A LEGAL MATTER:[1] PEER-TO-PEER FILE SHARING, THE DIGITAL MILLENNIUM COPYRIGHT ACT, AND THE HIGHER EDUCATION OPPORTUNITY ACT: HOW CONGRESS AND THE ENTERTAINMENT INDUSTRY MISSED AN OPPORTUNITY TO STEM COPYRIGHT INFRINGEMENT[2]

*By Joseph Storch and Heidi Wachs**

"Only one thing is impossible for God: to find any sense in any copyright law on the planet." –Mark Twain[3]

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[1] THE WHO, *A Legal Matter*, *on* MY GENERATION (Decca Records 1966), *available at* http://www.youtube.com/watch?v=YBMEFxEhu_8. We imagine that the first thing copyright sensitive attorneys will ask when they see the titles and headings in this paper, and the accompanying links to *YouTube* videos, is whether we are violating copyright or whether it is fair use. In fact, it is not fair use; it isn't even use at all. Rather, we are simply referencing a use that may or may not be a proper use of a work on a third-party site. The authors happen to like the songs that we chose as headings in this paper and encourage readers to legally obtain that content after sampling the songs through the *YouTube* links.

[2] A version of some of the more practical aspects of this article appeared as a National Association of College and University Attorneys ("NACUA") Note: Joseph Storch & Heidi Wachs, *Peer-to-Peer File Sharing Requirements of the Higher Education Opportunity Act*, NACUANOTES (Nat'l Ass'n Coll. & Univ. Attorneys, Washington, D.C.), July 22, 2010, at 1, *available at* http://www.nacua.org/nacualert/docs/P2P_HEOA/P2P_ HEOA.pdf. NACUA is an association of higher education attorneys which publishes notes on legal developments for practitioners. The authors are grateful to Director of Legal Resources, Karl Brevitz, and two anonymous reviewers for their helpful comments and assistance.

[3] MARK TWAIN, MARK TWAIN'S NOTEBOOK 381 (Albert B. Paine ed., Harper & Brothers 2d ed. 1935).

I. *START ME UP*:[4] AN INTRODUCTION TO HIGHER EDUCATION AND PEER-TO-PEER FILE SHARING

A palpable tension has existed between higher education and the content industry since the advent of peer-to-peer ("P2P") file sharing software. There have been several attempts by both higher education and the entertainment industry to negotiate a workable compromise, including the Joint Committee of the Higher Education and Entertainment Communities Technology Task Force[5] and the Digital Citizen Project.[6] Alas, no compromise was ever achieved. The P2P file sharing regulations included in the Higher Education Opportunity Act ("HEOA") are the latest chapter in a story of an industry that has pressured colleges and their students, as well as an amenable Congress, to force higher education institutions to act against illegal file sharing and the technology that supports it. The unfortunate result of more than a decade of struggle over the issue is legal requirements that will create some additional work for colleges, but do little to stem the problem of illegal file sharing.

The only constant about both music and technology is change. For hundreds of years, songs were passed down orally from person to person, and later through sheet music. Only recently have sound and video recordings been mechanically or digitally captured to be shared the world over. For much of that relatively brief time, individuals could listen to the music captured on the recorded medium (e.g. phonograph records), but had no power to change the recording, what Professor Lawrence Lessig referred to as the ""Read/Only' ('RO') culture.""[7] Those who held the copyright and controlled the rights to music could manufacture and sell as many records as desired (or as the market would support), confident that one would need the record to listen to the music. That is, even though buyers could resell or trade the record, once they did so, they

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[4] THE ROLLING STONES, *Start Me Up*, *on* TATTOO YOU (Virgin Records 1981), *available at* http://www.youtube.com/watch?v=ZzlgJ-SfKYE.

[5] *Joint Committee of the Higher Education and Entertainment Communities Technology Task Force*, EDUCAUSE, http://www.educause.edu/EDUCAUSE+Major+Initiatives/JointCommitteeoftheHigherEduca/1204 (last visited Oct. 6, 2010).

[6] *A Proactive Approach to Peer-to-Peer and Copyright Issues at Illinois State University*, DIGITAL CITIZEN PROJECT, http://digitalcitizen.illinoisstate.edu/ (last visited Oct. 6, 2010).

[7] LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 28–29 (2008); *see also Lawrence Lessig on Laws That Choke Creativity*, TED.COM (Nov. 2007), http://www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity.html.

no longer possessed that original record.[8]

A. Video Killed the Radio Star[9]

The world changed somewhat with the advent of recordable tape. Around the time that the Buggles' *Video Killed the Radio Star*[10] kicked off Music Television (MTV)[11] in August 1981 for a changing music audience, individuals acquired the ability to record and share music, albeit rudimentarily at first. This process became easier as blank tape prices plunged. In fact, Congress legalized the consumers' right to make non-commercial recordings of music, including recording songs played on the radio onto cassette tapes.[12] The quality of these second and third generation recordings improved as music fans began to record tapes from compact discs ("CDs") for trade or resale. The concomitant harm to this technological advance was that recording companies, and the musicians who rely on sales to make a living, saw diminishing profits due to sales or trades of dubbed recordings. The way that society listened to music was changing as well. Music had generally been consumed in groups until the early 1980s when consumers plugged headphones into a new device from SONY called the "Walkman" and, for the first time, enjoyed a solitary experience listening to music they chose themselves.[13] Just shy of twenty years

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[8] In fact, the copyright law even recognized such transfers as completely within the law, in a development commonly called the "first sale doctrine." That is, if one holds a legally created copy of a copyrighted work, he or she may sell or give away that specific copy without violating the copyright law, and is not bound by any restrictions put on the copy by the original author, such as a price for which the book must sell. *See* 17 U.S.C. § 109(a) (2006); Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 349–51 (1908). The key element here is that once the copy is sold or given away, the seller no longer possesses the copy. This is why used bookstores are legal. The first sale doctrine does not, however, translate well in the area of digital copies because when a user shares a copy of a copyrighted work with another, he or she still possesses and can access that copyrighted work.

[9] THE BUGGLES, *Video Killed the Radio Star* (Island Records 1979), *available at* http://www.youtube.com/watch?v=Iwuy4hHO3YQ.

[10] *Id.*

[11] Frances Romero, *Top 10 MTV Moments: Video Killed the Radio Star*, TIME (Feb. 10, 2010), http://www.time.com/time/specials/packages/article/0,28804,1963569_1963568,00.html.

[12] 17 U.S.C § 1008 (2006) ("No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.").

[13] Fred Kaplan, *Goodbye, Walkman: Sony Is Shutting Down Production of Its Revolutionary Portable Music Player*, SLATE (Oct. 25, 2010), http://www.slate.com/id/2272288/. Of course, individuals could listen to music in headphones prior to the Walkman, from a stereo or small transistor radio, but the Walkman gave individuals the opportunity to not

after *Video Killed the Radio Star's* debut, a college sophomore began the process of "Digital Kills the Compact Disc Star." The digital music revolution began on June 1, 1999, when nineteen year old Shawn Fanning shared the beta version of his Napster software. Within a few days, an estimated 10,000 to 15,000 people had downloaded the file-sharing software.

B. I Fought the Law (and the Law Won)[14]

The recording companies, which had become accustomed to high margins from CD sales by multiplatinum artists,[15] were not pleased, and Napster, at least in that incarnation, was not long for this world. Within a year of distributing the original version of the Napster software, the Recording Industry Association of America ("RIAA"), heavy metal band Metallica, and rap artist Dr. Dre, had all brought suit against the startup.[16] Metallica and Dr. Dre's lawsuit also initially named three universities, the University of Southern California, Yale University, and Indiana University, and the band's management company issued a statement that said, "[f]acilitating that effort are the hypocritical universities and colleges who could easily block this insidious and ongoing thievery scheme."[17] The universities were later dropped from the suit.[18]

The Napster case provided a glimpse into the future. In March 2001, the Northern District of California issued a revised injunction ordering the RIAA to provide Napster with a list of their copyrighted material. Napster was then to filter their system and remove all such infringing content.[19] Despite testing filtering technology based on digital "fingerprints," Napster found it technologically impossible to achieve a one hundred percent effective removal rate.[20] In July 2001, Napster settled with

only take their music with them and keep it to themselves, but also to choose what music they listened to, rather than having a radio station choose it for them.

[14] BOBBY FULLER FOUR, *I Fought the Law (and the Law Won)* (Exeter 1964), *available at* http://www.youtube.com/watch?v=I0sI6eFarFE.

[15] *See* STEVE KNOPPER, APPETITE FOR SELF-DESTRUCTION: THE SPECTACULAR CRASH OF THE RECORD INDUSTRY IN THE DIGITAL AGE 106–07 (2009).

[16] John Borland, *Metallica, Dr. Dre Urge Colleges to Cut Napster Access*, CNET NEWS (Sept. 8, 2000), http://news.cnet.com/2100-1023-245505.html.

[17] Christopher Jones, *Metallica Rips Napster*, WIRED (APR. 13, 2000), http://www.wired.com/politics/law/news/2000/04/35670.

[18] Borland, *supra* note 16.

[19] *See* A & M Records, Inc. v. Napster, Inc., 2001 WL 227083, *1–2 (N.D. Cal. 2001), *aff'd*, 284 F.3d 1091 (9th Cir. 2002).

[20] *See* Matt Richtel, *Napster is Told to Remain Shut*, N.Y. TIMES, July 12, 2001, http://www.nytimes.com/2001/07/12/technology/ebusiness/12NAPS.html.

Metallica and Dr. Dre, conceded defeat, and ceased operations.[21] Yet, like the proverbial mystical Learnaean Hydra, when Napster was shut down, many other file sharing options sprung up in its place. Since the technological requirements to develop file sharing software were not onerous for those (especially young) individuals with the requisite knowledge, P2P file sharing spread across the Internet like wildfire. Students, and increasingly non-students,[22] found myriad ways to share music files (and increasingly movie and book files) without paying any compensation.

Later that year, the entertainment industry found a new litigation target—the companies that distributed software to facilitate P2P file sharing.[23] In October 2001, a conglomerate of thirty music publishers, composers, and movie studios filed suit against Morpheus, KaZaa, and Grokster, three services that had established themselves as major players in the market for file sharing after Napster shut down.[24]

All three companies distributed software that licensed technology based on the KaZaa protocol.[25] This new technology enabled users on all the other computers connected to the network to exchange files directly without the use of any centralized system or server.[26] The file sharing companies earned revenue by serving advertisements into the end users' software each time they ran the program.[27] At the time the suit was filed, thirty-four million copies of the software had been downloaded, and in September 2001 alone,

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[21] *See* Brian Hiatt, *Metallica, Dre Settle With a Wounded Napster: File-Sharing Service's Toughest Foes Settle Suits and May Make Some Material Available Through It*, MTV NEWS (July 12, 2001), http://www.mtv.com/news/articles/1445111/20010712/metallica.jhtml.

[22] Although it is widely believed that the file sharing phenomenon arose among college students on campuses, one explanation may be that colleges provided some of the best access to large bandwidth in the late 1990s and the early part of this century. As broadband spread to society as a whole, file sharing apparently spread as well. A 2005 study by the Motion Picture Association of America attributes approximately three percent of lost revenue to on-campus residential college students. That is approximately the same as college students' share of the population as a whole. Andy Guess, *Downloading by Students Overstated*, INSIDE HIGHER ED (Jan. 23, 2008) http://www.insidehighered.com/news/2008/01/ 23/mpaa.

[23] *See* Benny Evangelista, *Use of Napster Substitutes on the Rise*, S.F. CHRON., Oct. 4, 2001, at E5, *available at* http://articles.sfgate.com/2001-10-04/business/17621460_1_webnoize-napster-musiccity-networks.

[24] Eric Schumacher-Rasmussen, *Record Industry Sues Morpheus and Other Decentralized File-Sharing Services: New Action Targets Companies That Used FastTrack Technology to Lure Former Napster Users*, MTV NEWS (Oct. 3, 2001) http://www.mtv.com/news/articles/ 1449535/20011003/story.jhtml.

[25] Evangelista, *supra* note 23, at E5.

[26] Schumacher-Rasmussen, *supra* note 24.

[27] Matt Richtel, *Technology: A New Suit Against Online Music Sites,* N.Y. TIMES, Oct. 4, 2001, http://www.nytimes.com/2001/10/04/business/technology-a-new-suit-against-online-music-sites.html.

1.5 billion songs were exchanged.[28]

In April 2003, the District Court ruled in favor of the companies that distributed Morpheus and Grokster.[29] The judge found that the companies were akin to those which created the VCR, another technology that enabled users to make personal copies of content.[30] The software, in essence, was capable of substantial non-infringing uses.[31] And the decentralized nature of their operations rendered the software companies unable to control or monitor the activities of end users. Therefore, the judge found, they were not liable for the actions of those end users. In August 2004, the Ninth Circuit affirmed the lower court's decision.[32]

The entertainment companies petitioned the Supreme Court to overturn the Ninth Circuit's decision in October 2004[33] and the Court agreed to hear the case.[34] In June 2005, the Supreme Court unanimously ruled in favor of the entertainment companies, holding the software companies liable for intentionally inducing infringement.[35] The court reasoned that the software distribution companies could be sued because their business activities showed a "purpose to cause and profit from third-party acts of copyright infringement," and remanded the case to the District Court.[36] The parties settled that November.[37] The terms of the agreement

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[28] Jefferson Graham, *File-Swapping Sites Sued by Movie, Music Industries*, USA TODAY, Oct. 4, 2001, http://www.usatoday.com/tech/news/2001/10/3/swap-sites-sued.htm.

[29] *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. (*Grokster I*), 259 F. Supp. 2d. 1029 (C.D. Cal. 2003), *aff'd* 380 F.3d 1154 (9th Cir. 2004), *vacated*, 545 U.S. 913 (2005), *remanded to* 419 F.3d 1005 (9th Cir. 2005), *remanded to* 454 F. Supp. 2d 966 (C.D. Cal. 2006); Matt Richtel, *Entertainment Industry Loses in Net Case*, N.Y. TIMES, Apr. 26, 2003, http://www.nytimes.com/2003/04/26/business/entertainment-industry-loses-in-net-case.html.

[30] *Grokster I*, 259 F. Supp. 2d at 1035–36.

[31] Although, it should be acknowledged, a significant amount of the use was for infringement. Attorneys in the field have compared P2P file sharing software to an automobile. While it is legal for a licensed driver to motor about the highway at fifty-five miles per hour, it is not legal to drive that same car at ninety miles per hour on a city sidewalk. Just as the car is legal in itself, but could be used illegally, so too file sharing software can be used to share content which is copyrighted, which is in the public domain, which is shared pursuant to fair use, or which is licensed for sharing, as with a creative commons license. *See About*, CREATIVE COMMONS, http://creativecommons.org/about/ (last visited Oct. 10, 2010).

[32] *See Grokster I*, 259 F. Supp. 2d. at 1029; Richtel, *supra* note 27.

[33] *See* Tom Zeller, Jr., *Entertainment Industry Asks Justices to Rule on File Sharing*, N.Y. TIMES, Oct. 12, 2004, http://www.nytimes.com/2004/10/12/technology/12share.html.

[34] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. (*Grokster II*), 543 U.S. 1032 (2004); Lorraine Woellert, *Why the Grokster Case Matters: The High Court Faces a Hard Choice Between Innovation and Copyright Protection*, BUSINESSWEEK (Dec. 27, 2004), http://www.businessweek.com/magazine/content/04_52/b3914038_mz011.htm.

[35] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. (*Grokster III*), 545 U.S. 913 (2005).

[36] *Id.*

[37] Brooks Boliek, *Grokster to Stop Distributing File-Sharing Service*, WASH. POST, NOV. 8,

required Grokster to terminate its service, cease distributing the software, and pay $50 million.[38] However, despite the entertainment companies' victory, file sharing activity continued to increase.[39] As with the death of the original Napster, disaggregation of file sharing software continued. With the corporate side of these instant defendants felled by lawsuits,[40] other services sprang up to take their place, including a reborn Napster offering a subscription-based service.[41] Most recently, a court ordered that file sharing service LimeWire disable its software.[42] The impact of this most recent decision remains to be seen.

C. Money (That's What I Want)[43]

Unable to silence the companies that distributed the P2P file sharing software, or to stem the increasing popularity of devices used to play MP3 files,[44] the recording industry, and later other

2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/08/AR2005110800145.html.

[38] *Id.*

[39] Alex Veiga, *File Sharing Still Thrives After Ruling*, FOX NEWS (June 30, 2006), http://www.foxnews.com/wires/2006Jun30/0,4670,GroksterAYearLater,00.html.

[40] We say here the "corporate side" for these defendants because, in a disaggregated system where users make a direct connection, the protocols for these file sharing systems live on long after the business death of the companies that developed them.

[41] Saul Hansell, *Music Sites Ask, 'Why Buy If You Can Rent*,' N.Y. TIMES, Sept. 27, 2004, http://query.nytimes.com/gst/fullpage.html?res=9F07E2D71F39F934A1575AC0A9629C8B63&sec=&spon=&pagewanted=1.

[42] Tim Arango, *Judge Tells LimeWire, the File-Trading Service, to Disable Its Software*, N.Y. TIMES, Oct. 26, 2010, http://www.nytimes.com/2010/10/27/technology/27limewire.html?_r=1.

[43] THE BEATLES, *Money (That's What I Want), on* WITH THE BEATLES (Parlophone 1963), *available at* http://www.youtube.com/watch?v=6vH3lBI5Arc.

[44] Concurrent with its lawsuit campaign against users, the RIAA sought to prevent the sale of the Rio, an MP3 player made by Diamond Multimedia. The RIAA's application for a temporary restraining order was denied. Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys., Inc., 29 F. Supp. 2d 624 (C.D. Cal. 1998); Robert A. Starrett, *RIAA Loses Bid for Injunction to Stop Sale of Diamond Multimedia RIO MP3 Player*, BNET (Jan. 1999), http://findarticles.com/p/articles/mi_m0FXG/is_1_12/ai_53578852/. With the ruling of the Ninth Circuit Court of Appeals, the RIAA's effort to stem the spread of file sharing and keep consumers purchasing compact discs and tapes by limiting the technology upon which MP3 files could be played came to an end. *See* Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys., Inc. 180 F.3d 1072 (9th Cir. 1999). The launch of Apple's iPod in October 2001 changed the industry entirely as millions of consumers bought a small (and successively smaller in later versions) device that could put the consumer's entire compact disc library, plus much more, on a very small device. *See* Brent Schlender, *Apple's 21st-Century Walkman CEO Steve Jobs Thinks He Has Something Pretty Nifty. And if He's Right, He Might Even Spook Sony and Matsushita*, CNN MONEY (Nov. 12, 2001), http://money.cnn.com/magazines/fortune/fortune_archive/2001/11/12/313342/index.htm; Press Release, Apple, Apple Presents iPod: Ultra-Portable MP3 Music Player Puts 1,000 Songs in Your Pocket (Oct. 23, 2001), *available at* http://www.apple.com/pr/library/2001/oct/

content producers, turned their attention to the group of individuals that they felt were engaging in the largest amount of illegal file sharing: college students. Industry representatives began sending scores of Digital Millennium Copyright Act ("DMCA") "takedown notices."[45] As explained in Part II, below, such notices allege infringing activity and request that the alleged infringing content be removed from servers managed by the Internet Service Provider ("ISP").

Additionally, the industry began filing lawsuits against students who it alleged were illegally sharing songs and other content.[46] As part of that process, the industry sent subpoenas to institutions for Internet Protocol[47] records. Some colleges opposed this process, moving to quash subpoenas.[48] The companies also asked colleges to forward pre-litigation settlement letters that offered students the opportunity to settle their own cases, and avoid potential future lawsuits, for an upfront payment of several thousand dollars.[49] The

23ipod.html.

[45] *See infra* Part II.

[46] Doug Lederman, *Campus Downloading Crackdown*, INSIDE HIGHER ED (Mar. 1, 2007), http://www.insidehighered.com/news/2007/03/01/sharing.

[47] By means of explanation, the Internet Protocol ("IP") address is the permanent or temporary "address" of a computer logged onto the Internet. Some IP addresses are static; for instance, a computer in an office that is hardwired with Ethernet cable and never logged off the network. That computer will often retain the same IP address for extended periods of time. Laptops, mobile phones, and other transient devices, however, may "catch and release" dynamic IP addresses. Each time the device logs onto the network, it is assigned an IP address. When it logs off, it releases that address to the general pool. Another device, or the same device, may then capture that IP address seconds, hours, days, or weeks after it is released (depending upon, among other factors, the number of free IP addresses on the network compared to the number of users at any one time). When an ISP receives a legal notice for which it must identify the owner of an IP address, networking professionals will look at Internet usage logs to match the IP address in question with the Media Access Control ("MAC") address, or college/network login identification code of the device that captured that IP address during the time in question, and, in turn, match that MAC address or login identification code to the contact information for the owner of the device (if available).

[48] The University of Oregon, for example argued unsuccessfully that, among other things, the subpoena request was burdensome. Eric Bangeman, *Quack Attack: U of Oregon Fights "Unduly Burdensome" RIAA Subpoenas*, ARS TECHNICA (Nov. 2, 2007), http://arstechnica.com/tech-policy/news/2007/11/quack-attack-u-of-oregon-fights-unduly-burdensome-riaa-subpoenas.ars; Eric Bangeman, *Judge Forces U of Oregon to Cough Up Student Data,* ARS TECHNICA (Sept. 30, 2008), http://arstechnica.com/old/content/2008/09/judge-forces-u-of-oregon-to-cough-up-student-data-to-riaa.ars.

[49] Bobby Cummings, *RIAA Offers Settlements to College Students for File Sharing*, N.Y. TIMES, Mar. 2, 2007, http://www.nytimes.com/uwire/uwire_GZFM030220071124375.html?adxnnl=1&adxnnlx=1190430873-8+b1t2XTRS6q9ZCZHQQp1g; Christina Mueller, *The Music Industry Campus Crackdown Continues: Letters Were Sent to 58 Colleges Warning of Possible Lawsuits Against Students*, U.S. NEWS & WORLD REP. (Sept. 5, 2007), http://www.usnews.com/education/articles/2007/09/05/the-music-industry-campus-crackdown-continues.html. For news stories about these settlement letters and the reactions of students, faculty, and staff, *see* Emily Cohn, *RIAA Targets College Students*, CORNELL DAILY SUN, Feb.

recording industry "helpfully" set up a Web site where students (or their parents) could pay these thousands of dollars by credit card or on a payment plan.[50] Importantly, these pre-litigation settlement offers were not legally binding, and if students opted to pay, that did not protect or guarantee them against a future lawsuit.

RIAA leadership credited these lawsuits with raising awareness of the problems of illegal file sharing.[51] Some of the statistics used by the industry to demonstrate a veritable plague of illegal file sharing had errors that led some in higher education to question the veracity of the claims.[52] Meanwhile, the number of takedown notices continued to rise for many campuses.[53]

In December 2008, the RIAA and its member organizations ended the campaign of filing suits against student file sharers[54] (although it promised to continue cases already in progress).[55] The two most famous (and unsuccessful) defendants in those cases are Joel Tenenbaum, who was a student at Boston University, and Jammie

28, 2008, http://cornellsun.com/node/28168; Halley Griffin, *Students Increasingly Sued for Illegally Downloading Media*, DAILY U. WASH., May 14, 2008, http://dailyuw.com/2008/5/14/students-increasingly-sued-illegally-downloading-m/; Christine Hall, *Cyber Stealing: The Truth About Duke's Downloading Policy*, DUKE CHRON., Dec. 3, 2008, http://dukechronicle.com/node/147803; Lital Shair, *The RIAA Targets Brandeis Students Once Again: The Recording Institute Association of America Sent 12 Pre-Litigation Letters to Students for Illegal Downloading*, JUST. (Brandeis Univ.), Jan. 15, 2008, http://media.www.thejusticeonline.com/media/storage/paper573/news/2008/01/15/News/The-Riaa.Targets.Brandeis.Students.Once.Again-3152654.shtml; Heath D. Williams, *Copyright Crackdown: Music Industry Targets College Students with Lawsuits to Stop Illegally Downloaded Music Files*, DAILY ORANGE (Syracuse Univ.), Mar. 30, 2007, http://www.dailyorange.com/2.8657/copyright-crackdown-music-industry-targets-college-students-with-lawsuits-to-stop-illegally-downloaded-music-files-1.1233931. Reportedly, the settlement amounts increased for students who did not take the offer within a short time period, and increased significantly for those students who fought their subpoena. Nate Anderson, *RIAA Doubles Settlement Cost for Students Fighting Subpoenas*, ARS TECHNICA (June 12, 2008), http://arstechnica.com/tech-policy/news/2008/06/riaa-doubles-settlement-cost-for-students-fighting-subpoenas.ars. Some colleges chose to forward such notices to students, while other colleges declined, inasmuch as nothing in federal or state law requires a third-party recipient to forward a settlement offer to another party.

[50] The site formerly maintained by the RIAA and affiliates, https://www.p2plawsuits.com/, is now defunct.

[51] Mitch Bainwol & Cary Sherman, *Explaining the Crackdown on Student Downloading*, INSIDE HIGHER ED (Mar. 15, 2007), http://www.insidehighered.com/views/2007/03/15/sherman.

[52] Kenneth C. Green, *Views: The Movie Industry's 200% Error*, INSIDE HIGHER ED (Jan. 29, 2008), http://www.insidehighered.com/views/2008/01/29/green.

[53] Doug Lederman, *Mysterious Multiplication of Copyright Complaints,* INSIDE HIGHER ED (May 6, 2008), http://www.insidehighered.com/news/2008/05/06/riaa.

[54] Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, http://online.wsj.com/article/SB122966038836021137.html.

[55] Jaikumar Vijayan, *RIAA Changes Its Tune, But Lawsuits Continue*, PC WORLD (Dec. 21, 2008), http://www.pcworld.com/businesscenter/article/155861/riaa_changes_its_tune_but_lawsuits_continue.html.

Thomas, a non-student. Tenenbaum was originally ordered to pay $675,000, or $22,500 per song for the thirty songs whose copyright he infringed.[56] He argued that the award was excessive,[57] and in July 2010, the district judge presiding over the case slashed the award to ten percent of the jury verdict, or $67,500 (which still amounts to more than $2,000 per song).[58] Thomas had several separate trials. In the first trial, the RIAA prevailed and the jury awarded $222,000, or $9,250 per song.[59] Due to the issue of whether Thomas actually shared songs, or simply made them available, and in consideration of his jury instructions in the first case, the judge ordered a new trial.[60] Thomas's second trial resulted in a verdict and award of $1.92 million, or about $80,000 per song.[61] The judge subsequently lowered the award to $54,000.[62] Thomas still rejected an RIAA offer to settle the matter for $25,000.[63] In an additional proceeding to assess damages after the RIAA rejected the $54,000 award, a different jury awarded the RIAA $1,500,000, or $62,500 per song.[64] Future cases may shed more light on this topic, particularly on the issue of damages.[65]

Yet, as it wound down the process of filing lawsuits against students, the RIAA and its members continued the practice of sending a plethora of takedown notices, alleging copyright

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[56] Denise Lavoie, *Student Must Pay $675,000 for Downloading, Distributing Music Files*, CHI. TRIB., July 31, 2009, http://www.chicagotribune.com/topic/ktxl-news-fileshare 0731,0,1275083.story.

[57] David Kravets, *$675,000 RIAA File Sharing Verdict is "Unreasonable,"* WIRED (Jan. 5, 2010), http://www.wired.com/threatlevel/2010/01/riaa-verdict-is-unreasonable/.

[58] David Kravets, *Judge Guts Whopping RIAA File Sharing Verdict*, WIRED (July 9, 2010), http://www.wired.com/threatlevel/tag/joel-tenenbaum/.

[59] Jeff Leeds, *Labels Win Suit Against Song Sharer*, N.Y. TIMES, Oct. 5, 2007, http://query.nytimes.com/gst/fullpage.html?res=9803E2DD1739F936A35753C1A9619C8B63.

[60] David Kravets, *Judge Says First-Ever RIAA Piracy Trial May Need a Do-Over*, WIRED (May 15, 2008), http://www.wired.com/threatlevel/2008/05/jammie-thomas-n/.

[61] Nate Anderson, *Thomas Verdict: Willful Infringement, $1.92 Million Penalty*, ARS TECHNICA (June 18, 2009), http://arstechnica.com/tech-policy/news/2009/06/jammie-thomas-retrial-verdict.ars.

[62] Nate Anderson, *Judge Slashes "Monstrous" P2P Award by 97% to $54,000*, ARS TECHNICA (Jan. 22, 2010), http://arstechnica.com/tech-policy/news/2010/01/judge-slashes-monstrous-jammie-thomas-p2p-award-by-35x.ars.

[63] Greg Sandoval, *Jammie Thomas Rejects RIAA's $25,000 Settlement Offer*, CNET NEWS, (Jan. 27, 2010), http://news.cnet.com/8301-31001_3-10442482-261.html. For those with an interest in just what Ms. Thomas was sued over, the twenty-four songs in question are collected in the following article: David Kravets, *RIAA Trial Produces Playlist of the Century*, WIRED (Oct. 4, 2007), http://www.wired.com/threatlevel/2007/10/trial-of-the-ce/.

[64] Steven Musil, *Jammie Thomas Hit with $1.5 Million Verdict*, CNET NEWS (Nov. 3, 2010), http://news.cnet.com/8301-1023_3-20021735-93.html.

[65] *See* Harper v. Maverick Recording Co., 598 F.3d 193 (5th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3325 (U.S. May 26, 2010) (No. 10-94).

infringement from illegal file sharing by students on college networks.[66] Interestingly, even as the RIAA very publically abandoned its lawsuit campaign, other copyright holders took a page from the file sharing software book and disaggregated. In 2010, colleges started receiving pre-litigation settlement letters from companies purporting to represent individual rights holders, and seeking small settlements in exchange for forbearance from bringing lawsuits.[67] Additionally, leadership at the Motion Picture Association of America ("MPAA") has, on occasion, threatened college students with lawsuits similar to the RIAA lawsuits, alleging copyright infringement of movies over file sharing systems.[68] In 2010, the United States Copyright Group, an organization primarily supported by the efforts of a single law firm in Virginia, began filing thousands of lawsuits against suspected illegal file sharers in federal court, on behalf of independent filmmakers, complete with pre-litigation settlement offers of $1500 to $2500.[69] As with the RIAA, the United States Copyright Group is "thoughtful" enough to accept all major credit cards.[70] The adult film industry has also pursued a lawsuit campaign again P2P users sharing copyrighted movies.[71] The cost for a college to comply with the DMCA, even prior to the advent of the HEOA requirements, can be substantial.[72]

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[66] Jeffrey R. Young, *Music Industry Will Stop Mass Lawsuits Against Students Over Illegal Trading*, CHRON. HIGHER EDUC., Dec. 19, 2008, http://chronicle.com/article/Music-Industry-Will-Stop-Ma/42156/.

[67] *See* Letter from David Gift, Vice Provost for Libraries, Computing and Technology, Michigan State University, to Michigan State University Students (Sept. 9, 2010), *available at* http://lct.msu.edu/documents/Pre-settlement type notices, memo re, 09 Sep 2010.pdf.

[68] Brock Read, *Coming Soon to a Campus Near You: Movie Industry Lawsuits*, CHRON. HIGHER EDUC., Jan. 14, 2005, http://chronicle.com/article/Coming-Soon-to-a-Campus-Near/12811/; Brock Read, *Movie Studios Widen Antipiracy Suits*, CHRON. HIGHER EDUC., Feb. 24, 2006, http://chronicle.com/blogPost/Movie-Studios-Widen-Antipir/2027/.

[69] Nate Anderson, *The RIAA? Amateurs. Here's How You Sue 14,000+ P2P Users*, ARS TECHNICA (June 1, 2010), http://arstechnica.com/tech-policy/news/2010/06/the-riaa-amateurs-heres-how-you-sue-p2p-users.ars; Mike Masnick, *Extortion-Like Mass Automated Copyright Lawsuits Come to the US: 20,000 Filed, 30,000 More on the Way*, TECH DIRT (Mar. 30, 2010), http://www.techdirt.com/articles/20100330/1132478790.shtml.

[70] *Settlement Page*, U.S. COPYRIGHT GROUP, http://farcry-settlement.com/ (last visited Oct. 10, 2010).

[71] Mathew J. Schwartz, *Adult Content Producers Take on BitTorrent Traders*, INFORMATIONWEEK (Sept. 7, 2010), http://www.informationweek.com/news/infrastructure/traffic_management/showArticle.jhtml?articleID=227300248.

[72] *See* Brock Read, *Fighting Music and Movie Piracy Costs Colleges Considerably, Study Says*, CHRON. HIGHER EDUC., Oct. 20, 2008, http://chronicle.com/article/Colleges-Face-Hefty-Costs-i/1257/.

D. For Whom the Bell Tolls:[73] *The Technology Behind P2P*

The next logical step in this article is a word or two on what we are discussing technology-wise. An attorney's strength in communicating with technology professionals, analyzing digital copyright issues, and implementing the appropriate laws and regulations stems, in part, from an ability to converse in the technologist's *lingua franca*, and vice-versa. P2P file sharing is a method of sharing files of all types between two individual users.[74] The current technological method for P2P file sharing creates a direct connection between two or more computers or devices, and files are then shared over that connection.[75] This differs from a system wherein individuals upload and download files from a central server with no direct connection.[76] That is, one can think of this as the difference between the United States Postal Service, where a package is taken from a house to the post office, and then delivered to another house with no direct connection, versus when a person gets into her car and delivers a package to a friend with no central stopping point in between, nor a third party facilitating the transfer.

P2P is not in and of itself illegal and, like a VCR, the software can be used for "substantial noninfringing uses."[77] In fact, there are many completely legal common uses of P2P, including sharing large research files, recording original music and sending it to friends, or uploading and downloading game-approved patches in multiplayer video games like World of Warcraft.[78] Just as a licensed driver may drive fifty-five miles per hour on the highway, but not eighty miles per hour on a city sidewalk, so too individuals may utilize P2P file sharing for a myriad of legal applications, but potentially run afoul of the law when they use the application to upload or download files whose content is protected by copyright law.

The Napster that arrived in 1999 heralded the first generation of file sharing software.[79] Users who had installed the original

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[73] METALLICA, *For Whom the Bell Tolls*, *on* RIDE THE LIGHTNING (Elektra 1984), *available at* http://www.youtube.com/watch?v=bg92QpjRcJk.

[74] John Borland, *Movie-Swapping Up; Kazaa Down*, CNET NEWS (July 13, 2004), http://news.cnet.com/Survey-Movie-swapping-up-Kazaa-down/2100-1025_3-5267992.html.

[75] *Kazaa Review*, FILESHARINGZ, http://filesharingz.com/reviews/kazaa-review.php (last visited Oct. 10, 2010).

[76] *Id.*

[77] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984).

[78] *See, e.g.*, *Blizzard Downloader F.A.Q.*, WORLD OF WARCRAFT, http://www.worldofwarcraft.com/info/faq/blizzarddownloader.html (last visited Oct. 10, 2010).

[79] Spencer E. Ante, *Napster's Shawn Fanning: The Teen Who Woke Up Web Music*,

Napster software would connect to a Napster-owned server. These servers handled 2000 to 5000 individual computers connected at any given time.[80] The server would then enable all of the connected computers to search for available files on the collective computers.[81] When one user found a file he or she would like to download, Napster connected the computers and facilitated the transmission.[82] This centralized design was a key factor in Napster's demise.

Morpheus, KaZaa, and Grokster represented a second generation of P2P design.[83] The software was completely decentralized and served as a mere "meet market" for individual users who would connect and share files in a pure peer-to-peer relationship.[84]

While the entertainment companies were busy with litigation against the second generation of file sharing software, the third generation was already developed, distributed, and generating a loyal following, albeit mostly for non-legal uses.[85] This next generation, pioneered by BitTorrent, unlocked the ability to exchange much larger files, television shows and full-length movies, at a much faster speed.[86] Also based on a decentralized model, the BitTorrent software matches users to servers that facilitate the uploading and downloading of these files.[87]

BitTorrent's efficiency is by design. The files are broken down into small chunks so they can be exchanged in portions, rather than in one long upload or download stream.[88] The uploading process is different than the downloading process.[89] To upload or distribute a file on BitTorrent, the user sets up a Torrent "tracker" Web site, basically a server that functions as a traffic director, which manages file requests and points the requesting user to the computer offering the file.[90] The tracker's links initiate the BitTorrent downloads.[91] To download files, a user needs to search

BUSINESSWEEK ONLINE (Apr. 12, 2000), http://www.businessweek.com/ebiz/0004/em0412.htm.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Kazaa Review*, *supra* note 75.

[84] *Id.*

[85] *See* Borland, *supra* note 74.

[86] *Id.*

[87] Xeni Jardin, *Hollywood Wants BitTorrent Dead*, WIRED (Dec. 14, 2004), http://www.wired.com/entertainment/music/news/2004/12/66034.

[88] John Borland, *File Swapping Shifts Up a Gear*, CNET NEWS (May 27, 2003), http://news.cnet.com/File-swapping-shifts-up-a-gear/2100-1026_3-1009742.html.

[89] *Id.*

[90] *Id.*

[91] Jardin, *supra* note 87.

for the tracker site that will point them to the desired file.[92]

The technological magic happens once a download has begun, at which point the user's computer is also converted into an uploading server for any other users seeking the same file.[93] Both the upload and download speeds are balanced by the software.[94] And, in contrast to other file sharing networks, the more users that search for a single file, the faster the chunks move around due to the load balancing.[95]

Of course, by the time this article is published, the technology may have changed again. The underpinnings of the technology, however, are likely to stay the same. These file sharing programs match up individual users, who may live a mile or a continent away from each other, to send and receive files, with no filter by the software or a central server to ensure that each party has the right to send and receive such files.

II. *IT'S TRICKY*:[96] CURRENT COLLEGE (AS ISP) REQUIREMENTS UNDER THE DMCA

Those colleges and universities that directly provide some form of Internet service to faculty, staff, and/or students qualify as ISPs.[97] Like their commercial counterparts, college ISPs are eligible for the legal protections afforded by the DMCA, including safe harbors from liability due to their users' activities.[98] The DMCA is instrumental in allowing rights holders to protect their copyrights when they are being infringed online. Before the advent of the Internet, rights holders had the ability to independently locate alleged infringers. While rights holders can identify potentially infringing conduct via the Internet, they require the assistance of the ISP carrying the traffic to identify a specific user.[99]

To qualify for the safe harbors enumerated in the DMCA,

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[92] *Id.*

[93] Borland, *supra* note 74.

[94] *Id.*

[95] *Id.*

[96] RUN-DMC, *It's Tricky*, *on* RAISING HELL (Arista Records 1986), *available at* http://www.youtube.com/watch?v=l-O5IHVhWj0.

[97] Antionette D. Bishop, *Illegal P2P File Sharing On College Campuses—What's the Solution?*, 10 VAND. J. ENT. & TECH. L. 515, 516 (2008).

[98] *Id.*

[99] When the rights holder sends the DMCA notice to the ISP, it is not aware of whether the alleged violation is covered by § 512(a) or § 512(c). Only after identifying the user associated with the IP address and timestamp can the ISP determine which user is alleged to have shared infringing content, and whether such an alleged infringement is a § 512(a) or § 512(c) violation. *See* 17 U.S.C. § 512(n) (2006).

universities must take some proactive steps. Universities must have a policy or program that terminates repeat infringers, and must not prevent copyright owners' efforts to locate and protect their intellectual property.[100] The ISP's burden begins upon receiving notice. Web sites and ISPs are not required to police the traffic on their sites or networks; that burden falls solely on the rights holder, even if the rights holder can reasonably allege a high level of infringement occurs on the site or network.[101]

A. DMCA Notices for University-Owned Devices

Two additional requirements must be met to satisfy the safe harbor under 17 U.S.C. § 512(c) of the legislation. Section 512(c) addresses "[i]nformation [r]esiding on [s]ystems or [n]etworks [a]t [d]irection of [u]sers,"[102] and applies to "a system or network controlled or operated by or for the service provider."[103] This section is interpreted to govern university-owned resources, such as faculty, staff, and computer lab computers. Universities must register a designated agent with the Copyright Office to receive notices of violations.[104] The Copyright Office maintains a directory of such agents.[105] In order to maintain the "safe harbor" under the law, and not be liable for monetary damages for infringing material on an ISP's server, the ISP must not have "actual knowledge" of the infringing material, not receive a direct financial benefit from the infringement, and, when notified,[106] must respond "expeditiously" to remove the infringing material or disable access to such material.[107] The statute sets out the elements required in a "takedown" notification.[108] Inasmuch as these are computers that the college or university actually *owns*, the institution *must* take action when it receives a DMCA takedown notice or risk its safe harbor.[109]

B. DMCA Notices for Student and Guest Devices

Conversely, 17 U.S.C. § 512(a) also applies to university

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100 *Id.* § 512(i)(1) (2006).
101 Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010).
102 *Id.* § 512(c) (2006).
103 *Id.*
104 *Id.* § 512(c)(2).
105 *Id.*
106 Likely by means of the DMCA takedown notice. *See* § 512(c)(1).
107 *Id.*
108 § 512(c)(3).
109 § 512(c).

networks, but governs "[t]ransitory [d]igital [n]etwork [c]ommunications."[110] This section of the legislation provides immunity to the ISP for information that simply transits the ISP's networks, with no direction, input, or interference from the ISP itself, and is not stored anywhere on the ISP's network.[111] Notably, no additional proactive steps are required for an ISP to avail itself of this immunity.[112] This section applies to most student and guest activity on university networks as those users are primarily connecting on their own machines. Therefore, the statute does not *technically* establish any legal requirement that institutions respond to or forward DMCA notices that correspond to such activity.[113] However, for a variety of reasons,[114] some colleges have chosen to treat these notices as if they were § 512(c) notices, terminating users from the network unless and until the infringing content is removed. Many colleges, as a matter of policy, address this kind of activity through a student affairs process, rather than a legal one so as to seize upon a "teachable moment" for students. College compliance costs with these requirements, when combined with the large number of takedown notices received, can be substantial.[115]

One other wrinkle is the question of whether all DMCA takedown notifications actually represent violations of copyright law. Most notices are sent after a content owner, or its agent, actually downloads a file made available by an individual on the Internet (student or otherwise). In that case, there is an upload and a download, a copy and a distribution, and a good faith belief that there has been a violation of copyright law that merits a takedown

[110] § 512(a).

[111] *Id.* This is sometimes referred to as "dumb pipes," that is, that information transmits over the pipes, but with no input or control from the ISP. Anne Halsey, *ISPs Want to Have Their First Amendment Cake and Eat It Too*, PUB. KNOWLEDGE (Aug. 20, 2010), http://www.publicknowledge.org/blog/isps-want-have-their-first-amendment-cake-and/.

[112] *See* § 512(a).

[113] Steven J. McDonald, Gen. Counsel, R.I. Sch. of Design, 30th Annual N. Conference on Law and Higher Educ., Stetson University Coll. of Law: Face the Music: The Law and Policy of File Sharing (Feb. 21–29, 2009), *available at* http://www.law.stetson.edu/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=7224.

[114] There are a variety of valid reasons why colleges and universities treat these § 512(a) notices as § 512(c) notices. When a college that uses dynamic IP addresses receives a notice, it may not be immediately clear whether the device is a college-owned or a personal device. Further, some students use or rent college-owned computers, further complicating the ownership question. Finally, some colleges recognize the "teachable moment" opportunity provided by a DMCA notice, and will act on such a notice of a student's violation even if a technical reading of the statute does not require such action.

[115] Andy Guess, *The Costs of Policing Campus Networks*, INSIDE HIGHER ED (Oct. 20, 2008), http://www.insidehighered.com/news/2008/10/20/p2p.

notice. Less agreed upon are RIAA notices, which have, in the past, been sent when individual users simply make music available via P2P file sharing software, although the RIAA and its agent never actually download the file. There is an argument that a notice sent in that situation is not a valid DMCA notice as 17 U.S.C. § 512 requires. Rather, it may simply be an advertisement of willingness to upload.[116] Those campuses that purchase hardware or software blocking systems may still receive these DMCA takedown notices since the notice is based on the user making the file available, even if an actual transfer would have been blocked by the hardware or software.[117] Further, one study, which cited a takedown notice issued against a networked printer, raised some doubts about whether RIAA-issued DMCA notices name the correct infringing IP address.[118]

III. *LAWYERS, GUNS, AND MONEY*[119]

In 2008, Congress passed, and President Bush signed, the HEOA, an amendment to the Higher Education Act of 1965.[120] Included in the hundreds of pages of the Act, within the section governing Title IV Financial Aid, are several short paragraphs requiring all colleges that accept federal financial aid to take certain actions to stem the spread of peer-to-peer file sharing.[121] Pursuant to requirements of the Act, the Department of Education engaged in a process of "negotiated rulemaking" within which representatives of the

[116] The argument would be that an individual standing outside his or her house offering to copy copyrighted compact discs for $10 a piece is merely advertising his or her willingness to violate the copyright law. There is no "attempted copyright violation" that can be used to enforce rights here. Until that person finds a customer and actually hands over a pirated compact disc (an upload and a download, if you will), he or she has not violated the law. Once the CD has changed hands, copyright law has been violated.

[117] Steven Musil, *Recording Industry Drops MP3 Spies: Follows Announcement It Will No Longer File Suits Against Suspected Music Pirates*, CBS NEWS (Jan. 5, 2009), http://www.cbsnews.com/stories/2009/01/05/tech/cnettechnews/main4699033.shtml. For analysis in the allied area of lawsuits over file sharing, *see* Declan McCullagh, *Judge to RIAA: You Can't Sue Over Songs "Made Available" Over P2P*, CNET NEWS (Apr. 1, 2008), http://news.cnet.com/8301-13578_3-9908353-38.html; Dan Slater, *In Blow to RIAA, Judge Raises Infringement Standard for File-Sharing*, WALL ST. J., Sep. 25, 2008, http://blogs.wsj.com/law/2008/09/25/in-blow-to-riaa-judge-raises-infringement-standard-for-file-sharing/tab/article/.

[118] Brad Stone, *The Inexact Science Behind D.M.C.A. Takedown Notices*, N.Y. TIMES, June 5, 2008, http://bits.blogs.nytimes.com/2008/06/05/the-inexact-science-behind-dmca-takedown-notices.

[119] Warren Zevon, *Send Lawyer's Guns & Money*, *on* EXCITABLE BOY (Asylum 1978), *available at* http://www.youtube.com/watch?v=S5puAN1PGQw&feature=related.

[120] Higher Education Opportunity Act, Pub. Law No. 110-315, 122 Stat. 3078 (2008).

[121] *Id.* at § 493, 122 Stat. at 3309.

entertainment industry and higher education negotiated regulatory language.[122] Unfortunately, due to a failure to reach agreement by negotiators on other issues, the negotiated rulemaking process failed. The Department of Education issued proposed[123] and final[124] regulations on preventing peer-to-peer file sharing in late 2009, which mirror the compromises reached during the negotiated rulemaking sessions.[125] The regulations officially took effect July 1, 2010.[126] Until then, colleges were simply required to make "best efforts" to comply with the statute.

IV. *TWO STEP*[127] TO COMPLY: P2P IN THE HIGHER EDUCATION OPPORTUNITY ACT

After a significant amount of wrangling and lobbying, Congress included two sections in the HEOA that affect peer-to-peer file sharing, what we refer to as a "notification" requirement and a "written plan" requirement:

A. Notification

> Section 485(a) (20 U.S.C. 1092(a)) is amended—
> . . .
> (E) by adding at the end the following:
> "(P) institutional policies and sanctions related to copyright infringement, including—
>
> "(i) an annual disclosure that explicitly informs students that unauthorized distribution of copyrighted material, including unauthorized peer-to-peer file sharing, may subject the students to civil and criminal liabilities;
>
> "(ii) a summary of the penalties for violation of Federal copyright laws; and

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[122] *See 2009 Negotiated Rulemaking for Higher Education*, U.S. DEPARTMENT OF EDUC., http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/gen-program.html (last visited Oct. 20, 2010).

[123] General and Non-Loan Programmatic Issues, 74 Fed. Reg. 42,380 (proposed Aug. 21, 2009) (to be codified at 34 C.F.R. pts. 600, 668, 675, 686, 690, 692), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-18550.pdf.

[124] General and Non-Loan Programmatic Issues, 74 Fed. Reg. 55,902 (Oct. 29, 2009) (to be codified at 34 C.F.R. pts. 600, 668, 675, 686, 690, 692), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-25373.pdf.

[125] General and Non-Loan Programmatic Issues, 74 Fed. Reg. at 42,391.

[126] General and Non-Loan Programmatic Issues, 74 Fed. Reg. 55,902.

[127] DAVE MATTHEWS BAND, *Two Step*, *on* CRASH (RCA 1996), *available at* http://www.youtube.com/watch?v=nmi7CiqQq44&ob=av2n.

> "(iii) a description of the institution's policies with respect to unauthorized peer-to-peer file sharing, including disciplinary actions that are taken against students who engage in unauthorized distribution of copyrighted materials using the institution's information technology system."[128]

B. Written Plan

> "(29) The institution certifies that the institution—
>
> "(A) has developed plans to effectively combat the unauthorized distribution of copyrighted material, including through the use of a variety of technology-based deterrents; and
>
> "(B) will, to the extent practicable, offer alternatives to illegal downloading or peer-to-peer distribution of intellectual property, as determined by the institution in consultation with the chief technology officer or other designated officer of the institution."[129]

The Congressional Record that accompanied passage of the statute provides some perspective to Congress' intent in crafting this language.[130] Most notably, the Manager's Report provided some context on the requirement that colleges utilize "technology based deterrents." The Report stated that several options are available, providing

> an institution with the ability to choose which one best meets its needs, depending on that institution's own unique characteristics, such as cost and scale. These include bandwidth shaping, traffic monitoring to identify the largest bandwidth users, a vigorous program of accepting and responding to [DMCA] notices, and a variety of commercial products designed to reduce or block illegal file sharing.[131]

Further, the statute is intended to be "technology neutral"

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[128] Higher Education Opportunity Act, Pub. Law No. 110-315, § 488(a), 122 Stat. 3078, 3293 (2008).

[129] Higher Education Opportunity Act, Pub. Law No. 110-315, § 493(29), 122 Stat. 3078, 3309 (2008).

[130] The peer-to-peer section of the Manager's Report is reprinted in its entirety in Appendix I. *See infra* Appendix I.

[131] H.R. REP. NO. 110-803, at 547 (July 30, 2008) (Conf. Rep.), *reprinted in* 2008 U.S.C.C.A.N. 1212. This language is also captured in the preamble to the Final Regulations. General and Non-Loan Programmatic Issues, 74 Fed. Reg. at 55,926.

allowing for a "broad range" of compliance methods.[132] The Report closed by referencing several technological methods, including hardware and software packages, automatic processing of DMCA notices, dialing-down bandwidth, and packet shaping.[133]

V. *REGULATE*:[134] THE PROPOSED AND FINAL REGULATIONS ON P2P

The final regulations of the Department of Education on peer-to-peer (and a variety of other) issues generally follow the statutory language, while providing some clarification of the steps colleges must take to comply:

A. Notification

> § 668.43 Institutional information.
>
> (a) Institutional information that the institution must make readily available to enrolled and prospective students under this subpart includes, but is not limited to—
>
> . . .
>
> (10) Institutional policies and sanctions related to copyright infringement, including—
>
> (i) A statement that explicitly informs its students that unauthorized distribution of copyrighted material, including unauthorized peer-to-peer file sharing, may subject the students to civil and criminal liabilities;
>
> (ii) A summary of the penalties for violation of Federal copyright laws; and
>
> (iii) A description of the institution's policies with respect to unauthorized peer-to-peer file sharing, including disciplinary actions that are taken against students who engage in illegal downloading or unauthorized distribution of copyrighted materials using the institution's information technology system.[135]

B. Written Plan

> § 668.14 Program participation agreement.

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[132] H.R. REP. NO. 110-803, at 548.

[133] *Id.*

[134] WARREN G FEAT. NATE DOGG, *Regulate*, *on* REGULATE . . . G FUNK ERA (DEF Jam 1994), *available at* http://www.youtube.com/watch?v=ORjG0u_J-VE (note: song is somewhat explicit, but bleeped).

[135] Institutional Information, 34 C.F.R. § 668.43 (2010).

(b) By entering into a program participation agreement, an institution agrees that—

. . .

(30) The institution—

(i) Has developed and implemented written plans to effectively combat the unauthorized distribution of copyrighted material by users of the institution's network, without unduly interfering with educational and research use of the network, that include—

(A) The use of one or more technology-based deterrents;

(B) Mechanisms for educating and informing its community about appropriate versus inappropriate use of copyrighted material, including that described in § 668.43(a)(10);

(C) Procedures for handling unauthorized distribution of copyrighted material, including disciplinary procedures; and

(D) Procedures for periodically reviewing the effectiveness of the plans to combat the unauthorized distribution of copyrighted materials by users of the institution's network using relevant assessment criteria. No particular technology measures are favored or required for inclusion in an institution's plans, and each institution retains the authority to determine what its particular plans for compliance with paragraph (b)(30) of this section will be, including those that prohibit content monitoring; and

(ii) Will, in consultation with the chief technology officer or other designated officer of the institution—

(A) Periodically review the legal alternatives for downloading or otherwise acquiring copyrighted material;

(B) Make available the results of the review in paragraph (b)(30)(ii)(A) of this section to its students through a Web site or other means; and

(C) To the extent practicable, offer legal alternatives for downloading or otherwise acquiring copyrighted material, as determined by the institution.[136]

[136] Program Participation Agreement, 34. C.F.R. § 668.14 (2010).

In addition, the Department of Education stated that the regulations only applied to colleges that provide students with "school-maintained and operated internet services," thus exempting those institutions that provide no such service.[137] Admittedly, there are very few traditional higher education institutions that do not provide at least some network access for students, faculty and/or staff.

VI. *THE TIMES THEY ARE A CHANGIN'*:[138] COMPLYING WITH THE NEW REQUIREMENTS

Contrary to initial reports and the fears of some in higher education, the new regulations do not require significant expenditures of blood or treasure to comply.[139] First, the notion that colleges would *have* to purchase technology-based deterrents did not come to pass. Most colleges will not have to expend any additional

[137] "Provisions related to peer-to-peer file sharing, for example, only affect schools that provide students with school-maintained and operated internet services; many small institutions lack the resources or need to provide such services and so will not be affected by the provisions." General and Non-Loan Programmatic Issues, 74 Fed. Reg. 55,902, 55,924 (Oct. 29, 2009) (to be codified at 34 C.F.R. pts 600, 668, 675, 686, 690, 692), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-25373.pdf. "For those that will be affected, the Department is encouraging the adoption of best practices which should reduce institutional burden." *Id.*

[138] BOB DYLAN, *The Times, They Are A-Changin'*, *on* THE TIMES THEY ARE A-CHANGIN' (Columbia 1964), *available at* http://www.youtube.com/watch?v=YNpgnojMG-4.

[139] Earlier versions of the statutory language, and earlier language desired by the content industry, would have required colleges to purchase expensive blocking hardware and software; required that colleges offer students free methods of legally accessing content, with colleges footing the quite hefty expense for this service; and created a list of the top twenty-five "worst offender" institutions as determined by the content industry or by the Secretary of Education, which would lose some or all federal funding if they appeared on the list a number of times. *See* Ken Fischer, *Bill Would Force "Top 25 Piracy Schools" to Adopt Anti-P2P Technology*, ARS TECHNICA (July 23, 2007), http://arstechnica.com/tech-policy/news/2007/07/bill-would-force-top-25-piracy-schools-to-adopt-anti-p2p-technology.ars; Andy Guess, *Downloading by Students Overstated*, INSIDE HIGHER ED (Jan. 23, 2008), http://www.insidehighered.com/news/2008/01/23/mpaa; K.C. Jones, *Senate Adds Anti-Piracy Requirement to Education Bill*, INFO. WEEK (July 24, 2007), http://www.informationweek.com/news/internet/showArticle.jhtml?articleID=201200868; Doug Lederman, *The Evolving Higher Ed Act Bill*, INSIDE HIGHER ED (July 24, 2007), http://www.insidehighered.com/news/2007/07/24/hea; Declan McCullagh, *Universities Win Senate Fight over Anti-P2P Proposal,* CNET NEWS (July 24, 2007), http://news.cnet.com/8301-10784_3-9749071-7.html?tag=mncol;txt. The MPAA argued that it was legitimate to link prevention of piracy on campus to a threatened loss of federal funding. Anne Broache, *MPAA: Linking College Funding, Piracy is 'Perfectly Legitimate'*, CNET NEWS (Nov. 19, 2007), http://news.cnet.com/8301-10784_3-9820200-7.html. Of course, what is not stated in the article is that, for almost any college across the country, a complete loss of federal funding for more than a short period of time would serve as a death knell and force the college to close its doors. Needless to say, as detailed later in this article, none of these requirements came to pass in the final legislation and regulation.

funds or acquire any new hardware or software to comply with the final regulations. Rather, the regulations require notification, some organization by each college or university, and a decision on how each college will comply with the technology-based deterrents requirement, often by continuing current administrative practice. Perhaps the most important effect of the regulations is that every institution receiving Federal Title IV funding must now convene campus stakeholders and make an educated decision as to how issues of alleged copyright infringement, and particularly receipt of DMCA takedown notices, will be handled going forward.

A. Notification

This notification will likely accompany the many other notifications printed (or digitally created) in a student handbook, or similar document, and sent to each enrolled and prospective student at the beginning of the academic year.[140] The notification consists of three parts: a statement that unauthorized distribution of copyrighted material may bring civil and criminal penalties; a summary of the penalties for violating copyright law; and a description of the specific policies of the college.[141] In June 2010, the Department of Education published a "Dear Colleague" letter, developed in conjunction with the content industry and colleges, summarizing the regulatory requirements, and offering sample language that colleges *may* use to meet the notification requirement.[142] In addition to that sample, other samples appear in

[140] 34 C.F.R. § 668.41, 668.43 (2010). The proposed regulations reaffirm that such

> notice must be made through an appropriate mailing or publication, including direct mailing through the U.S. Postal Service, campus mail or electronic mail. Posting on Internet or Intranet Web sites does not constitute notice. If the institution discloses the consumer information . . . by posting the information on a Web site, it must include in the notice the exact electronic address at which the information is posted, and a statement that the institution will provide a paper copy of the information on request.

General and Non-Loan Programmatic Issues, 74 Fed. Reg. 42380, 42391 (Aug. 21, 2009) (to be codified at 34 CFR Parts 600, 668, 675, 686, 690, 692), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-18550.pdf.

[141] "Dear Colleague" Letter from Daniel T. Madzelan, U.S. Dep't of Educ., to Institutions of Higher Learning (June 4, 2010), *available at* http://ifap.ed.gov/dpcletters/GEN1008.html.

[142] *Id.* Summary of Civil and Criminal Penalties for Violation of Federal Copyright Laws:

> Copyright infringement is the act of exercising, without permission or legal authority, one or more of the exclusive rights granted to the copyright owner under section 106 of the Copyright Act (Title 17 of the United States Code). These rights include the right to reproduce or distribute a copyrighted work. In the file-sharing context, downloading or uploading substantial parts of a copyrighted work without authority constitutes an infringement.
>
> Penalties for copyright infringement include civil and criminal penalties. In general,

Appendix II, below.[143] The institution need not provide such notice to faculty and staff.[144]

B. Written Plan

The regulations require that colleges without a written plan to handle file sharing create one.[145] The regulations maintain that these plans need not be all encompassing, and need not harm the business practices of the college.[146] To the extent that any proposed plans interfere with the educational or research uses of the network, those proposals need not be adopted.[147] The Department of Education specified that any written plan must apply to all users of a college's network (including faculty, staff, contractors, and

anyone found liable for civil copyright infringement may be ordered to pay either actual damages or "statutory" damages affixed at not less than $750 and not more than $30,000 per work infringed. For "willful" infringement, a court may award up to $150,000 per work infringed. A court can, in its discretion, also assess costs and attorneys' fees. For details, see Title 17, United States Code, Sections 504, 505.

Willful copyright infringement can also result in criminal penalties, including imprisonment of up to five years and fines of up to $250,000 per offense.

Id. For more information, please see the Web site of the U.S. Copyright Office at http://www.copyright.gov, especially its FAQs at http://www.copyright.gov/help/faq. "The Department will work with representatives of copyright holders and institutions to develop a summary of the civil and criminal penalties for violation of Federal copyright laws to include as part of the *Federal Student Aid Handbook* that an institution *may use* to meet this requirement." General and Non-Loan Programmatic Issues, 74 Fed. Reg. 42,380, 42,392 (Aug. 21, 2009) (to be codified at 34 CFR Parts 600, 668, 675, 686, 690, 692), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-18550.pdf (emphasis added).

[143] A working group, composed of attorneys and policymakers from colleges and universities around the country, analyzed language planned for use at a number of campuses, and has been working on sample language that consolidates some of these versions. The members of that working group are: Steven Worona, Director of Policy & Networking Programs at EDUCAUSE; Steven McDonald, General Counsel of the Rhode Island School of Design; Jack Bernard, Assistant General Counsel at the University of Michigan; Tracy Mitrano, Director of IT Policy at Cornell University; Kent Wada, Director, Strategic Information Technology and Privacy Policy at University of California, Los Angeles; Timothy McGovern, Manager, IT Security Services, Client Support Services at Massachusetts Institute of Technology; and the two authors of this article. The working group developed two samples, called the "Short Sample" and the "Long Sample." Both are reproduced in Appendix II, *infra*, along with samples from several institutions. *See infra* Appendix II. These are unofficial samples, not endorsed by any official higher education organization, and are meant to supplement and provide options to the sample version published in the *Federal Financial Aid Handbook*.

[144] General and Non-Loan Programmatic Issues, 74 Fed. Reg. at 42,393.

[145] *Id.* EDUCAUSE maintains a page of "role model" campuses from which policy ideas and language may be researched: *HEOA Role Models*, EDUCAUSE, http://www.educause.edu/HEOArolemodels (last visited Oct. 10, 2010).

[146] For further explanation of the balance between network security and network function considered by the Department of Education, see General and Non-Loan Programmatic Issues, Fed. Reg. at 42,392.

[147] General and Non-Loan Programmatic Issues, Fed. Reg. at 42392.

guests), not simply to student users.[148]

1. Education

The written plans must include an educational component, some of which will be customized on an institutional level. The proposed regulations state somewhat opaquely that education methods "could include any additional information and approaches determined by the institution to contribute to the effectiveness of the plan, such as including pertinent information in student handbooks, honor codes, and codes of conduct in addition to e-mail and/or paper disclosures."[149] Colleges across the country have taken different tacks in educating their students. Cornell developed an educational video using real students,[150] and the University of Michigan has developed "BAYU" or "Be Aware You're Uploading," an educational and action system that tracks uploading of content and notifies users that they may be uploading in violation of the law.[151]

2. Responding to Unauthorized Distribution of Copyrighted Material

Written plans must include procedures for handling unauthorized distribution of material (read: illegal file sharing), including the use of a college's student disciplinary process.[152] Importantly, the regulations do not require that the institution actively monitor

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[148] General and Non-Loan Programmatic Issues, Fed. Reg. at 42,392. We are reprinting this brief discussion in its entirety here:

> Although there was some discussion of requiring an institution to effectively combat the unauthorized distribution of copyrighted material by only student users of the institution's network, the regulatory language on which tentative agreement was reached would apply the requirement more broadly to "users." This approach ensures that institutions will be more likely to deter and prevent downloads of copyrighted material by employees and members of the public that may use computers at a school library, for example, and also allow them to identify illegal downloads being made by students who are not accessing the computer systems using their student accounts. The Department believes that this approach meets the intent of the statute that institutions secure their networks from misuse by individuals who are given access to the networks.

Id.

[149] General and Non-Loan Programmatic Issues, 74 Fed. Reg. at 42,391. The final regulations did not amend or change this guidance.

[150] Cornell Info. Tech., *Copyright Education Video*, CORNELL U. (2009), http://traindoc.cit.cornell.edu/copyright/vidPlayer480.html.

[151] *Be Aware You're Uploading (BAYU)*, U. MICH., http://bayu.umich.edu/ (last visited Oct. 10, 2010).

[152] General and Non-Loan Programmatic Issues, 74 Fed. Reg. 55,902, 55,926 (Oct. 29, 2009) (codified at 34 C.F.R. pts. 600, 668, 675, 686, 690, 692), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-25373.pdf.

networks or seek out students to discipline.[153] However, when the issue is brought to the attention of the college, typically by means of a (valid) DMCA notice, the college must have written procedures for handling the matter, usually, as described above, by removing the student from the network, at least temporarily, asking him or her to remove the allegedly offending file from his or her computer or stop sharing that file, and potentially through the use of the college disciplinary process.[154]

College disciplinary procedures for illegal file sharing are as diverse as colleges themselves. Some will terminate students from the network by suspending access for short amounts of time, others for longer.[155] Some colleges have opted not to prevent students from accessing the network during final exam or study periods to prevent any disruption to their academic work during those critical times.[156] Others charge students a fee to reconnect to the network; sometimes that fee escalates for repeat offenders.[157] Some colleges ask their judicial affairs department to adjudicate the allegations of student infringement, while others leave the discipline to information technology ("IT") professionals.[158] At other institutions, first offenses are handled by IT professionals, while second and third offenses are handled by student affairs administrators.[159] The final regulations do not specify *how* a college must use its student disciplinary process for illegal file sharing, just that discipline must be a potential part of the process, at least for certain cases.

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[153] *Id.* ("The final regulations make clear that no particular technology measures are favored or required for inclusion in an institution's plans, and each institution retains the authority to determine what its particular plans for compliance will be, including those that prohibit content monitoring.").

[154] *Computer Usage and Copyrights*, COMPUTER & TELECOMM. SERVICES, RICHARD STOCKTON C. N.J. (2010), http://intraweb.stockton.edu/eyos/page.cfm?siteID=39&pageID=86.

[155] Kent Wada, *Illegal File Sharing 101*, EDUCAUSE Q., Oct.–Dec. 2008, at 18, 90, *available at* http://www.educause.edu/EDUCAUSE+Quarterly+Quarterly/EDUCAUSE QuarterlyMagazineVolum/IllegalFileSharing101/163441.

[156] *Id.* at 21.

[157] *Information & News: File Sharing and Copyright Law: How It Affects You*, STAN. U. RESIDENTIAL COMPUTING, http://rescomp.stanford.edu/info/dmca/ (last visited Oct. 10, 2010).

[158] *Id.* It should be noted that, in the experience of the authors, the strongest discipline systems are those in which technology professionals and student affairs professionals work together to create meaningful educational lessons for students accused of illegal file sharing. Each party brings to the table an independent skill: the IT professional can explain in summary or detail exactly what the student is accused of, while the student affairs professional brings experience in appropriate and effective disciplinary and educational methods. It is this team approach that has the best chance of effectively educating students.

[159] *See* STAN. U. RESIDENTIAL COMPUTING, *supra* note 157.

3. Technology-Based Deterrents

The institution's written plan must include the use of one or more technology-based deterrents.[160] Institutions are offered several options for such deterrents, and the regulations state plainly that they do not favor one technology over another.[161] Some technological options are hardware and software blocking packages, aggressive manual (or automatic) processing of DMCA notices, dialing down bandwidth, and packet shaping.[162] Each of the above referenced methods interacts at a different level with network operations. The feasibility of implementing each method will vary from institution to institution.

a. Packet Shaping

Packet shaping works to "shape" the speed of data over an institution's network.[163] These technologies classify, analyze, and manage the bandwidth, giving priority to certain types of data, such as e-mail, while de-prioritizing other types of data, such as shared files.[164]

b. Content Filters

Content filters, in the form of hardware and software solutions, are generally considered the most intrusive and costly of the technology-based deterrent options. These filters are placed directly on the network and scan all network traffic seeking matches to the digital "fingerprints" stored in the device. Files that are a match to these fingerprints are blocked.[165] Theoretically, the content

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[160] The proposed regulations cited the diversity of higher educational institutions, and stated that it would be up to the institution itself to determine "how many and what type of technology-based deterrents it uses as a part of its plan . . . every institution must employ at least one." General and Non-Loan Programmatic Issues, 74 Fed. Reg. 42380, 42392 (Aug. 21, 2009) (to be codified at 34 CFR Parts 600, 668, 675, 686, 690, 692), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-18550.pdf.

[161] *See* General and Non-Loan Programmatic Issues, 74 Fed. Reg. 55,902, 55,926 (Oct. 29, 2009) (to be codified at 34 C.F.R. pts. 600, 668, 675, 686, 690, 692), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-25373.pdf.

[162] Wada, *supra* note 155, at 22.

[163] Paul Cesarini, *Of Gladiators, and Bandwidth Realities*, EDUCAUSE REV., July–Aug. 2007, at 72, 72, *available at* http://www.educause.edu/EDUCAUSE+Review/EDUCAUSEReviewMagazineVolume42/OfGladiatorsandBandwidthRealit/161756.

[164] *Id.*

[165] Wada, *supra* note 155, at 23 (privacy concerns are often raised in discussion about content filtering as, by its nature, all network traffic is examined). In addition, its efficacy is questionable. *See* Andy Guess, *Can Anyone Police File Sharing*, INSIDE HIGHER ED (Aug. 3,

providers themselves provide the content filter companies with updated digital fingerprints on songs to keep the blocking system current.

The use of content filters inverts the DMCA's burden on rights holders and shifts it to ISPs. When an institution deploys a content filter, they have implicitly adopted the role of system monitoring, which some refer to as "copyright police." The pursuit by a school's network operators of identifying acts of suspected infringement, even with the assistance of a content filter, puts the institution in a proactive role. The DMCA clearly promotes a reactive role by ISPs; the rights holders have the obligation to police their works and protect their copyright interests by contacting ISPs and notifying them of alleged infringement.[166]

c. Low-Tech Options

Perhaps the easiest method to comply with the requirement to use technology-based deterrents is a comparatively low-tech option: accepting and responding to DMCA notices, as outlined in Part II, above. The Automated Copyright Notice System ("ACNS"), developed in 2003 by NBC Universal and Universal Music Group ("UMG") with support from Disney, provides a technical framework for the automated processing of DMCA notices.[167] Many schools have implemented ACNS, or built onto it, to move away from the time and resource consuming manual processing of the notices.[168] Others handle the process manually.

4. Legal Alternatives for Downloading Copyrighted Material

Another written plan requirement is for institutions to periodically review the current state of legal alternatives for downloading or acquiring copyrighted material, and publish that review on a college Web site or otherwise distribute that information to students.[169] EDUCAUSE, a non-profit higher education technology group, maintains a list of known legal file sharing alternatives that is made available to the higher education

2007), http://www.insidehighered.com/news/2007/08/03/filesharing.

[166] *See* Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

[167] *Automated Copyright Notice System (ACNS) 2.0*, MOTION PICTURE LABORATORIES, INC., http://movielabs.com/ACNS (last visited Oct. 10, 2010).

[168] Wada, *supra* note 155, at 23.

[169] *Id.*

community.[170] Inasmuch as few colleges have the staff to monitor the industry the way EDUCAUSE does, as technology and the industry change, a link to its list satisfies compliance with this requirement[171] and prevents disparate lists varying from institution to institution.

In addition to publishing the review of legal alternatives, institutions have the option, to the extent practicable,[172] of offering students legal alternatives for downloading or otherwise acquiring copyrighted content, as the institution determines is appropriate. The Department of Education has commented, understandably, that simply not blocking legal alternatives does not satisfy the requirements, as it is not the same as making legal alternatives available.[173] The regulations[174] and a subsequent "Dear Colleague" letter issued by the Department of Education in June 2010[175]

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[170] The list is updated regularly by EDUCAUSE staff. *Legal Sources of Online Content*, EDUCAUSE, http://www.educause.edu/legalcontent (last visited Oct. 10, 2010).

[171] The "Dear Colleague" letter from the Department of Education states that "[t]he Department anticipates that individual institutions, national associations, and commercial entities will develop and maintain up-to-date lists that may be referenced for compliance with this provision." Letter from Daniel T. Madzelan to Institutions of Higher Learning, *supra* note 141.

[172] It should be noted that neither Congress, nor the Department of Education, has provided any guidance whatsoever as to standards or meanings of "to the extent practicable."

[173] General and Non-Loan Programmatic Issues, 74 Fed. Reg. 55,902, 55,910 (Oct. 29, 2009) (to be codified at 34 C.F.R. pts. 600, 668, 675, 686, 690, 692), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-25373. We are reprinting this brief discussion in its entirety here:

> We do not believe that simply not blocking legal alternatives for downloading or otherwise acquiring copyrighted material qualifies as "offering" legal alternatives. The requirements of § 668.14(b)(30)(ii)(A) and (B), that an institution must periodically review the legal alternatives and make available the results of the review to its students through a Web site or other means, support the notion that an institution's actions in this area must be active, rather than passive. We note, however, that an institution must offer such legal alternatives "to the extent practicable." Thus, how or whether the institution offers such alternatives is controlled by the extent to which it is practicable for the institution to do so. As stated in the preamble to the NPRM (74 FR 42393), the Department anticipates that individual institutions, national associations, and commercial entities will develop and maintain up-to-date lists of legal alternatives to illegal downloading that may be referenced for compliance with this provision. The requirement that, as a part of an institution's plans for combating the unauthorized distribution of copyrighted material, the institution must include the use of one or more technology-based deterrents is statutory (see section 485(a)(1)(P) of the HEA) and we do not have the authority to remove this requirement. Moreover, we believe that the requirement that an institution's plans include procedures for periodically reviewing the effectiveness of the institution's plans for combating the unauthorized distribution of copyrighted material is essential for institutions to comply with the requirements in section 485(a)(1)(P) and 487(a)(29) of the HEA.

Id.

[174] *Id.*

[175] Letter from Daniel T. Madzelan to Institutions of Higher Learning, *supra* note 141.

reaffirm that legal alternatives need only be made available to the extent practicable. The road to offering legal downloading alternatives to college students is paved with mis-starts and failed attempts, such as the rebranded Napster, Roxio, and Ruckus.[176] Companies of more recent vintage are meeting with colleges and universities seeking takers for new business models aimed at higher ed.[177] Simultaneously, the entertainment industry is promoting options, such as Hulu[178] and Pandora,[179] to college students and the general population.

5. Periodic Review of the Written Plan

Finally, the written plan must include language that requires periodic review of said plan to determine its continuing effectiveness. Although the proposed regulation states that, "[i]t would be left to each institution to determine what relevant assessment criteria are,"[180] nothing in the language of either the proposed or final regulations defines how long "periodic" is, although an annual review of the college's plan, prior to the annual publication, and in consideration of changes in the technologies and student habits and behaviors, would seem to be reasonable. Some institutions may use a "process-based review," while others find an "outcome-based review" more satisfactory.[181]

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[176] Rafat Ali, *PaidContent.org—College Online Music Service Ruckus Closes Down*, Wash. Post, Feb. 7, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/02/07/AR2009020700684.html.

[177] An example of such a company is Choruss. *See Choruss: A New Business Model for Digital Music*, EDUCAUSE LIVE! (March 3, 2009), http://net.educause.edu/live095; Jeff Young, *Choruss Music Project Changes Plans Again, Spins Off From Warner*, CHRON. HIGHER EDUC., Apr. 20, 2010, http://chronicle.com/blogPost/Choruss-Music-Project-Changes/23306/.

[178] HULU, http://www.hulu.com/ (last visited Oct. 10, 2010).

[179] PANDORA, http://www.pandora.com/ (last visited Oct. 10, 2010).

[180] General and Non-Loan Programmatic Issues, 74 Fed. Reg. 42,380, 42,391 (Aug. 21, 2009) (to be codified at 34 CFR Parts 600, 668, 675, 686, 690, 692), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-18550.pdf. The final regulations did not amend or change this guidance.

[181] *Id.* at 42,393. We are reprinting this brief discussion in its entirety here:

> As the specifics of a plan will be determined by an institution, the Department believes that the institution is in the best position to determine the appropriate criteria to assess its plan. In some cases, appropriate assessment criteria might be process-based, so long as the institution's information system information does not contradict such a determination. Such process-based criteria might look at whether the institution is following best practices, as laid out in guidance worked out between copyright owners and institutions or as developed by similarly situated institutions that have devised effective methods to combat the unauthorized distribution of copyrighted material. In other cases, assessment criteria might be outcome based. The criteria might look at whether there are reliable indications that a particular institution's plans are effective in combating the unauthorized distribution of copyrighted material. Among such

VII. *ALL MIXED UP*[182]: INCONSISTENCIES IN THE LAW AND REGULATIONS

Unfortunately, as is common with statutes negotiated among many lawmakers and interested parties, the P2P requirements of the HEOA have some unfortunate inconsistencies, both internally and vis-à-vis the DMCA.

A somewhat minor inconsistency is the notion of to whom colleges and universities must apply aspects of the law. Pursuant to the regulations, notice must be sent to all enrolled and prospective students, not to faculty, staff, contractors, or guests of the college. Yet the written plan for stemming file sharing must apply to all users of the network.

While at first blush this may appear to be a minor point, it should be noted that federal reporting, notification, and disclosure requirements are chockfull of such tiny inconsistencies. Colleges collectively devote thousands of hours, and millions of dollars, to comply with federal and local statutes and regulations. Distinctions such as this one rarely raise attention until an incident occurs or an audit or program review of the college is commenced. Fortunately, even in a program review, it is almost impossible for a campus to be tripped up by this inconsistency.

A more complex inconsistency in the HEOA's P2P requirements concerns one potential technology-based deterrent prescribed by Congress and the Department of Education—a vigorous program of responding to DMCA notices. As detailed in Part II, above, the DMCA requires different (more stringent) action when a college receives a DMCA notice alleging infringement by content shared on university-owned computers, covered by § 512(c), as opposed to when that allegedly infringing content is simply traversing the "dumb pipes" of the network, covered by § 512(a), in order to maintain safe harbor status. By far, the vast majority of DMCA notices that colleges receive are of the latter type. Therefore, a literalist interpretation reading the two statutes together would

> indications may be "before and after" comparisons of bandwidth used for peer-to-peer applications, low recidivism rates, and reductions (either in absolute or in relative numbers) in the number of legitimate electronic infringement notices received from rights holders. The institution is expected to use the assessment criteria it determines are relevant to evaluate how effective its plans are in combating the unauthorized distribution of copyrighted materials by users of the institution's networks.

Id.

[182] 311, *All Mixed Up*, *on* 311 (THE BLUE ALBUM) (Capricorn Records 1995), *available at* http://www.youtube.com/watch?v=JjTjtJDZomw.

require very little extra of colleges and universities in order to meet the technology-based deterrent requirement of the HEOA (remembering, of course, that many colleges treat the network violation DMCA § 512(a) notices as if they were § 512(c) notices due to the "teachable moment" for students). Although such an interpretation would satisfy a literal reading of the statutes together, that was surely not the congressional intent (as seen in the House Manager's Report). That intent seems to be that colleges would vigorously respond to all notices received, regardless of whether, upon identifying the user, § 512(a) or § 512(c) applies to the alleged infringement. Of course, if this is true, Congress has (perhaps accidentally, but surely sloppily) amended the DMCA, but only targeting colleges and universities.[183] The vast majority of the nation's ISPs, upon which most illegal file sharing occurs, may continue business as usual under the DMCA.

Whatever Congress' true intent, the actual result of the statutory language is messy and inconsistent, and such inconsistencies may not lead to universal compliance in the way that Congress intends.

VIII. *THE NEXT EPISODE*[184]

While it may be unlikely that colleges will see significant additions to these requirements on the federal level, at least in the near future, that cannot be guaranteed. The entertainment industries have expressed significant concern about their future due to sharing of songs, television shows, video games, digital books, software, movies, and other content, and may seek further federal protections if their commercial success does not improve.[185] At the

[183] To a certain extent, of course, this would codify the current state of practice at many colleges.

[184] DR. DRE, *The Next Episode*, *on* 2001 (Aftermath/Interscope 1999), *available at* http://www.youtube.com/watch?v=QZXc39hT8t4 (somewhat explicit, but bleeped).

[185] The RIAA maintains a blog on the vagaries of illegal downloading and its negative effect on business. *Piracy: Online and on the Street*, RIAA, http://www.riaa.com/physicalpiracy.php (last visited Oct. 10, 2010). The RIAA, along with other content providers, have long predicted that file sharing will result in their ultimate demise. Four months after the September 11, 2001 attacks, Jack Valenti, the late President of the MPAA, compared the fight against file sharing to a terrorist war. Amy Harmon, *Black Hawk Download: Moving Beyond Music, Pirates Use New Tools to Turn the Net Into an Illicit Video Club*, N.Y. TIMES, Jan. 17, 2002, http://www.nytimes.com/2002/01/17/technology/circuits/17VIDE.html?pagewanted=all. This is the same MPAA leader who said of the VCR that it was "to the American film producer and the American public as the Boston strangler is to the woman home alone." *Home Recording of Copyrighted Works: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 8 (1982) (statement of Jack Valenti, President, Motion Picture Association of America); David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN.

same time, industry groups have waged a state-by-state campaign to enact statutes that require even more effort by colleges and universities.[186] Such state laws may create different requirements for public and private colleges in certain states.

One other trend of note may see the technology outgrow the ability of colleges and universities to regulate file sharing. When the DMCA was enacted, colleges boasted the "biggest pipes," the fastest broadband Internet connections for students, faculty, and staff to surf the Internet. Over the decade since that law came on the books, however, broadband Internet access has spread significantly into private business and home networks. Many of today's incoming first-year students come to college with little or no memory of ever accessing the Internet over a dialup connection. Concurrently, access to the Internet over mobile networks has made great leaps in just a few short years.[187] Users of an iPad can watch full screen movies at a similar (if not identical) speed, whether over a broadband network or a cellular network.[188] As cellular networks advance from "3G" to "4G" and beyond, the speed of the data flowing over these networks will increase precipitously.[189]

At a certain point, the speed of cellular networks will approach or perhaps surpass the speed of college broadband networks. Colleges and universities are currently reporting an explosion in the number of wireless devices connecting to their campus networks. Competition between the cellular providers, however, may cause the price of data plans to drop steeply. At that point, the market may lead students and others to subscribe to a cellular network on their mobile devices (upon which they will hold much of their music, movies, and other content), and dispense with the college network entirely.[190] This trend will advance even quicker if students believe they can surf and share however they would like on cellular

L. REV. 652, 664 n.58 (2010).

[186] For example, a 2008 Tennessee state law governed file sharing at public colleges and universities. Greg Sandoval, *RIAA Win: Tennessee to Police Campus Networks*, CNET NEWS, (Nov. 18, 2008), http://news.cnet.com/8301-1023_3-10101840-93.html; TENN. CODE ANN. § 49-7-142 (2009).

[187] *See* Molly McLaughlin, *Mobile Broadband: Speed vs. Coverage*, CONSUMER SEARCH (May 12, 2010), http://consumersearch.com/blog/mobile-broadband-speed-vs-coverage.

[188] *See* Ed Baig, *iPad Wi-Fi + 3G: Is Anytime Worth It?*, USA TODAY, May 2, 2010, http://content.usatoday.com/communities/technologylive/post/2010/05/review-ipad-wi-fi--3g/1.

[189] McLaughlin, *supra* note 187.

[190] It is possible that, at some inflection point, the bottom may fall out of network usage on college campuses if cellular networks increase in speed, improve in network coverage, and come down in price. For convenience, users will choose a single point of access to the Internet above accessing the Internet through many different broadband sources.

networks while they are restricted on college networks. At that point, which may be only a few years in the future, no amount of college-specific regulations that require efforts to stem file sharing will have their intended effect.

As referenced earlier, several private and industry groups look to work with colleges to provide legal downloading alternatives.[191] While these groups may find some takers among higher education institutions, students and others are quickly moving from file sharing music so that they can "own" (or at least possess) a copy of a song, to simply streaming that song from a site (often legally).[192] As bandwidth speeds increase and users can access content quickly and efficiently over a network, there is no need to possess content on a hard drive. If a user can watch a television show or movie, or listen to a song instantly (or close to it) by streaming that content to a mobile device, there is no need to own or possess the file, and no need to risk violating the law by illegally downloading that content.

IX. *YOU CAN'T ALWAYS GET WHAT YOU WANT*:[193] THE FAILURE OF CONGRESS AND THE ENTERTAINMENT INDUSTRY TO CRAFT LAWS AND REGULATIONS THAT WOULD ACTUALLY, EFFECTIVELY STEM FILE SHARING

Ultimately, the story of the battle over peer-to-peer file sharing is one of failure to regulate in a manner that rectifies the core problem: lost revenue due to copyright infringement via file sharing networks. Despite the sometimes breathless media coverage of major changes for colleges and their students,[194] a realistic legal and policy review of the notification and written plan changes required in the HEOA shows much heat, but little light. The new regulations have already had at least one major impact on college campuses. They are stimulating conversations among campus

[191] Examples include Choruss and a program of the Berkman Center at Harvard University. EDUCAUSE LIVE!, *supra* note 177; Young, *supra* note 177.

[192] John Bowe, *The Music Copyright Enforcers*, N.Y. TIMES, Aug. 6, 2010, http://www.nytimes.com/2010/08/08/magazine/08music-t.html.

[193] THE ROLLING STONES, *You Can't Always Get What You Want*, *on* LET IT BLEED (Universal Records 1969), *available at* http://www.youtube.com/watch?v=wxkdmL3iMCY.

[194] *See e.g.*, Dexter R. Mullins, *'Free' Movies, Songs No More as Colleges Bust File Sharing*, USA TODAY, Aug. 3, 2010, http://www.usatoday.com/news/education/2010-08-04-Filesharing04_ST_N.htm; Randy Simons, *Campus Crackdown on Illegal Downloads*, CBS 6 NEWS (Aug. 6, 2010), http://www.cbs6albany.com/news/albany-1277012-campus-crackdown.html; David Stephenson, *Federal Act Targets File Sharing*, TRIANGLE (Drexel U.), July 9, 2010, http://media.www.thetriangle.org/media/storage/paper689/news/2010/07/09/News/Federal.Act.Targets.File.Sharing-3923133.shtml.

stakeholders to decide what each institution's comprehensive approach to file sharing activity will look like.[195] Whether these regulations will actually reduce file sharing activity on campus networks remains to be seen, but is highly unlikely. And further, since the regulations only apply to activity on campus networks, they do nothing to stem the overwhelming majority of illegal file sharing that occurs in off-campus housing and on commercial ISPs.[196]

The HEOA is but one example of Congress carrying out the will of a myriad of interest groups attempting to solve a problem (or the perception of a problem) through regulation of colleges and universities. In fact, one expert recently called colleges and universities the most regulated entities in the nation.[197] Even the Government Accountability Office has weighed in on what compliance with the HEOA will entail, calling the burden for college data collection varied but higher than estimated.[198]

If properly crafted, regulations can succeed in addressing a problem, but, more realistically, these requirements simply add to the plethora of topics about which colleges must "notify" students through orientation, the student handbook, or a series of emails that arrive steadily throughout the academic year. Students receive dozens of collective pages of notice warning them of the dangers they may encounter during their college career. However, these warnings do not seem to be effective, nor do they prevent students from engaging in high-risk behavior. The fact is, just as in the population as a whole,[199] most students never read these notices. A

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[195] *HEOA Role Models*, EDUCAUSE, http://www.educause.edu/HEOArolemodels (last visited Oct. 10, 2010).

[196] Letter from David Ward, President, American Council on Educ., to Edward M. Kennedy & Michael B. Enzi, Comm. on Health, Educ., Labor & Pensions (Mar. 11, 2008), http://www.acenet.edu/AM/Template.cfm?Section=LettersGovt&CONTENTID=25998&TEMPLATE=/CM/ContentDisplay.cfm; Andy Guess, *Downloading By Students Overstated*, INSIDE HIGHER ED (Jan. 23, 2008), http://www.insidehighered.com/news/2008/01/23/mpaa.

[197] Barbara A. Lee, *Fifty Years of Higher Education Law: Turning the Kaleidoscope*, 36 J. C. & U.L. 649, 649 (2010).

[198] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-871, HIGHER EDUCATION: INSTITUTIONS' REPORTED DATA COLLECTION BURDEN IS HIGHER THAN ESTIMATED BUT CAN BE REDUCED THROUGH INCREASED COORDINATION 10 (2010), http://www.gao.gov/new.items/d10871.pdf.

[199] *See generally* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure* (U. Chi. L. Sch. & U. Mich. L. Sch., Working Paper Nos. 516 & 10-008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1567284 (in an incredibly detailed study, the authors argue that, while governmental regulation requires mandated disclosure as a salve for many societal problems, the technique is destined for failure because disclosures are not read, not understood, and only give the appearance of providing the information necessary to make a complex decision).

Although contracts of adhesion are well accepted in the law and routinely enforced,

very small percentage of students read the (arguably more important)[200] crime and safety statistics that each student receives around the same time that they will receive their peer-to-peer file sharing notification.[201] Even worse, students who do not read these notifications may not even realize that there are any penalties or ramifications for engaging in peer-to-peer file sharing until they are referred for judicial sanctions for violating the rules.

The reaction of the content industry to the onslaught of illegal file sharing after Napster debuted was to raise prices to recoup lost

> the inherent inequality of bargaining power supports an approach to unconscionability that preserves the role of the courts in reviewing the substantive fairness of challenged provisions. Otherwise, the imbalance of power creates an opportunity for overreaching in drafting form agreements. The possibility of overreaching is even greater in ordinary consumer transactions involving relatively inexpensive goods or services because consumers have little incentive to carefully scrutinize the contract terms or to research whether there are adequate alternatives with different terms, and companies have every business incentive to craft the terms carefully and to their advantage. The unconscionability doctrine ensures that companies are not permitted to exploit this dynamic by imposing overly one-sided and onerous terms. In sum, there are provisions so unfair or contrary to public policy that the law will not allow them to be imposed in a contract of adhesion, even if theoretically the consumer had an opportunity to discover and use an alternate provider for the good or service involved.

Gatton v. T-Mobile USA, Inc., 61 Cal. Rptr. 3d 344, 355 (Cal. Ct. App. 2007) (not enforcing an arbitration clause in a rarely read or understood click-through Internet agreement); *see also* Kai Falkenberg, *Ideas and Opinions: Disclosed to Death*, FORBES.COM (June 7, 2010), http://www.forbes.com/forbes/2010/0607/opinions-disclosure-legal-contracts-medical-ethics-ideas-opinions.html. When a British retailer, as part of a practical joke, added a clause to its online click-wrap agreement whereby shoppers would, by clicking "Yes," agree to transfer of their immortal souls, only twelve percent opted out, even though, in addition to maintaining one's soul, opting out awarded the soul-full user with a five pound coupon off the cost of their purchase! *Id.*; *see also* Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* 36–37 (N.Y. U. Sch. Law, Law & Econ. Research Paper Series, Working Paper No. 09-40, 2009), *available at* http://ssrn.com/abstract=1443256. In a study of Internet shoppers, it was found that almost no one actually reads standard form click-through agreements (also called End User License Agreements or "EULA") and those that do read them spend far too little time on the agreements to actually understand them. *Id.*

[200] At least according to Maslow's hierarchy of needs, which would put safety and security needs before self-actualization or esteem needs. *See* Abraham Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370 (1943), *available at* http://psychclassics.yorku.ca/Maslow/motivation.htm.

[201] Steven M. Janosik & Donald D. Gehring, *The Impact of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act on College Student Behavior*, EDUCATIONAL POLICY INSTITUTE OF VIRGINIA TECH POLICY PAPER 5 (2001), *available at* http://filebox.vt.edu/chre/elps/EPI/Clery.pdf (regarding the Clery Act Annual Security Report notifications of crime on college campuses, seventy-three percent of students were unaware of the Act, seventy-eight percent could not remember if they received the information, which all college students do, and seventy-eight percent reported they had, for certain, not read the information); Steven M. Janosik, *Parents' Views on the Clery Act and Campus Safety*, 43 J.C. STUDENT DEV. 43, 45 (2004) (as with their college-aged children, few parents read or were aware of campus crime notifications).

profits.[202] From an economics standpoint, however, each time the price went up, a proportional amount of individuals who would have purchased content legally, in the form of compact discs and, with decreasing frequency, tapes, were pushed out of their own price point on the honesty premium curve.[203] In 1998, at the advent of Napster, compact discs were sold for $12, $15, or even $20 each, and only a few songs were available as "singles" for individual purchase. In order to listen to a single song, a young person, making the minimum wage of $5.15 per hour in 1998,[204] had to work four hours. Today, single songs can be purchased legally on a variety of sites, including iTunes, Amazon, and WalMart for 99¢ or even less, while the minimum wage is $7.25.[205] A young person need work mere minutes to legally purchase a song.

By the time Apple's iTunes came along in 2001,[206] millions of consumers had illegally downloaded material and become accustomed to accessing such content for free. When Napster debuted, all of a sudden consumers who had just days before worked half a day to purchase a single song were able to download that same song, and scores of others, for free. They did so in droves. Yet, rather than seize on numerous opportunities to sell single songs and albums at a competitive market price, the recording industry spent years filing lawsuits and asking Congress to condemn the technology.[207]

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[202] *See* Ashlee Vance, *Music Sales Rise Despite RIAA's Best Efforts*, REG. (U.K.), Oct. 21, 2004, http://www.theregister.co.uk/2004/10/21/riaa_mid2004_salesshock/.

[203] Essentially, it is argued that when the price is extremely low, consumers will purchase rather than steal content such as music. If the price was unreasonably high, consumers would either steal the content or go without. In between those extreme price points, however, are individual points at which individuals' moral sense will cause them to pay a premium to purchase content legally or steal/forego. As the price rises, more consumers move from paying the premium to stealing or foregoing. This is especially the case where, as in the years that followed Napster but preceded iTunes, it is much easier to access the content from an illegal source than it is from a legal source. The number of individuals who would legally purchase a product perceived to be inferior, rather than steal a superior product, declines as the price rises.

[204] *Changes in Basic Minimum Wages in Non-Farm Employment Under State Law: Selected Years 1968 to 2010*, U.S. DEP'T OF LABOR (July 2010), http://www.dol.gov/whd/state/stateMinWageHis.htm.

[205] *Id.*

[206] *Apple Introduces iTunes—World's Best and Easiest to Use Jukebox Software*, APPLE (Jan. 9, 2001), http://www.apple.com/pr/library/2001/jan/09itunes.html.

[207] Interestingly, the results of at least one study lead to the argument that the industry may have been targeting the wrong people; that study found that those who illegally download music from file sharing sites also spend the most funds on legally acquiring music. Rachel Shields, *Illegal Downloaders 'Spend the Most on Music': Crackdown on Music Piracy Could Further Harm Ailing Industry*, INDEPENDENT (U.K.), Nov. 1, 2009, http://www.independent.co.uk/news/uk/crime/illegal-downloaders-spend-the-most-on-music-

Congress attempted to assist the content industry by means of the HEOA file sharing language. The Department of Education estimated that the written plan elements of the peer-to-peer provisions of the HEOA regulations will create an additional 92,544 hours of work, while the notification requirements will create an additional 1424 hours of work across higher education,[208] for a total of almost 100,000 hours devoted to stemming illegal peer-to-peer file sharing by students. In other words, after years of the content industry lobbying Congress, the results are a statute and regulations that require some effort by the colleges, but in reality will likely do little to actually curtail file sharing.

X. *CLOSING TIME*:[209] FINAL THOUGHTS ON COMPLIANCE

Colleges should consider the unique environment at each institution, and craft peer-to-peer compliance with an eye toward that environment and the lessons the institution wishes to impart to its students, while not demonizing any specific technology.[210] While it is perfectly acceptable for a college to use the sample notices provided in this article, or in the *Federal Financial Aid Handbook*, or to draft a notice that reads like the opening screen on a DVD,[211] the broad regulations also provide an opportunity to share the college's values on intellectual property, and to educate students on the distinctions between legal and illegal uses of others' creative works. Colleges are major creators and users of intellectual property and may even occasionally avail themselves of the protections provided by the law. Most colleges license music for use on campus through licensing organizations, such as ASCAP and BMI.[212] Further, the written plan requirements provide

says-poll-1812776.html.

[208] General and Non-Loan Programmatic Issues, 74 Fed. Reg. 55,902, 55,926 (Oct. 29, 2009) (to be codified at 34 C.F.R. pts. 600, 668, 675, 686, 690, 692), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-25373.pdf.

[209] SEMISONIC, *Closing Time, on* FEELING STRANGELY FINE (MCA 1998), *available at* http://www.youtube.com/watch?v=xGytDsqkQY8.

[210] Recall that, just as with a car or a handgun, the technology may be useful, although certain uses of that technology are certainly illegal.

[211] For an ironically *pirated* image of the first warning screen of a DVD, see *FBI Anti-Piracy Image*, FILM SCH. REJECTS, http://www.filmschoolrejects.com/images/fbiwtf_wide.jpg (last visited Oct. 10, 2010). Note that the text of the warning is not available anywhere on the Internet, and unauthorized use of the logo, which prohibits unauthorized use of content, *is itself* prosecutable under federal law. *See The Anti-Piracy Warning Seal*, FBI, http://www.fbi.gov/about-us/investigate/cyber/ipr/anti-piracy (last visited Oct. 10, 2010).

[212] *See* ASCAP, http://www.ascap.com/index.aspx (last visited Oct. 10, 2010); *A Crash Course in Music Rights for Colleges and Universities*, ASCAP

opportunities to educate students on fair use, property rights, and some of the thorny ethical issues that arise in the digital era. Although the law and regulations as drafted are not the most effective way of stemming copyright infringement on campuses, we urge campuses to "save" the important educational concepts of how one should legally and morally acquire intellectual property from the jaws of the requirements. While compliance with the laws and regulations as they are written will not be onerously difficult for most colleges, and may ultimately have little effect on whether a student shares files illegally, a little creativity may go a long way toward preparing students for the digital world they will confront, a world peppered with questions of creation, ownership, and sharing of data and content.

http://www.ascap.com/licensing/pdfs/educational.pdf (last visited Oct. 10, 2010); *Get a BMI License*, BMI, http://www.bmi.com/licensing/ (last visited Oct. 10, 2010).

APPENDIX I: CONGRESSIONAL RECORD ACCOMPANYING THE HIGHER EDUCATION OPPORTUNITY ACT AMENDMENTS[213]

Section 488. Institutional and financial assistance information for students

The Senate amendment and the House bill require institutions to make available to current and prospective students the institution of higher education's policies and sanctions related to copyright infringement, including a description of actions taken by the institution of higher education to detect and prevent the unauthorized distribution of copyrighted materials on the institution of higher education's technology system.

Both the Senate and the House recede with an amendment to replace language in (iv) with language requiring institutions to make available the development of plans to detect and prevent unauthorized distribution of copyrighted material on the institution of higher education's information technology system which shall, to the extent practicable, include offering alternatives to illegal-downloading or peer-to-peer distribution of intellectual property, as determined by the institution of higher education in consultation with the Chief Technology Officer or other designated officer of the institution.

The Conferees have combined elements from both bills to require institutions to advise students about this issue and to certify that all institutions have plans to combat and reduce illegal peer to peer file sharing.

Experience shows that a technology-based deterrent can be an effective element of an overall solution to combat copyright infringement, when used in combination with other internal and external solutions to educate users and enforce institutional policies.

Effective technology-based deterrents are currently available to institutions of higher education through a number of vendors. These approaches may provide an institution with the ability to choose which one best meets its needs, depending on that institution's own unique characteristics, such as cost and scale. These include bandwidth shaping, traffic monitoring to identify the largest bandwidth users, a vigorous program of accepting and responding to Digital Millennium Copyright Act (DMCA)

[213] H.R. REP. NO. 110-803, at 547 (July 30, 2008) (Conf. Rep.), *reprinted in* 2008 U.S.C.C.A.N. 1212.

notices, and a variety of commercial products designed to reduce or block illegal file sharing.

Rapid advances in information technology mean that new products and techniques are continually emerging. Technologies that are promising today may be obsolete a year from now and new products that are not even on the drawing board may, at some point in the not too distant future, prove highly effective. The Conferees intend that this Section be interpreted to be technology neutral and not imply that any particular technology measures are favored or required for inclusion in an institution's plans. The Conferees intend for each institution to retain the authority to determine what its particular plans for compliance with this Section will be, including those that prohibit content monitoring. The Conferees recognize that there is a broad range of possibilities that exist for institutions to consider in developing plans for purposes of complying with this Section.

Numerous institutions are utilizing various technology based deterrents in their efforts to combat copyright infringement on their campuses. According to a report of the Joint Committee of the Higher Education and Entertainment Communities, many institutions of higher education have taken significant steps to deal with the problem. Indiana University, for example, hosts an extensive "Are you legal?" educational campaign for students on the issues, and enforces campus policies on proper use of the network. It acts on DCMA notices by disconnecting students from the network and requires tutorials and quizzes to restore service. Second offenders are blocked immediately and are sent to the Student Ethics Committee for disciplinary action.

Audible Magic's CopySense Network Appliance provides comprehensive control over Peer-to-Peer (P2P) usage on a university's network. The CopySense Appliance identifies and blocks illegal sharing of copyrighted files while allowing other legitimate P2P uses to continue. It filters copyrighted P2P content by sensing an electronic fingerprint unique to the content itself, which is very similar to the way virus filters operate.

Red Lambda's "Integrity" is a network security solution dedicated to the management of file-sharing activities via protocols like P2P, IM, IRC, and FTP. This technology is able to detect all P2P, OS file-sharing, FTP, IM, proxy use, Skype and application tunneling over HTTP, HTTPS, DNS and ICMP

protocols.

The University of Maryland, College Park, severely restricts bandwidth for residential networks and block certain protocols. It designed "Project Nethics" to promote the responsible use of information technology through user education and policy enforcement. A third violation can result in eviction from the university housing system. Montgomery College in Maryland enforces an Acceptable Use Policy on its wired and wireless networks.

Additional existing technological approaches can deter illegal file sharing by automatically processing notices sent by scanning vendors then taking actions such as messaging the user via browser redirection, applying the appropriate sanction and automatically re-enable browsing after a timeout or reconnect fee is paid. Other institutions use technology to appropriately manage their campus networks by limiting and/or shaping bandwidth, such as Packeteer's packet shaping technology.

APPENDIX II: SAMPLE NOTIFICATION LANGUAGE FOR HIGHER EDUCATION INSTITUTIONS

Short Sample

The unauthorized distribution of copyrighted material, including through peer-to-peer file sharing, may subject a student to criminal and civil penalties. The laws that govern copyright are not specific to any one technology. Students can violate the rights of a copyright holder using many different types of technology. Both uploading and downloading of files can pose a violation of the copyright law. Students should be cautious when obtaining any copyrighted material. As a rule of thumb, before a student receives anything for free, they should research whether that source provides material licensed by the copyright owner. [College] offers a list of licensed sources at [LINK].

Individuals who violate copyright law by illegally uploading and downloading copyrighted files may be subject to civil penalties of between $750 and $150,000 per song. These penalties are established by federal law. In the past, pre-litigation settlements offered by copyright owners have ranged from $3,000 to $4,000 and up while juries have issued verdicts of hundreds of thousands and even millions of dollars. In addition, a court may, in its discretion, grant the copyright owner reasonable attorney fees. Although criminal prosecution of students for file sharing is extremely rare, federal law lays out criminal penalties for intentional copyright infringement which can include fines and jail time.

In addition to potentially violating the law, unauthorized distribution or receipt of copyrighted material is a violation of the College's acceptable use policy. That policy states that [FILL IN POLICY PARAGRAPH].

Long Sample

Before you share, beware! The unauthorized distribution of copyrighted material, including through peer-to-peer file sharing, may subject you to criminal and civil penalties. Although using peer-to-peer file sharing technology in itself is not illegal, *what* you share and *how* you share it may violate the law (just as while driving a car is legal, driving a car on the sidewalk at 90 miles per hour is not). The laws that govern copyright are not specific to any one technology; you can violate

the rights of a copyright holder using many different types of technology. Both uploading and downloading of files can pose a violation of the copyright law, and the law applies for songs, videos, games, textbooks, and any other type of creative content.

Use technology wisely. You are responsible for the choices you make and should be cautious when obtaining any copyrighted material. As a rule of thumb, before you download anything for free, you should research whether that source provides material licensed by the copyright owner. [College] offers a list of licensed sources at [LINK].

Individuals who violate the copyright law, even unintentionally, by illegally uploading or downloading may be subject to civil penalties of between $750 and $150,000 per song! For those who download or upload dozens or hundreds of songs, penalties could reach into the millions of dollars. These penalties are established by federal law.

Content owners actively monitor file sharing networks and issue takedown notice to Internet Service Providers (including our college) requesting that the college remove these files or subpoenas requesting that the college turn over your contact information for the purpose of filing a lawsuit. Pursuant to State and Federal law, the college must comply with all valid subpoenas.

In the past, pre-litigation settlements offered by copyright owners prior to filing lawsuits against students have ranged from $3,000 to $4,000 and up while juries have issued verdicts against illegal file sharers of hundreds of thousands and even millions of dollars. In addition, a court may, in its discretion, grant the copyright owner reasonable attorney fees. Although criminal prosecution of students for file sharing is extremely rare, federal law lays out criminal penalties for intentional copyright infringement which can include fines and jail time.

While it is generally accepted in copyright law that you may format-shift content, that is, you may rip a CD onto your computer and then listen to it on your iPod, that only applies for your own personal use. You may not then distribute that song file to others. To do so, is to violate the copyright law as is to download a file shared in this manner.

In addition to following the law, you must also follow college policy. Unauthorized distribution or receipt of copyrighted material is a violation of the College's acceptable use policy. That policy states that [FILL IN POLICY PARAGRAPH].

Cornell University Sample

Welcome back, students! A couple of quick messages about important issues related to use of the Internet on the Cornell network.

As almost everyone knows, distributing copyright protected materials such as music, videos, software and electronic games without permission, is a potential violation of copyright law. Copyright violations can lead to both criminal and civil legal actions and penalties can run from $750 to $150,000 per infringement! Very large volume infringements have, in some rare circumstances, resulted in criminal investigations and prosecutions that included sentencing.

Content owners, such as the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA), as well as network television such as Home Box Office (HBO), deploy detection services targeted to higher education networks such as Cornell. In the past, the RIAA in particular has sued students for copyright infringement, with settlements costing students and their families thousands of dollars. While Cornell has long objected to the targeting of higher education networks, and will not as a matter of policy monitor its network for content (as some schools do), we are both obligated by law to inform you of these kind of issues and want to let you know that special risks exist regarding the practice of file-sharing copyright protected materials on our network. If you are interested in more information about copyright law and contemporary issues, the IT Policy Office sponsors a free, optional tutorial available here: http://www.ecornell.com/cu-digital-copyright-education/

Cornell does not sponsor an internal hosted music service, but we do maintain a web page that provides you with alternative legal media services available on the Internet. http://www.cit.cornell.edu/policies/copyright/music.cfm A group of sites devoted to information about copyright law, peer-to-peer file sharing technology and the consequences of receiving Digital Millennium Copyright, or "take-down," notices, while using the Cornell network may be found here: http://www.cit.cornell.edu/policies/ copyright/index.cfm If you are unfamiliar with how peer-to-peer technology works and the implications of running such a program on the device you register to the Cornell network, please read through this material and feel free to call me with any legal or policy

questions or the HelpDesk for technical advice.

Finally, The IT Policy Office has created an open and free Digital Literacy Program newly available this year. Focused on academic work and undergraduate research, this program offers information about copyright, plagiarism and privacy. http://digitalliteracy.cornell.edu/ We hope that it will help you avoid some of the most obvious pitfalls of using information technologies in academic work and enhances your student experience at Cornell.

Good luck this year in your life and studies!

Tracy Mitrano tbm3@cornell.edu

Director of Information Technology Policy

http://www.cit.cornell.edu/policies/

Rhode Island School of Design Sample

Over the past year, the recording, motion picture, and software industries have become increasingly aggressive in their campaign against peer-to-peer file sharing. The Recording Industry Association of America has filed lawsuits against some 26,000 alleged file sharers to date and is now targeting college students specifically. The Motion Picture Association of America has sued many thousands more – including at least one RISD student who allegedly had shared a single copy of a single movie. The Entertainment Software Association recently began a similar campaign of its own.

Most of these lawsuits are being settled, typically for payments in the range of $3,000 to $5,000 each, but the potential liability is significantly greater. Earlier this month, in the first of these lawsuits to go to trial, the RIAA won a judgment of $222,000 against a woman who allegedly had shared just 24 songs – an astounding $9,250 per song. And, arguably, even that was a "bargain." Under applicable law, the amount of damages that can be awarded against an infringer can run as high as $150,000 for <u>each</u> work infringed, and, in some circumstances, there can be criminal penalties as well.

The RIAA, MPAA, and ESA determine whom to sue by actively monitoring file-sharing networks and then issuing subpoenas to ISPs for the identities of the file sharers they find. RISD has not yet received such a subpoena, but it has received a number of infringement notices, which often are precursors to subpoenas and lawsuits, and would have no choice but to comply were it to receive one.

> These tactics may seem misguided and heavy-handed, but the RIAA, MPAA, and ESA are correct that most file sharing constitutes copyright infringement. While it generally is accepted that "space-shifting" – ripping an MP3 from a CD you already own for your own personal use on your own computer or MP3 player – is "fair use," the courts have held that it is not legal to then share that MP3 indiscriminately over the Internet. The technology may make it easy for you to do so, you may not be charging anything, you may be "publicizing" the artist in the process, and the music, movie, and software industries' business practices may themselves be worthy of debate, but none of those justifications is a viable defense to a copyright infringement suit under current law.
>
> At an institution devoted to the creation of art, we should be especially mindful of these issues. Artists' and designers' livelihoods are dependent in large part on the creation of, and the respect of others for, intellectual property. Just as you wish to protect the economic value of your own copyrights, so, too, do the musicians, filmmakers, and other fellow artists whose work is being traded over the Internet without appropriate compensation.
>
> In addition, illegal file sharing is also a violation of RISD's computer use policy. While RISD does not actively monitor its networks, it will respond to violations that come to its attention, and repeat infringers will be deprived of further network access.
>
> Additional information about these issues can be found at the following:

NBC Universal Sample

Additionally, David Green, Vice President for Public Policy Development at NBC Universal, has sent the following language as a potential sample to EDUCAUSE:

> Copyright infringement is the act of exercising, without permission or legal authority, one or more of the exclusive rights granted to the copyright owner under section 106 of the Copyright Act (Title 17 of the United States Code). These rights include the right to reproduce or distribute a copyrighted work. In the file-sharing context, downloading or uploading substantial parts of a copyrighted work without authority constitutes an infringement.
>
> Penalties for copyright infringement include civil and criminal penalties. In general, anyone found liable for civil copyright

infringement may be ordered to pay either actual damages or "statutory" damages affixed at not less than $750 and not more than $30,000 per work infringed. For "willful" infringement, a court may award up to $150,000 per work infringed. A court can, in its discretion, also assess costs and attorneys' fees. For details, see 17, U.S.C. §§ 504, 505. Willful copyright infringement can also result in criminal penalties, including imprisonment of up to five years and fines of up to $250,000 per offense.