

# Illegal P2P File Sharing on College Campuses—What’s the Solution?

*Antionette D. Bishop\**

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Since the introduction of Napster in 1999, illegal peer-to-peer (P2P) file sharing<sup>1</sup> has been a continuously growing problem for the music industry. According to the music industry, Internet users are allowed to copy and distribute millions of songs and other copyright-protected material illegally by using internet networks and P2P file-sharing software.<sup>2</sup> To stop the illegal P2P file sharing, the music industry has taken action against the individuals who participate in illegal file sharing, as well as the parties that promote and facilitate

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\* J.D. Candidate, William & Mary School of Law, 2009; M.B.A. Candidate, William & Mary Mason School of Business, 2009; B.A., University of Virginia, 2003. The author would like to thank Professor Laura Heymann for her comments and support throughout the writing process. Runner-up in The GRAMMY Foundation®’s 10th Annual Entertainment Law Initiative Writing Competition.

1. P2P file sharing has both legitimate and illegitimate uses; illegal P2P file sharing refers to the use of P2P file-sharing technology to download and/or upload and “share” unauthorized copyrighted material. See Douglas Heingartner, *Software Piracy Is in Resurgence, with New Safeguards Eroded by File Sharing*, N.Y. TIMES, Jan. 19, 2004, at C9.

2. *Copyright Infringement and File Sharing: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Cary Sherman, President, Recording Industry Association of America), available at 2005 WLNR 15361093.

the illegal activity, by filing numerous lawsuits.<sup>3</sup> The music industry has successfully sought to hold facilitating parties, such as Napster and Grokster, secondarily liable for the direct infringing activity of the users of their services and/or products.<sup>4</sup> Recognizing the potential threat to Internet service providers (ISPs) for providing Internet access to infringing users, “safe harbor” provisions were implemented through the Digital Millennium Copyright Act (DMCA) to limit the liability of ISPs that merely provide transitory services.<sup>5</sup>

Illegal P2P file sharing occurring on college<sup>6</sup> networks has received a great deal of attention since early 2007, when the Recording Industry Association of America (RIAA), the trade group representing the interests of the U.S. music industry, began to focus on the infringing activities of college students.<sup>7</sup> In addition to its efforts to hold college students liable for their direct infringing activity, the RIAA has sought to have college ISPs assume responsibility for the illegal file sharing occurring on their networks.<sup>8</sup> Regardless of the DMCA “safe harbor” provisions that protect ISPs from liability, the RIAA claims that college ISPs should be held to a higher level of responsibility than commercial ISPs because of the fundamental differences between the relationships that colleges have with their students and those that commercial ISPs have with their customers.<sup>9</sup> While the RIAA claims that the “special relationship” that exists between colleges and students warrants more responsibility on the

3. See, e.g., Adam Liptak, *In the Heated Fight Over Music Piracy, a Rare Stand for Privacy*, N.Y. TIMES, Dec. 31, 2007, at A11 (“In the past four years, record companies have sued tens of thousands of people for violating the copyright laws by sharing music on the Internet.”); Recording Industry Association of America (RIAA), *Piracy: Online and On the Street*, <http://www.riaa.com/physicalpiracy.php> (last visited Mar. 12, 2008).

4. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

5. 17 U.S.C. § 512(a) (2000).

6. The term “college” refers to both colleges and universities.

7. In fact, the RIAA has focused on file sharing since as early as 2003. See Jon Healey, *Labels Will See Music File Sharers in Court*, L.A. TIMES, June 26, 2003, at 1 (discussing the RIAA’s announcement of “plans to . . . identify[] targets among the estimated 57 million people using file-sharing networks in the United States, focusing on those offering a ‘significant’ amount of songs for others to copy”).

8. See Mike Musgrove, *Music Industry Tightens Squeeze On Students; Campus Network Access Targeted*, WASH. POST, Mar. 9, 2007, at D03. College ISPs’ roles in illegal file sharing relate to the Internet access that they provide and not to the hosting of infringing material.

9. See Frank Ahrens, *Despite Drop in CD Sales, Music Industry Is Upbeat*, WASH. POST, Apr. 18, 2007, at D01 (noting that in the first weeks of April 2007, “the RIAA sent ‘pre-litigation settlement letters’ to 22 universities, including the University of Maryland system and the College of William & Mary, telling administrators that the RIAA is about to sue students for illegal downloading”).

part of colleges, there are public policy arguments that can be made to refute the RIAA's assertion. Restricting P2P file-sharing capabilities on college campuses could prove to be costly for colleges, both financially and academically. Perhaps the solution to preventing illegal P2P file sharing on college campuses is not heightened monitoring by college ISPs, but rather a joint venture that would allow copyright holders to be compensated for their works, while at the same time allowing colleges to provide unrestricted academic freedom to their students.

#### I. THE MUSIC INDUSTRY'S RESPONSE TO ILLEGAL P2P FILE SHARING

In an effort to discourage the illegal downloading of music, the RIAA, on behalf of the music industry, embarked on an initiative to deter users from participating in P2P file sharing. In mid-2003, the RIAA began to file individual user lawsuits against users who were illegally sharing substantial amounts of copyrighted music on P2P networks.<sup>10</sup> In early 2007, the RIAA began to focus its deterrence efforts particularly on colleges; more than fifty percent of college students download music illegally.<sup>11</sup> College "students accounted for 1.3 billion illegal music downloads in 2006."<sup>12</sup>

The RIAA has been requesting more active involvement from colleges to promote its anti-piracy campaign, including increased monitoring by colleges to identify and stop infringing activity occurring on the colleges' networks and the implementation of legal music downloading alternatives.<sup>13</sup> A new education bill introduced to Congress would help ensure that colleges follow certain procedures to prevent piracy on their networks under the threat of losing federal financial aid.<sup>14</sup> These procedures include requiring colleges to (1) make their policies regarding illegal downloading and distribution of other copyrighted material publicly available for all students and employees, and (2) develop a plan to offer alternatives to illegal

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10. See Healey, *supra* note 7, at 1.

11. See Musgrove, *supra* note 8, at D03.

12. *Id.*

13. See Recording Industry Association of America (RIAA), *Piracy: Online and On the Street*, *supra* note 3.

14. College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong. § 494 (2007); see Eric Bangeman, *New Bill Would Punish Colleges, Students Who Don't Become Copyright Cops*, ARS TECHNICA, Nov. 11, 2007, available at <http://arstechnica.com/news.ars/post/20071111-new-bill-would-turn-colleges-into-copyright-cops.html>.

downloading as well as offer “technology-based deterrents” to prevent illegal activity.<sup>15</sup>

## II. COLLEGE–STUDENT RELATIONSHIP

The college–student relationship is arguably a “special relationship” that would warrant imposing a duty on colleges to monitor their networks and implement strategies to put a stop to illegal file sharing on their campuses. Although most college students are legally adults, colleges still largely guide many aspects of student life through the provision of food, housing, and security,<sup>16</sup> as well as through the rules and regulations that guide student conduct. “This attempt at control . . . is directed toward a group whose members are adults in the contemplation of law . . . . Despite the recognition of adulthood, universities continue to make an effort to regulate student life . . . .”<sup>17</sup> The music industry can claim that since colleges are so heavily involved with the structural aspects of student life, they have established a relationship that is sufficiently close to impose a duty of supervision on colleges.

Based on the claim that colleges provide a significant amount of structure for students by providing food, housing, security, and rules and regulations, an argument can be made that this activity is comparable to the way that a parent provides for his or her child’s food, housing, and security, and sets rules and regulations by which the child is expected to abide.<sup>18</sup> However, even if colleges were to assume the responsibilities and obligations of a parent for their students, this would not impose a legal duty on colleges to be responsible for the copyright infringement of their students. A parent would not be liable for the infringing activity of a child simply because of the parent-child relationship.<sup>19</sup> A child is a separate legal person who would be responsible for his or her own activity in the same way that an adult would be responsible.<sup>20</sup> If a parent does not have a “special relationship” with a child that would hold the parent directly responsible for the child’s infringing activity, it is difficult to support an argument that colleges have a “special relationship” with their

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15. H.R. 4137, § 494.

16. *McClure v. Fairfield Univ.*, No. CV000159028, 2003 WL 21524786, at \*6 (Conn. Super. Ct. June 19, 2003).

17. *Id.* (quoting *Furek v. Univ. of Del.*, 594 A.2d 506, 516 (Del. 1991)).

18. *See generally id.*

19. *See* Janelle A. Weber, Note, *Don’t Drink, Don’t Smoke, Don’t Download: Parents’ Liability for Their Children’s File Sharing*, 57 FLA. L. REV. 1163, 1169 (2005).

20. *See id.*

students that would impose a heightened liability standard. Therefore, college ISPs should not be singled out for higher liability scrutiny for the copyright infringement of their students; any duties imposed on college ISPs should be imposed on all ISPs equally.

### III. PUBLIC POLICY CONCERNS

Even if colleges were found to have a “special relationship” with their students that would support higher standards for monitoring and preventing illegal file sharing, there are public policy reasons that rebut such a conclusion. Specifically, the implementation of monitoring tools and alternatives to illegal file sharing may not be the most productive use of college funds, and the use of funds for these purposes may negatively impact academic freedom.

#### A. *Efficient Use of College Funds*

Technological monitoring tools and legal music downloading alternatives could put a strain on a college’s budget, which may already be limited, particularly in the case of many state-supported colleges. Many critics, including the Digital Freedom Campaign,<sup>21</sup> “believe that Universities have more urgent things to do with their scarce budgets than collect information on their students for the government and for the RIAA . . . . Academic resources would be better spent educating students rather than spying on them at the behest of large corporations.”<sup>22</sup> On the other hand, if students are required to incur the monitoring costs, through raised tuition or other fees, the burden would fall on the infringing users to rectify the problem that they created. However, since there is no feasible way to distinguish each infringing user from each non-infringing user easily, the entire student population would incur the monitoring costs. This same argument would hold true if commercial ISP users were required to bear the burden of monitoring costs.

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21. The mission of the Digital Freedom Campaign is to protect the rights of “artists, innovators, and consumers[] to use digital technology free of unreasonable government restrictions or the threat of costly lawsuits from the big recording labels and movie studios.” Digital Freedom, About the Digital Freedom Campaign, <http://www.digitalfreedom.org/utilities/about.html> (last visited Mar. 12, 2008).

22. Ken Fisher, *Bill Would Force “Top 25 Piracy Schools” To Adopt Anti-P2P Technology*, ARS TECHNICA, July 23, 2007, <http://arstechnica.com/news.ars/post/20070723-bill-would-force-top-25-piracy-schools-to-adopt-anti-p2p-technology.html?rel> (quoting Jennifer Stoltz, spokesperson for the Digital Freedom Campaign).

### *B. Academic Freedom*

The implementation of “technology-based deterrents,”<sup>23</sup> such as network filters that identify and block the use of P2P technology, on college networks may provide the music industry with a significant victory in its war on music piracy, but it could also have the effect of blocking the legitimate, academic uses of file sharing. Some technological monitoring tools, such as the University of Florida’s Integrated Computer Application for Recognizing User Services (ICARUS),<sup>24</sup> block both the infringing and non-infringing uses of P2P technology.<sup>25</sup> Others, such as Audible Magic’s CopySense Network Appliance,<sup>26</sup> only block the infringing uses of P2P technology, but they do so by monitoring the actual content of all data that is transferred via P2P technology (both infringing and non-infringing), which could be described as more of a “surveillance tool for ubiquitous content monitoring” than a filter.<sup>27</sup>

P2P file-sharing technology has many important uses for colleges. Colleges utilize digital bulletin boards to facilitate communication between students and faculty, and “[a]s the Ninth Circuit recognized in a lower *Grokster* decision, P2P file-sharing technology is ‘regularly used to facilitate and search for public domain materials, government documents, media content for which distribution is authorized, media content as to which the rights owners do not object to distribution, and computer software for which distribution is permitted.’”<sup>28</sup> If colleges are forced to implement these technological deterrents at the risk of losing federal funding, it could

23. College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong. § 494 (2007).

24. David Joachim, *The Enforcers—The University of Florida’s ICARUS P2P-Blocking Software Has Clipped Students’ File-Sharing Wings. Do its Policy-Enforcing Capabilities Go Too Far?*, NETWORK COMPUTING (Feb. 19, 2004), available at <http://cyber.law.harvard.edu/digitalmedia/Icarus%20at%20UF.htm>.

25. Jason Putter, Note, *Copyright Infringement v. Academic Freedom on the Internet: Dealing with Infringing Use of Peer-to-Peer Technology on Campus Networks*, 14 J.L. & POL’Y 419, 452 (2006).

26. Audible Magic Corp., *White Paper: The Impact of Peer-to-Peer Applications in Office and Educational Networks*, <http://www.audiblemagic.com/pdf/AudibleMagic-WhitePaper-P2P-Impact.pdf> (last visited Mar. 12, 2008).

27. Putter, *supra* note 25, at 456-57.

28. Brian McCormick, Note, *The Times They Are A-Changin’: How Current Provisions of the Digital Millennium Copyright Act, Recent Developments in Indirect Copyright Law and the Growing Popularity of Student Peer-to-Peer File-Sharing Could “Chill” Academic Freedom and Technological Innovation in Academia*, 32 J.C. & U.L. 709, 722 (2006) (quoting *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1035 (C.D. Cal. 2003), *aff’d*, 380 F.3d 1154 (9th Cir. 2004), *vacated*, 545 U.S. 913 (2005)).

have a crippling effect on the ability of colleges to provide an environment where knowledge and information can be freely exchanged.

#### IV. ALTERNATIVE PROPOSED SOLUTION: COLLECTIVE LICENSING

The Electronic Frontier Foundation proposed an alternative solution to having colleges monitor their networks: the music industry and ISPs could enter into a collective licensing agreement where the ISPs (or individual users) would pay a flat fee in exchange for unrestricted use of any P2P file-sharing technology used to download music.<sup>29</sup> This solution would result in the music industry being compensated for their currently infringed-upon copyrighted works, and would promote the use of P2P file-sharing technology by more users because as more users utilized P2P file sharing, the music industry would receive more money in fees. As it relates to colleges in particular, this solution would preserve the free and open exchange of knowledge and ideas.

This solution appears to be a good idea—copyright holders would finally be consistently compensated for music downloads that are presently being illegally downloaded, and network users would continue to have easy access to music. Some colleges are now promoting services such as Ruckus and Rhapsody, which allow students to download music legally and freely.<sup>30</sup> However, there are some usability issues with these services resulting in lower user rates and, hence, continued use of illegal P2P file sharing.<sup>31</sup> The major problems that arise are the inability to transfer downloaded music to portable digital music players, such as the Apple iPod, and the fact that these free services are terminated once students graduate.<sup>32</sup> A collective licensing agreement would enable users to continue to utilize the same P2P file-sharing software that they currently use, as well as allow users to continue to transfer music files to digital music players. Also, both college and commercial ISPs can easily implement

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29. See ELECTRONIC FRONTIER FOUNDATION, *RIAA V. THE PEOPLE: 4 YEARS LATER* (Aug. 2007), [http://w2.eff.org/IP/P2P/riaa\\_at\\_four.pdf](http://w2.eff.org/IP/P2P/riaa_at_four.pdf).

30. See Javier C. Hernandez, *Schools Broaden Efforts To Stop Piracy*, BOSTON GLOBE, Aug. 16, 2007, at B1 (discussing the effects partnerships with Ruckus have had for various universities).

31. See Saul Hansell, *Big Labels Offer Free Music to College Students*, N.Y. TIMES, Jan. 22, 2007, at C10 (noting that Ruckus is not compatible with the Apple iPod).

32. See *id.* (noting that Ruckus is available to anyone with an e-mail address ending in “.edu,” including faculty, staff, and alumni, but that access to the service would cost these individuals \$8.95 a month).

collective licensing agreements, thereby promoting legal downloading for all users and not just the college student population.

Collective licensing is not a perfect solution, however. From the perspective of the music industry, the primary concern would be that the flat fee would not be sufficient to cover the cost of the volume of downloads that take place. However, even if the flat fee is too low, the music industry would still be in a better position than they are currently in because, as it stands now, they are not being compensated at all for the illegal P2P file sharing outside of the settlements that have been made with select identified infringing users. From the perspective of the network users, the plan would either unjustifiably impose a cost on the non-P2P file-sharers or would be ineffective altogether. If ISPs are paying the flat fee and passing the costs on to the users, users that do not participate in P2P file sharing may be charged for this benefit of which they have no desire to take advantage. However, this is a reality that many college students already face; most colleges require students to pay mandatory fees that cover services, such as student recreation centers, student transportation, and computer labs, and not all students utilize these services. An additional fee added to the other mandatory fees that students are required to pay likely would not be met with a great deal of objection. If the flat fee is paid directly by the individual user, the same illegal file-sharing problem would probably persist under the same premise: why pay for music that can be downloaded for free? It seems that the only chance a solution like this has of being successful is to have the flat fee come directly from the ISPs, which would take away the users' choice of whether or not to pay and would eliminate the ability of users to download music illegally (using current P2P file-sharing methods) via the network of an ISP participating in the licensing agreement.

## V. CONCLUSION

There are clearly legal and public policy arguments that favor and disfavor holding college ISPs to a stricter liability standard than commercial ISPs for the infringing activities of their users. From a legal perspective, college ISPs are not treated any differently than commercial ISPs; both groups are equally protected by the DMCA for the infringing activities of their users. Also, college ISPs have a strong argument that the relationship that exists between colleges and students does not create a "special relationship" that would warrant heightened liability for colleges. Colleges consider their students to be adults and, thus, responsible for their own actions, just

as commercial ISPs hold their users responsible for their own network activities.

Public policy, in general, does not favor making colleges responsible for monitoring illegal P2P file-sharing activity. The resources that colleges would have to spend to implement the necessary monitoring tools would take away from other education-related needs of the colleges. Also, monitoring could stifle the academic freedom of students and faculty. While it is important to instill a sense of responsibility in students and maintain the integrity of the colleges by preventing illegal activities from occurring on campuses, doing so should not come at the expense of academic freedom or at the expense of depriving colleges of funds that are needed to improve the educational offerings of the colleges. Implementing a plan such as the collective licensing agreement proposed by the Electronic Frontier Foundation would allow colleges to remove illegal P2P file sharing from campuses, while at the same time maintaining the freedom of students and faculty to share ideas and information and allowing colleges to utilize their funds in a proper manner—to educate their students.