

File Sharing: Illegal Activity or Fair Use?

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The Recording Industry Association of America [RIAA] is an umbrella organization that represents, among many other things, the music industry's concerns about the distribution of music files via the Internet. This distribution of files is known collectively as file sharing, and the RIAA's concern has to do with illegal peer-to-peer [P2P] audio file sharing. P2P audio file sharing is illegal because of the U.S. Copyright Law. Owners of a copyright are guaranteed six exclusive rights under the Copyright Law and two of those exclusive rights are the right to control copies and distribution of those copies.

The RIAA is very aggressive when it comes to finding and prosecuting violators of illegal audio file sharing. Their main objection: they are losing revenues because of these illegal P2P file-sharing activities.

But we need to keep some perspective on money and the RIAA's quest for it. It seems quite clear that the RIAA and those associated with it will do whatever it takes to keep the monies flowing in - even if an activity is illegal. A closer look at the music recording industry and one of their own [and it must be added, alleged] illegal practices to keep the monies rolling in provides some insight into their attitude toward consumers.

In October of 2002, Universal Music, Sony Music, Warner Music, Bertelsmann's BMG Music and the EMI Group, plus a group of retailers that included Musicland Stores, Trans World Entertainment and Tower Records made an out-of-court settlement in a lawsuit filed against them for price fixing. In essence, these entities were artificially keeping audio CD prices high. And they got caught. They agreed to pay out \$67.4 million to settle this lawsuit which included illegal price fixing activities transacted over five consecutive years: from 1995 to 2000. Here is a portion of an article that relates to the music industry's price fixing schemes and that settlement.

NEW YORK - The five largest music companies and three of the USA's largest music retailers agreed Monday to pay \$67.4 million and distribute \$75.7 million in CDs to public and non-profit groups to settle a lawsuit led by New York and Florida over alleged price-fixing in the late 1990s.

Attorneys general in the two states, who were joined in the lawsuit by 39 other states, said that the industry kept consumer CD prices artificially high between 1995 and 2000 with a practice known as "minimum-advertised pricing" (MAP).

"This is a landmark settlement to address years of illegal price-fixing," New York Attorney General Eliot Spitzer said in a statement. "Our agreement will provide consumers with substantial refunds and result in the distribution of a wide variety of recordings for use in our schools and communities."

Source: http://www.usatoday.com/life/music/news/2002-09-30-cd-settlement_x.htm

Curiously, these record industry corporations admitted no wrongdoing but nonetheless, paid out \$143,100,000 for their alleged innocence. We must be reminded that innocence, in an alleged illegal act, is a presumption of the law. You are innocent until proven guilty. But we

now have a law on the books that presumes no innocence at all. And this law is used in a most draconian fashion by the RIAA for their own aims including profit opportunities, invasion of privacy, and intimidation of the consumer. What law is this? It is the Digital Millennium Copyright Act or DMCA. The DMCA provides the RIAA with a tool to shut down an alleged infringer by forcibly denying access to their Internet Service Provider [ISP]. How is this done?

In order to have an allegedly infringing web site removed from an ISP's network, the copyright owner must, by law, provide notice to the service provider with the following information:

- The name, address, and electronic signature of the complaining party [Section 512(c)(3)(A)(i) of the Copyright Law]
- The infringing materials and their Internet location [512(c)(3)(A)(ii-iii)]
- Sufficient information to identify the copyrighted works [512(c)(3)(A)(iv)]
- A statement by the owner that it has a good faith belief that there is no legal basis for the use of the materials complained of [512(c)(3)(A)(v)]
- A statement of the accuracy of the notice and, under penalty of perjury, that the complaining party is authorized to act on the behalf of the owner. [512(c)(3)(A)(vi)]

Once notice is given to the ISP, the ISP is required to remove the alleged infringing material from its network. It is then the responsibility of the alleged infringer to prove his or her innocence!

Here is a portion of an article formerly at the RIAA website but still available via Google that demonstrates how the Copyright Law is used for the RIAA's own interests, gain and purposes:

RIAA Moves Against Operators Of Pirate P2P Systems Housed On Internal College Networks

WASHINGTON - Moving to combat a growing and alarming piracy trend on some college campuses, the Recording Industry Association of America (RIAA) today filed lawsuits against the operators of four Napster-like internal campus networks that illegally distribute millions of copyrighted songs.

Source: <http://www.cpwire.com/archive/2003/4/3/1296.asp>

It should be noticed that in the complete article cited above, there is no use of the word "alleged" in this April 4th, 2003 suit. Legally, the RIAA does not have to use the word "alleged." But regardless, there is no presumption of innocence. The RIAA has decided ipso facto that their perception of alleged, illegal activity is a closed case and that what they have discovered is, a priori, illegal. The Digital Millennium Copyright Act, as discussed above, gives them this carte blanche power."

It should also be noted that the above article mentions "Napster-like internal campus networks." The "Napster-like internal campus networks" were, in fact, only four undergraduate students who were operating network search engines. It seems clear that it was decided by the RIAA that these four students were going to be made an example of the consequences of illegal audio P2P file-sharing activities. These students were going to be made an example, first of all, by using the DMCA to not allege infringement, but to assert

guilt. Secondly, as part of being made an example, they were intimidated with a lawsuit that sought total damages of \$100,000,000! Where the RIAA got this confiscatory figure is unknown. Third, the RIAA made a digital leap and called the four students campus networks.

In reality, what the four students were providing was a mechanism, a capability of Windows XP that searched and looked across all shared folders on their respective schools' networks. They were not running P2P networks or services like the now defunct Napster, or the still alive, kicking and sharing Grokster and StreamCast's Morpheus services. Of course on a college or university network, there could actually be legitimate P2P sharing of files falling under:

- fair use, royalty free or personal photos;
- fair use, royalty free or personal videos;
- fair use, royalty free or personal audio; and,
- personal class notes.

But the RIAA and their lawsuit, not surprisingly, did not address these issues at all. The RIAA wanted an example. The four students were going to be assessed damages in an amount that would make all those who use P2P networks for illegal audio file sharing think twice.

It is unclear as to whether or not any or all of these four students received a cease and desist letter from the RIAA before taking them to court. This is the usual legal procedure.

Fortunately for the students, this case has been settled out-of-court. Unfortunately for the students, they will have several thousands of dollars added to the cost of their undergraduate education going directly to the RIAA. One student must pay \$12,000 to the RIAA, two students must pay \$15,000 and one student must pay \$17,500. These damages have to be paid off in just a few years. The fines will be added to their college loans and they are required to make installments on the fines from 2003 to 2006.

Source: <http://www.theregister.co.uk/content/6/30522.htm>

Back Home Again in Indiana

Hoosier P2P file sharing has made some headlines. In January 2003, Indiana University felt the unchallenged charges of illegal file sharing made by the RIAA. Here is a portion of an article.

Students forced to delete music

Users face loss of IU Internet, J-board for not complying
Published Thursday, January 30, 2003

Close to 200 IU students were told to delete movie and music files from their computers last month. University Information Technology Services received notifications from the Recording Industry Association of America and the Motion Picture Association of America saying users of IU's network were illegally distributing copyrighted material.

Source: <http://idsnews.com/print.php?id=14352>

Again, notice that the word "alleged" is not used. The Digital Millennium Copyright Act is wielded by the RIAA [and the Motion Picture Association of America or MPAA] in a most sweeping and disturbing manner. The article does not mention whether any of these RIAA infringement charges might in fact include audio or video that might be legitimately used for educational purposes through fair use. Undoubtedly there were instances of illegal file sharing but it does not follow that all of the audio and video files were illegal. The RIAA simply states that they are illegal and if there is no compliance, the cease and desist order becomes a lawsuit.

In February 2003, Purdue University, in an effort to proactively ward off any illegal file sharing, sent out letters and made phone calls to students warning them that they can be penalized for downloading copyrighted materials including games, movies and music. They were also informed that this type of downloading is against Purdue University policy and against the law.

Source: <http://purdueexponent.org/interface/bebop/showstory.php?date=2003/02/24§ion=campus&story=illegaldownloads>

What about Ball State? Ball State University takes copyright infringement very seriously. Online information is available to assist understanding the Ball State policy. Information about Digital Millennium Copyright Act Compliance is located in the Related Links.

Provisions for copyright infringements are part of the "Computer Users' Privileges and Responsibilities" document and can be viewed in the Related Links.

Information is also provided in the Ball State Student Handbook.

A Chilling Internet Fact of Reality

The fact that various commercial enterprises like Sony, the RIAA and the MPAA are allowed to search private files at a college or university is alarming at least. The Digital Millennium Copyright Act provides these commercial enterprises the right to search your personal files without a search warrant.

A Small Ray of Hope!

On April 26th, 2003 a Los Angeles U.S. District Court Judge Stephen Wilson declared that the P2P Grokster and Morpheus from StreamCast were not liable for illegal file swapping done by their users as contended by the RIAA. This ruling was a surprise to many including a number of copyright experts. Summary information and additional links on this victory can be viewed here:

<http://www.bespacific.com/mt/archives/002539.html>

But Then on the Other Hand

Not one to stand idly by and have a U.S. District Court disagree with their views on music file sharing, the RIAA immediately went on the offensive and began spamming various networks with built-in chat functions. Their message:

[You] "are not anonymous and you can easily be identified."

This is another example of intimidation that the RIAA will use to serve their interests. In point of law, the RIAA needs a warrant to get your name. But the RIAA has conveniently forgotten to mention that fact. Their spam is a scare tactic.

Unfortunately, getting your name has just become easier when Verizon, on April 25th, 2003, was ordered to identify two P2P traders. To their credit, Verizon refused to provide the names to RIAA on privacy grounds and held out until ordered to provide the names by a court. Interestingly, a court clerk signed the original claim of a crime writ, not a judge! On June 19th, cease and desist letters were sent by the RIAA to those names surrendered by Verizon. It is understood by some that this identify ruling might have a constitutional implication or two.

As a result of this Verizon ruling, Sen. John McCain, R-Arizona, has expressed his concerns about the privacy issue and plans on holding a hearing on the matter. Sen. Sam Brownback, R-Kansas, had moved to add an amendment to a Federal Trade Commission reauthorization bill requiring DMCA subpoenas be used only after a copyright holder has filed a civil lawsuit or other court action. Unfortunately, the amendment was withdrawn when McCain announced that he was holding a hearing on the RIAA v. Verizon issue.

3 Strikes and Your [PC] Is Out!

Imagine a shoplifter being caught for the 3rd time. Because he used his automobile in the shoplifting violation, the owners of the store get to destroy his car!

Destruction of personal property by the aggrieved party is exactly what Sen. Orrin Hatch, R-Utah, has suggested happen to those who illegally download copyrighted music. You download illegally the first time and then follow that download up with a second time, get caught and you get a warning. The third time, your third strike, your computer gets destroyed!

Sen. Hatch has hatched a scheme that will authorize technology to destroy your computer remotely. "If we can find some way to do this without destroying their machines, we'd be interested in hearing about that. If that's the only way, then I'm all for destroying their machines. If you have a few hundred thousand of those, I think people would realize" the seriousness of their actions.

Fortunately, lawyers and rational federal legislators realize that this would be a violation of federal anti-hacking laws, something Hatch should've known about. Sen. Patrick Leahy, D-Vermont, called Hatch's suggestion too drastic. Rep. Rick Boucher, D-Virginia, urged Hatch to reconsider.

Hatch's remarks are very troubling and would truly be, to paraphrase Sen. Leahy, a harsh and extreme step in the wrong direction.

Source: <http://apnews.excite.com/article/20030618/D7RO25U00.html>

Source: <http://news.com.com/2100-1028-1018845.html>

What Does This All Mean for Ball State?

The Ball State University Community needs to be reminded of the oppressive uses of the DMCA that the RIAA [and the Motion Picture Association of America] wields on its own behalf. They engage in corporate censorship; they are aggressive, abusive and over-

reaching in their pursuit of what they consider to be illegal audio file sharing, and they do, in fact, have the DMCA on their side. The DMCA has one, dramatic and singular effect: it serves only the entertainment industries.

Fortunately, The Copyright Law in Section 107 guarantees fair use of copyrighted materials for educational purposes. Fair use involves restrictions on the use of copyrighted materials. Fair use allows for the limited use of copyrighted materials without having to obtain permission from the copyright owner. Fair use, by law, requires the one claiming fair use to make a fair use analysis of the use of those copyrighted materials to determine whether or not the use of that copyrighted material is a fair use. Legitimate, legal file sharing is allowable through a fair use analysis finding for educational purposes.

If you are unsure about file sharing, fair use, the Copyright Law and infringement, there is help available. Assistance about these concerns and all other copyright matters is available from The University Libraries.