November 8, 2006

Dear Colleagues:

The Joint Committee of the Higher Education and Entertainment Communities was formed in 2003 to facilitate cooperation between these two sectors in addressing the serious problem of copyright infringement by means of unauthorized campus peer-to-peer (P2P) file sharing. (A current Committee membership list is attached). Since its inception, the Joint Committee has worked on three basic approaches to reducing or eliminating illegal P2P file sharing: (1) campus education concerning P2P file sharing, (2) the use of computer network management technologies to control illegal file sharing, and (3) the development of legal, campus-based online music subscription services.

Three years ago, as part of the Joint Committee's education efforts, the Committee's Education Task Force prepared and distributed to the higher education community a paper on copyright law and the potential liability of students engaged in unauthorized P2P file sharing on campus networks.

Since that time, although some progress has been made, the problem persists. Consequently, and in light of recent developments, including the U.S. Supreme Court's unanimous decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd*. (confirming that the entertainment industries may challenge businesses that seek to profit from the active inducement of copyright infringement through the use of P2P technologies), we are distributing a revised version of that paper.

As discussed in the enclosed paper, P2P file-sharing software is not itself unlawful, but its use for unauthorized downloading and uploading of copyrighted music and other works may well constitute copyright infringement. Copyright owners are steadily 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 liabilities that may be incurred by students who engage in that activity. We encourage you to share this paper with the appropriate members of your administration. We hope that you will find the enclosed paper to be helpful in thinking about this issue and framing you own institutional policies.

Sincerely,

John Hennessy
President, Stanford University, and Chair,
Education Task Force

STANFORD
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Graham Spanier
President, The Pennsylvania State University,
and Co-Chair, Joint Committee of the Higher
Education and Entertainment Communities

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Background Discussion of Copyright Law and Potential Liability for Students Engaged in P2P File Sharing on University Networks[1] (Revised 2006)

EXECUTIVE SUMMARY

Although peer-to-peer ("P2P") file sharing on university networks is not unlawful *per se*, many students have used popular P2P software programs and services such as Grokster, StreamCast, eDonkey, Lime Wire, KaZaA, and Morpheus to engage in file sharing that results in extensive infringement of copyrighted works (including music, movies, computer software, video games, and photographs). Since April 2004, many civil lawsuits have been filed against individual university network users by copyright owners who have increasingly taken the offensive against infringements of their protected works. Some suits have been directed against infringement of music copyrights on Internet2, an advanced network created by participating colleges and universities for important academic research. Further, in 2005 Congress passed a new law with stiff penalties for distributing pre-release copyrighted works via any computer network available to the public. Clearly, students 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 their copyrighted works, both of which are implicated in P2P file sharing. The Copyright Act does not require a showing of intent in order to find civil 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 she knows of the infringing activity and induces, causes, or materially contributes to the infringing conduct of another; and under *vicarious infringement*, a person may be liable if he has the right and ability to supervise the

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[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.

infringing activity and also has a direct financial interest in the activity. Most users of P2P networks who infringe do so directly. Absent directly infringing conduct, however, students who operate, encourage, or actively induce the use of such networks may be open to contributory or vicarious infringement claims.

The copyright law contains 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 (that is, recording for later playing) 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 fair use applies (see page 7). 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.

Another important limitation, the "first sale" doctrine, states that once a copyright owner consents to the sale of a particular copy, the owner may not exercise the distribution right to that copy. (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 because file sharing causes duplication and distribution of the work, rather than a complete transfer of ownership of a copy of the work, as contemplated by the first sale doctrine.

Remedies for infringement allow for the recovery of actual damages and 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. 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, is common, and impoundment of equipment used in the infringing activity, including computers, may be ordered. In a criminal action, serious penalties, including imprisonment, also may be imposed on persons who willfully infringe copyrighted works for commercial advantage or private financial gain, or in the instances of reproduction and distribution, when the total retail value of infringing copies is more than $1,000. For the willful distribution of pre-release movies, music, and

computer software by making them available on a computer network available to the public, criminal sanctions could apply.

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 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. But a major step toward ending unlawful P2P activities on college and university campuses lies in education; it is therefore important for institutions to provide information to students about their rights and responsibilities with regard to copyrighted works on P2P services.

In the late 1990s, individuals with a personal computer and access to the Internet, using a program called Napster, began to offer free digital copies of copyrighted sound recordings for download by other users. Although the recording companies and music publishers were successful in obtaining an injunction against Napster for copyright infringement, millions of individuals in the United States and overseas continued to share digital files of copyrighted recordings using a subsequent generation of file-sharing computer programs. These have included Grokster, eDonkey, Lime Wire, KaZaA, and Morpheus software. Since September 2003, the recording industry has filed more than 18,000 lawsuits against individuals, claiming billions of dollars in damages based on P2P file sharing and consequent violations of federal copyright laws. More than 1,000 lawsuits have been directed against students at over 130 universities and colleges of every size and institution type.

New distribution technologies, when used for unlawful purposes, do not create immunity from being charged with infringing activities. For example, a spate of lawsuits in 2005 was directed against infringement of music copyrights on Internet2, the advanced network developed by participating colleges and universities for academic research. Internet2 was developed through the partnerships among academia, industry, and government that helped create today's Internet. Through the use of a file-sharing application known as "i2hub," sharing of music and even full-length movies could be accomplished rapidly. Some students found i2hub appealing because of their mistaken belief that illegal file sharing could not be detected in the closed environment of the Internet2 network. To date, more than 600 Internet2 lawsuits have been filed against individuals at 39 schools. On September 9, 2005, Internet2 announced that two entertainment industry trade associations—the Recording Industry Association of America ("RIAA") and the Motion Picture Association of America ("MPAA")—had joined the organization as corporate members. On November 14, 2005, i2hub shut down.

Copyright owners have always had the authority to bring traditional infringement suits against individuals who unlawfully copy the owners' works. Lawsuits are sometimes brought for the twin purposes of education and deterrence. Justice Stephen Breyer recently noted that P2P lawsuits have served as a "teaching tool, making clear that much file sharing, if done without permission, is unlawful." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.,* 545 U.S. _____, 125 S. Ct. 2764, 2795 (June 27, 2005) (J. Breyer, concurring) There is evidence that lawsuits indeed have had a substantial deterrent effect (see, e.g., *The impact of recording industry suits against music file*

swappers, Pew Internet Project and ComScore Media Matrix Data Memo, January 2004; and *Music and video downloading moves beyond P2P*, Pew Internet and American Life Project, March 2005). A vast majority of those lawsuits have been settled and, according to press reports, defendants have agreed to pay a range of $4,000 to $5,000 to resolve direct infringement lawsuits. For more serious infringing activities, such as the operation of a local area network ("LAN") for infringing purposes, settlements have been as high as $17,500. 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 one another, or even when a band decides that it will authorize the sharing of its music. In its *Grokster* decision, the U.S. Supreme Court underscored the lawful uses of P2P file sharing to assist research, store and distribute knowledge, and promote teaching and learning (see *Metro-Goldwyn-Mayer v. Grokster, supra,* 125 S. Ct. at 2770). At the same time, the Court confirmed that the entertainment industries may challenge certain P2P networks that are actively used to induce copyright infringements.

The primary basis for liability in P2P file sharing is federal copyright law; although liability may arise based on other legal theories, they are likely to be overshadowed by copyright liability. Copyright law provides for "statutory damages" for *each infringed work*, with a possible increase in damages 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 have not even been raised in the existing record industry suits. As can be seen by recent lawsuits filed by the MPAA, others who have rights in a particular work (e.g., movie studios, software companies, and photographers) or who represent creators can bring credible lawsuits against students for infringements of their respective works. Finally, P2P file sharing may draw university administrative sanctions for interfering with network performance.

I. LIABILITY UNDER U.S. COPYRIGHT LAW

Individuals sued for copyright infringement often state that they did not know that they were doing anything wrong. However, copyright is a strict liability tort without an intent requirement. A showing of "willfulness" serves to augment statutory damages; in some cases, a showing that the defendant had no reason to believe his conduct was infringing could operate to reduce those damages. And copyright law does contain a number of limitations on the rights of copyright owners, the most important being "fair use," as discussed below. 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 seeks a balance between providing incentives for creative pursuits through the granting of proprietary rights to copyright owners and promoting public access to and use of creative works through limitations to those rights.

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). Copyright does *not* cover facts or ideas themselves, only the creative expression of them. 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 (that is, the overall right to exclude or set the terms and conditions of use) 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. Those 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 record industry's 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 without securing permission from 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 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, 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. These 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 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 done 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 unlikely. 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 so far considered the issue have accepted the recording industry's evidence and arguments that the massive scope of file sharing is damaging to the market for copyrighted works. See, e.g., *Metro-Goldwyn-Mayer v. Grokster, supra,* 125 S. Ct. at 2772; *A&M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004 (9th Cir. 2001).

One argument, not completely settled, posits that "space-shifting," which allows a user to transfer a copyrighted work from one medium to another, is "fair use." Indeed, counsel to the recording industry stated before the Supreme Court that the industry considered the copying of purchased CDs to computers and other portable devices to be lawful. See *RIAA v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999). With new computing technologies bursting upon the scene, novel issues 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 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, 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 mutual physical exchange of CDs. Students may contend that digital networks merely permit the "swapping" of previously purchased copyrighted works that, in the world of physical copies, can be bought and later shared or given away. In the digital environment (depending on the technology), however, files typically are not simply exchanged. They are copied through a downloading or uploading process. The first sale doctrine contemplates a complete transfer of a copy of the work, not reproduction and distribution of multiple copies. 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 other users 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) — apply to particular facts and circumstances that typically are not found in the P2P file-sharing context.

Finally, copyright law "contains built-in First Amendment accommodations." *Eldred v. Ashcroft*, 537 U.S. 186, 219 (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 sufficient defense for copyright infringement in typical cases of P2P file sharing by students.

Types of infringements. Under copyright law, three types of infringement exist: (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). As stated above, strict liability is the rule. It is not a defense for a defendant to say that he did not know that the copying was infringing or that he acted 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, 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) inducement, 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.

Recently, the Supreme Court found that an entity that distributes software that permits computer users to share electronic files through P2P networks "with the objective of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement," may be liable for the resulting acts of infringement by third parties. *Metro-Goldwyn-Mayer Studios v. Grokster, supra*, 125 S. Ct. at 2780. Accordingly, contributory infringement liability may be imposed against a student who knowingly provides P2P software or who operates a P2P file-sharing service on a university network with the proscribed intent, where that software or service materially contributes to actual direct infringements by other students. Courts are likely to look to evidence of active inducement as well as the operator's intent, such as steps taken to encourage direct infringement through instructing others how to engage in infringing activities or communications that make clear that the operator was seeking to promote infringement. Mere knowledge of potential or actual infringing uses and activities ordinarily incidental to providing software or operating a service (such as providing product updates and technical support) will not be enough to subject a student distributor to indirect liability.

Vicarious liability. Vicarious liability, on the other hand, can be imposed on persons who do not "induce" or "cause" direct infringement or who, 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). The issue of right and ability to supervise can raise difficult questions that may be implicated in certain P2P activities. None of the numerous lawsuits brought by the recording companies against students have claimed vicarious liability.

In sum, 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, including those who engage in purposeful, active inducement of infringement. A student who operates a P2P file-sharing network may fall into all these categories if the student actually uploads or downloads works, operates the network with the intent to advance actively or induce clear, direct infringing acts of others with a purpose to cause and profit from third-party acts of copyright infringement, and retains the right and ability to control the infringing activity of the network users; and derives direct financial benefit from the infringing activity.

Potential liability for colleges and universities. The focus of this white paper is on the potential liability of those users 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 could, for example, raise questions about the institution's knowledge of the conduct, whether there was an intent and affirmative steps taken to promote the infringing conduct, ability to control the conduct, and whether or not the institution obtained a direct financial benefit from the conduct. Because institutions are not likely to meet the conditions for establishing liability and, as network operators, are generally not liable for the infringing acts of third-party users of their networks, claims of contributory or vicarious liability are unlikely to succeed. However, lawsuits can be costly and burdensome to defend, and these issues are potentially complex; therefore, colleges and universities should consult with counsel.

In addition, 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, which are designed to compensate owners and 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. 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 in which 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 in which the infringer sustains the burden of proving, and the court (jury or judge) finds, that the infringer was not aware and had no reason to believe that 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 college and university education efforts, recent press coverage, congressional hearings, and Internet chat, students could find that difficult to prove. Because students are not likely to be making profits from P2P file sharing and the record labels may have some difficulty showing lost profits, it is unlikely that future lawsuits against students will request actual damages and profits.

In establishing "willfulness," juries (or judges) consider whether the defendant knew, had reason to know, or recklessly disregarded the fact that his 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 rights holders 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, attorney's fees, and settlements. 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 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 may 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 and permanent injunctions, impoundment, and disposition orders. Impoundment and disposition orders permit 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. Many settlement agreements contain what is, for all practical purposes, injunctive relief language: that is, to stop infringing activities and destroy all unlawful copies, however stored or in whatever medium.

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 law 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 educational institutions 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 with the Copyright Office).

The DMCA creates a subpoena procedure for copyright owners to seek the identity of an anonymous Internet user who is alleged to have infringed protected copyrighted works. *Id.* at § 512(h). However, this procedure is not available against a service provider that is acting as a "mere conduit" for the transmission of information stored on the personal computers of its users—as is typically the case when students engage in P2P file sharing. See *RIAA v. Verizon Internet Services, Inc.,* 351 F.3d 1229 (D.C. Cir. 2003); In re: *Charter Communications, Inc., subpoena Enforcement Matter,* 393 F.3d 771 (8th Cir. 2004). In cases in which the service provider is acting as a conduit and the DMCA

subpoena is not available, copyright owners may file "John (and Jane) Doe" lawsuits against the unknown users and seek those users' identities from the service provider in a subpoena as soon as the case is filed. But in cases in which the service provider stores infringing material on its servers, the DMCA subpoena procedure likely is available even before a suit is filed. *Id.* In either case, the university as a service provider will be required to divulge the user's name.

Bootleg sound recordings and music videos. The Copyright Act contains a separate chapter prohibiting the unauthorized recording ("bootlegging"), and trafficking in such 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. The anti-bootlegging statute also has a sister provision that establishes criminal liability for bootlegging. Because the anti-bootlegging statutes provide seemingly perpetual protection for musical performances that are unfixed, federal courts are currently split on whether the statutes comport with constitutional parameters.

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; 18 U.S.C. § 2319. In 1997, Congress amended the copyright 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)(1). The law prescribes fines, terms of imprisonment (up to five years), forfeiture, destruction, or other disposition of infringing copies, phonorecords, and related paraphernalia. In 2005, Congress enacted, as part of the Family Entertainment and Copyright Act, the Artists Rights and Theft Prevention (ART) Act of 2005, rendering unlawful, among other provisions, the willful distribution of pre-release movies, music, and computer software by making them available

to the public on a computer network. The penalties, which include not more than three years imprisonment for a first offense, are severe.

To date, federal law enforcement personnel have been reluctant to criminally prosecute P2P copyright infringements. Nonetheless, in the P2P environment, this may be changing. The U.S. Department of Justice has created a Computer Crime and Intellectual Property Section ("CCIPS") in its Criminal Division. In the past few years, CCIPS has made online piracy prosecutions a priority, but it is not clear the extent to which the Justice Department will look to campus P2P file sharing as part of its efforts. See *Progress Report of the Department of Justice's Task Force on Intellectual Property* (June 2006).

State criminal laws also may be invoked. In one 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 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. LIABILITY FROM OTHER STATUTES

P2P file sharing by students also may 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) also may apply.

III. INTERNATIONAL LIABILITY RISKS

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. In the context of P2P file sharing, a student who operates a file-sharing network that includes large amounts of foreign works could infringe the rights of foreign rights holders who could 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.

IV. SANCTIONS FOR NEGATIVE EFFECTS ON NETWORK PERFORMANCE

In addition to the serious legal problems generated by unauthorized P2P file sharing, the unauthorized use of such file-sharing applications and services can generate so much traffic that network performance is adversely affected for all users who share the network. Further, by introducing malicious viruses, worms, and Trojan horses, these files may threaten the security and stability of a school's computing infrastructure. At universities and colleges, it is commonplace for the information services department to monitor traffic to ensure the viability and effectiveness of the campus computer network for all users. Interfering with the network's capacity or the ability of others to use network services may result in sanctions, such as the suspension of access to university computing and networking resources.

CONCLUSION

A growing number of colleges and universities are informing their students about potential liabilities that arise from certain P2P file-sharing activities. Since 2003, students have increasingly become aware of legal actions by industry against downloaders and distributors of copyrighted works. Nonetheless, the number of students who engage in unlawful file sharing remains a significant concern in higher education. Given the seriousness of the liabilities and their negative implications for students' lives, it is appropriate for colleges and universities to continue to catalog the liabilities and educate their students about the risks of unlawful behavior.

To summarize the key aspects of these liabilities and risks:

- P2P file sharing by students on university networks could create serious liability for direct infringements of multiple copyrighted works. Students also could face claims of contributory infringement if they materially contribute to or engage in active inducement of direct infringement by others.

- 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 date, lawsuits for direct copyright infringement generally have resulted in settlements to pay a range of $4,000 to $5,000 in a lump-sum amount, to destroy all infringing copies of download copyrighted works however stored, and to agree not to engage in further unlawful activities. Settlement in cases involving secondary copyright infringement falls into a higher range.

- In the worst cases, criminal prosecutions could occur, raising the possibilities of potent sanctions. In addition, liabilities might arise from application of other state and federal statutes. Given the right fact pattern and jurisdiction, lawsuits also could arise in foreign countries. Finally, administrative sanctions may be imposed by a university or college for interference with a network's capacity.

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