could be imposed against a student who knowingly provides P2P software or who operates a P2P file-sharing service on a university network that materially contributes to infringements by other students. Compare *Sony Corp. of America v. Universal City Studios, Inc., supra*; *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (9th Cir. 2001); *In re: Aimster Copyright Litigation*, 252 F.Supp.2d 634 (N.D. Ill. 2002), *affirmed*, __ F.3d __ (7th Cir., June 30, 2003); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* 259 F.Supp.2d 1029 (C.D. Cal. 2003). Participating in a P2P service, and knowingly leaving that service in a computer's "logged on" position on an individual's computer so that thousands of copyrighted works are accessible to others, could fall under the category of contributory infringement.

> ***Vicarious liability***. Vicarious liability, on the other hand, can be imposed on persons who do not "induce" or "cause" direct infringement or, for that matter, are not even aware that another party is involved in infringing activity when their economic interests are intertwined with the direct infringers. Even in the absence of an employment relationship, a defendant may incur liability for various copyright infringements if the defendant "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." *Fonovisa, Inc. v. Cherry Auction, Inc*. 76 F.3d 259, 262 (9th Cir. 1996) (quoting *Gershwin*, *supra,* 443 F.2d at 1162). In a long line of cases emanating from the music industry, courts imposed vicarious liability on dancehall owners for infringing performances by bands that attracted customers and revenue even if the owner had no knowledge of what songs were being played. Showing profits of vicarious infringers can be a thicket, especially when payments are not at all associated with infringing activities. Some courts have indicated that the use of infringed copyrighted works as a "draw" for customers may suffice. It makes no difference whether the activity is a flea market in a muddy, rural field or a sophisticated Internet web site like Napster. *See Napster*, 239 F. 3d at 1022; *Fonovisa*, 76 F. 3d at 262. The issue of right and ability to supervise can also raise difficult questions that may be implicated in certain P2P activities. In the recent lawsuits brought by the recording companies against the students, vicarious liability was not claimed.

Accordingly, a copyright owner may file an infringement action not only against the person who actually engages in the unauthorized exercise of one or more exclusive rights but also against contributory or vicarious infringers. Similarly, a lawsuit may lie against a direct infringer who also is facilitating the infringement of others. A student who operates a P2P file-sharing network may fall into all these categories if he or she actually uploads or downloads works, knowingly operates the network that enables direct infringements by others, retains the right to control the infringing activity of the users of the network, and derives direct financial benefit.

Potential liability for colleges and universities. The focus of this White Paper is on the potential liability of those actually engaged in P2P file sharing rather than on colleges and universities that operate the computer networks over which the file sharing occurs. It is worth noting, however, that these institutions may face claims of contributory or vicarious liability from the conduct of their students. Such cases would likely raise questions about the institution's knowledge of the conduct, contribution to the conduct, ability to control the conduct, and whether or not the institution obtains a direct financial benefit from the conduct. These issues are potentially complex, and colleges and universities should consult with counsel.

Further, the institution, as a network operator, is likely to be in a position to rely on the liability limitations provided to service providers by the Digital Millennium Copyright Act (the "DMCA"), which are discussed below. These liability limitations are subject to certain conditions, which institutions would be well advised to review.

Damages. The Copyright Act provides for substantial monetary damages that are designed to compensate owners and to deter or punish copyright infringers. The Act authorizes courts to award damages for the actual losses of the copyright owner caused by the infringement and any additional profits of the infringer due to the infringement. 17 U.S.C. § 504(b). Because copyright owners sometimes have difficulty establishing actual damages and profits, the Act also entitles owners who have registered their copyrights with the Copyright Office before an infringement occurs to elect statutory damages instead. 17 U.S.C. § 504(c). Pursuit of statutory damages is entirely at the discretion of the copyright owner, and the election may occur any time before final judgment, a right somewhat circumscribed by the fact that in 1998 the U.S. Supreme Court held that there is a constitutional right to a jury trial on the question of statutory damages. *Feltner v. Columbia Pictures Television, Inc*., 523 U.S. 340 (1998). The range for statutory damages lies between $750 and $30,000 per infringed copyrighted work "as the court considers just." 17 U.S.C. § 504(c)(1). In a case where the copyright owner satisfies the burden of proving, and the court (jury or judge) finds, that an infringement was committed "willfully," the court can increase the statutory damage award to $150,000 per infringed work. *Id*. at § 504(c)(2). In a case where the infringer sustains the burden of proving, and the court (jury or judge) finds that such infringer was not aware and had no reason to believe that his or her acts constituted copyright infringement (so called "innocent" infringement), the court has the discretion to decrease the statutory damage award to as low as $200 per infringement. *Id*. Given recent press coverage, congressional

hearings, and Internet chat, students could find it difficult to prove that they were unaware that file sharing was infringement. In the recent lawsuits against the four students, the recording companies requested maximum statutory damages in the amount of $150,000 with respect to *each* copyrighted work infringed. Because students are not likely to be making profits from P2P file sharing and the labels may have some difficulty showing lost profits, it is unlikely that future lawsuits against students will request actual damages and profits.

The courts follow certain benchmarks in arriving at "just" statutory awards: first, the amount of actual damages and profits a plaintiff probably would have recovered if it had been able to prove and had been so affected; and second, the amount necessary to induce copyright owners to enforce their rights and to deter infringements. Both of these considerations – the former remedial and the latter deterrent or punitive – could lead to high statutory damages, but that is not necessarily assured for lawsuits against students as compared to commercial or corporate entities. On the other hand, juries can feel a great deal of sympathy for defendants and occasionally even "nullify" clear cases of unlawful activities.

In establishing "willfulness," juries (or judges) consider whether the defendant knew, had reason to know, or recklessly disregarded the fact that his or her conduct constituted infringing activity. Willfulness sometimes depends on receipt of a "cease and desist" letter prior to the lawsuit and failure to take remedial action.

In infringement cases involving multiple works, statutory damages for *each* work that was registered prior to infringement may be awarded. For example, if a student downloads or uploads 1,000 CDs (with ten songs per CD) to a P2P file-sharing network, and the infringements are found not to be innocent and also not to be willful, the statutory damage range could fall between $7.5 million and $300 million. Because section 504(c)(1) provides that the copyright owner may elect to recover a single award of statutory damages "for all infringements involved in the action, with respect to any one work … ," it matters little whether the defendant infringed both the right to reproduce and the right to distribute. Nonetheless, if other rightsholders entered the litigation fray (for example, if the student was sharing movies and software as well as sound recordings), the defendant could face multiple damage actions (with the potential liability window growing accordingly).

Costs and attorney's fees. The Copyright Act provides that in any civil action arising under the Act "the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof." 17 U.S.C. § 505. Further, for infringements of works registered with the U.S. Copyright Office prior to the commencement of the infringing conduct, the court may award a reasonable attorney's fee to the prevailing party. 17 U.S.C. § 412. Costs and attorney's fees can be significant, particularly for cases that are subjected to discovery and go to trial. Settlement negotiations alone cost thousands of dollars. Court-awarded costs and attorney's fees are in addition to those borne by the student (or the student's family) in defense.

Injunctive relief. Copyright owners often need immediate relief to stop infringing activities. Sections 502 and 503 of the Copyright Act authorize courts to grant temporary restraining orders, preliminary injunctions, impoundment, and disposition orders. The latter permits the seizure of means and articles through which copies or phonorecords may be reproduced. A student, as a consequence, could lose a laptop or personal computer in the process. Upon finding an infringement, a court may liberally grant a final injunction "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). Permanent injunctions, however, are not automatic.

Limitations on liability for online materials. The DMCA limits the liability of online service providers, including colleges and universities, that engage in certain activities: (1) transitory (mere conduit) digital network communications; (2) system caching; (3) information residing on systems or networks at the direction of users; and (4) information location tools. 17 U.S.C. § 512. The DMCA creates safe harbors from any monetary liability and limits the scope of injunctive relief available against service providers that satisfy the prescribed conditions. All of the safe harbors require the service provider to adopt and reasonably implement policies to terminate subscribers and account holders who are "repeat" infringers. However, the Act provides the service provider with substantial flexibility in the policies that are implemented. Several of the safe harbors establish "notice and take-down" procedures that must be complied with in order to qualify for the safe harbor, and at least one (and possibly others) requires the

service provider to designate an agent to accept notices by registering with the Copyright Office. The DMCA contains separate provisions for public or nonprofit institutions of higher education to immunize them from monetary liability in certain circumstances. *Id.* at § 512(e).

Notably, the notice and take-down process does not apply to the safe harbor applicable to service providers when they act as mere conduits, simply carrying the communications of others. Under these circumstances, response to a take-down notice is not a condition of the safe harbor. However, a university may decide that it is appropriate to respond and to institute internal procedures when such a notice is received, and most universities do so.

Neither the general DMCA safe harbor for service providers nor the specific provisions that relate to nonprofit educational institutions appear likely to protect university students who engage in P2P file sharing, although the question has not been fully litigated. Students who engage in file sharing are not likely to qualify as service providers, and students who distribute file-sharing software or operate local area P2P networks are likely to run afoul of one of the other conditions on the liability limitations (for example, they generally do not file designations of their agents in the Copyright Office).

The DMCA creates a subpoena procedure to be used by copyright owners who seek the identity of an anonymous Internet user who is alleged to have infringed protected copyrighted works. *Id.* at § 512(h). Recently, a district court held that service providers (including universities) may be required to divulge the name of individuals (including students) who have engaged in copyright infringements online. *See In re: Verizon Internet Services, Inc. Subpoena Enforcement Matter,* 257 F.Supp.2d 244 (D.D.C. 2003). This decision is the subject of an expedited appeal, challenging on statutory and constitutional grounds the applicability of the DMCA procedure to the P2P context, where the service provider acts as a conduit for information stored on the personal computers of its users. In light of the district court decision, however, a university may be compelled to turn over information identifying file-sharing students upon the receipt of a subpoena.

A major trade association that represents the recording industry (the RIAA) recently announced that it is beginning to collect evidence identifying individuals who are making available substantial numbers of unauthorized music files using P2P software. In the first several weeks of this campaign, almost 1,000 subpoenas have been issued. Although this program is not directed at colleges and universities, students could be identified along with anyone else. To date, several colleges and universities have received subpoenas.

Bootleg sound recordings and music videos. The Copyright Act contains a separate chapter prohibiting the unauthorized recording ("bootlegging"), and trafficking in recordings, of live performances. Chapter 11 circumscribes the unauthorized taping of live musical performances and the subsequent transmission, communication, or distribution to the public of the sounds and images of these live performances. 17 U.S.C. § 1101. Anyone who violates Chapter 11 could be subjected to the same civil remedies discussed above. Consequently, even though no record company's sound recording is involved, P2P file sharing of bootlegged live-musical performances could lead to similar liability.

Criminal penalties. The Copyright Act provides serious criminal sanctions, including imprisonment. Criminal liability may be imposed on any person who willfully infringes a copyright for purposes of commercial advantage or private financial gain. 17 U.S.C. § 506. In 1997 Congress amended the law with enactment of the "No Electronic Theft" ("NET") Act, offering prosecutors the possibility of bringing to justice those who act, particularly in the computer context, to the detriment of copyright owners without necessarily benefiting in any personal way from their actions. The NET Act holds those persons to be criminals who willfully infringe copyrights by the "reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords or 1 or more copyrighted works, which have a total retail value of more than $1,000." *Id.* at § 506(a)(2). The law prescribes fines, terms of imprisonment (up to five years), forfeiture, destruction, or other disposition of infringing copies, phonorecords, and related paraphernalia.

These sanctions are potent, and Congress has increased them in recent years. Actual application of the criminal laws to young people who file share but otherwise respect the law is another matter. Federal law enforcement personnel have been reluctant to investigate copyright infringements, and even when

investigations bear fruit (or copyright owners inform the U.S. Department of Justice), prosecutors and grand juries often do not indict. In the P2P environment, given the right case, this could change.

State criminal laws may also be invoked. In a recent investigation at a major university, four students had their rooms searched and their computers confiscated pursuant to law enforcement warrants alleging violations of two state laws: one law that prohibits knowingly gaining access to a computer network beyond the scope of the express consent of the network owner, and another that bars the knowing transmission of pictures, sounds, or images with the purpose of executing a fraud.

As in the federal context, it is difficult to estimate how state criminal prosecutions will fare before judges and juries. Based on the recent experience, students who engage in extensive copyright infringements on university networks should be aware that their rooms may be searched and their computers seized.

II. Serious Liabilities Arise From Other Statutes.

P2P file sharing by students may also implicate numerous other laws that protect intellectual property, such as the federal Lanham Act (trademark law), or state laws regarding unfair competition and misappropriation. Laws that protect the personal interests of individual creators, performers and artists (be they movie stars, cinematographers, film directors, sports heroes, musicians, artists, songwriters, composers, or photographers) may also apply.

III. Liability Risks May Even Arise Globally.

The World Wide Web gives Internet users the ability to reach people all over the world. To the extent that university networks are connected to foreign campuses and programs, file sharing inevitably becomes international. It is plausible that a student who operates an unlawful file-sharing network could be sued in a foreign court pursuant to foreign law.

The jurisdiction of American courts is subject to rules that are sometimes difficult to apply in international situations. As regards the jurisdiction of foreign courts, there is no multilateral international treaty governing how jurisdiction is to be determined worldwide. An analysis of P2P file-sharing litigation reveals the international dimensions. In a recent case involving a P2P service, Grokster, a U.S. district court in California denied a motion to dismiss for lack of personal jurisdiction. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073 (C.D. Cal. 2003). Sharman Networks Ltd. Corporation does business primarily in Australia and is organized under the laws of the island nation of Vanuatu. In a libel case, an Australian court recently gave a bilateral meaning to the term “publishing” to include the publisher’s act of publication and the receipt of the publication by a third party. In the context of P2P file sharing, a student who operates a file-sharing network including large amounts of foreign works could infringe the rights of foreign rightsholders who would sue in a foreign court. If personal jurisdiction lies against the student in that forum (the student comes from the country where the lawsuit is filed or has assets there), liability concerns would be heightened.

CONCLUSION

As reported in the press, a number of colleges and universities have begun to inform students about potential liabilities that arise from certain P2P file-sharing activities. Given the seriousness of the liabilities and their negative implications for students' lives, it is right to catalog the liabilities and appropriate to weigh the risks. To summarize:

> As to the merits of P2P file sharing by students on university networks, serious liability could arise for direct infringements of multiple copyrighted works. There also appears to be a reasonable likelihood of success on contributory copyright infringement claims against students who materially contribute to the direct infringements of other students. Given the complexities and conflicts in recent court decisions, this determination will turn on the facts of each case.
>
> Students engaged in file sharing, distributing P2P software, or operating P2P networks are not likely to qualify as online service providers under the DMCA.
>
> As a general proposition, whether a student has acted "willfully" and, therefore, qualifies for augmented statutory damages will depend on the facts and circumstances of each case. In any event, mandatory-minimum statutory damages even for non-willful infringements by a student could be enormous (in the millions of dollars). Within the range, a court would consider what is "just." Juries could act with compassion, but that is not guaranteed.
>
> Upon a finding of infringement, entry of an injunction against a student's infringing activities is likely. Court-ordered impoundment or other disposition of a student's computer and telephonic equipment used to facilitate file sharing is a possibility.
>
> A student could be ordered to pay the costs and attorney's fees of a successful plaintiff in addition to the student's own costs and attorney's fees. To mount a vigorous defense, substantial monetary resources might be necessary. The attorney's fees just for a settlement can cost thousands of dollars.
>
> If the student engages in file sharing of live musical performances that have been taped, similar liabilities could arise from the federal anti-bootlegging statute.
>
> In the worst cases, criminal prosecutions could occur with multiple counts, raising the possibilities of potent penal sanctions including terms of imprisonment, fines, and forfeitures of technological equipment used in P2P file sharing.
>
> Finally, liabilities might arise from application of other state and federal statutes. Given the right fact pattern and jurisdiction, lawsuits could also arise in foreign countries.

Colleges and universities generally do not have a legal duty to control students' private conduct. Students therefore should not assume that their college or university will accept liability for them or provide them with legal representation.

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