

**REQUEST OF THE INTELLECTUAL PROPERTY ENFORCEMENT
COORDINATOR FOR PUBLIC COMMENT ON THE JOINT STRATEGIC
PLAN**

COMMENTS OF EDUCAUSE

EDUCAUSE submits these comments in response to Part II, Supplemental Comment Topic 16, of the IPEC Request for Public Comment:

Discuss the effectiveness of recent efforts by educational institutions to reduce or eliminate illegal downloading over their networks. Submissions should include recent specific examples.

EDUCAUSE is a non-profit association of over 2,200 colleges and universities. We represent the interests of the IT professionals on campus from chief information officers (CIOs) to the professionals who keep networks operating on a day-to-day basis. Our community is intimately acquainted with the issues surrounding the topic at hand. We take the problem seriously and have for years developed and deployed creative, aggressive, and responsive approaches, at considerable cost of time and money, consistent with the research, instruction, and public-service needs of our campus technology systems. We are pleased to be able to share these brief comments and observations, and would welcome the opportunity to work with the IPEC on the elements of the Joint Strategic Plan that impact or implicate college and university networks.

The IPEC inquiry is timely because of the recent passage and upcoming effective date of the Higher Education Opportunity Act of 2008 (HEOA). As noted below, beginning July 1, 2010, all colleges and universities will be required by the U. S. Department of Education to implement “plans to effectively combat the unauthorized distribution of copyrighted material by users of the institution’s network.” Among other requirements, these plans must include one or more “technology-based deterrents” and must be periodically reviewed using “relevant assessment criteria.” The implementation and assessment of these plans by thousands of institutions over a period of years should provide useful input to the IPEC on approaches that are and are not effective as technologies, applications, and culture evolve.

We begin our comments with some observations regarding the relationship of campus networks to the problem of unauthorized content distribution.

- When Napster, the first peer-to-peer (P2P) file-sharing system, was developed in 1999¹, campus networks did represent a disproportionate amount of the country's high-speed network capacity. Since then, however, the expansion of residential broadband has been explosive², and campuses no longer constitute a uniquely powerful conduit to the Internet. This trend will only accelerate as efforts such as the Federal Communications Commission National Broadband Plan take effect.
- The amount of infringing activity on campus networks has been drastically overstated. In one well-known incident³, the Motion Picture Association of America (MPAA) commissioned a study reporting that 44% of its losses were attributable to college and university networks. The MPAA subsequently discovered an error and adjusted the figure to 15%. Further examination of the data and methodology, however, revealed that the 15% figure referred to college and university *students*, not campus networks. In fact, under 20% of college and university students live on campus⁴. To the extent that the MPAA study is otherwise valid, the loss attributable to campus networks is thus 3%.
- Every campus administrator knows that students' file-sharing habits are well-established before their freshman year in college. Research sponsored by the Digital Citizen Project⁵ at Illinois State University indicates that the use of P2P file-sharing starts as early as sixth grade.
- Peer-to-peer network technology is used to distribute a variety of instructional and research material, including content from NASA⁶. Commercial use of P2P technology for distribution of video content is

¹ Sarah Riedel, "A Brief History of Filesharing", Feb. 24, 2008, available at http://www.associatedcontent.com/article/20644/a_brief_history_of_filesharing_from.html.

² FCC: *Broadband Adoption and Use in America*, Pew Internet and American Life Project, Feb. 23, 2010.

³ Mike Nizza, "Movie Industry Admits It Overstated Piracy on Campus", *N.Y. Times*, Jan. 23, 2008, available at <http://thelede.blogs.nytimes.com/2008/01/23/movie-industry-admits-it-overstated-piracy-on-campus/>.

⁴ "National Retail Federation 2009 Back-to-School and Back-to-College Surveys", available at http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=756.

⁵ Testimony of Professor Cheryl Asper Elzy before the Science and Technology Committee, U. S. House of Representatives, June 5, 2007, p.9.

⁶ NASA's "Visible Earth" project, available at <http://visibleearth.nasa.gov/faq.php>.

under way and increasing⁷, and P2P was even used by CNN to distribute the live stream of President Obama's inaugural.⁸

Notwithstanding these observations, colleges and universities have been working hard for years to minimize the use of their networks for the unauthorized distribution of copyrighted material. Campuses are in the teaching business. They conduct orientation lectures; distribute posters, flyers, and videos; send out physical and electronic notices; mandate completion of tests and quizzes; and employ a wide variety of other mechanisms to explain what copyright is and the penalties for infringement, information most students are hearing for the first time. In addition to instruction, the annual EDUCAUSE Core Data Survey⁹ indicates that the use of "bandwidth shaping" – one of the "technology-based deterrents" specified by the HEOA – is nearly universal. Further, data from the Campus Computing Project's annual survey of college and university CIOs¹⁰ show that 88% of campuses have policies to address inappropriate downloading of copyrighted content and nearly 90% of campuses have policies by which students can lose their network privileges for P2P violations. Across all institutions, direct annual costs associated with combating infringement average almost \$37,000, reaching \$68,000 at large public institutions. Extending the accounting to include indirect costs can raise the figure to a quarter of a million dollars or more¹¹.

The HEOA, which was signed into law by President Bush in August, 2008, included requirements that U. S. campuses take steps to deal with copyright infringement on their networks. The U. S. Department of Education initiated a Negotiated Rulemaking process which, in October, 2009, established the HEOA compliance rules. Campuses have three primary requirements:

- (a) Develop and implement a written plan to effectively combat the unauthorized distribution of copyrighted material by users of the

⁷ "Peer-to-Peer: Commercial Uses" available at http://itlaw.wikia.com/wiki/Peer-to-peer#Commercial_Uses.

⁸ "Watch CNN.com Live Video, Share Your Computer With CNN", *Huffington Post*, Feb. 5, 2009 available at http://www.huffingtonpost.com/2009/02/05/watch-cnncom-live-video-s_n_164201.html.

⁹ EDUCAUSE Core Data Survey, available thru <http://net.educause.edu/apps/coredata/>.

¹⁰ Kenneth C. Green, *Campus Computing 2009*, December 2009, available thru www.campuscomputing.net.

¹¹ Kenneth C. Green, *The Campus Costs of P2P Compliance*, October, 2008, available thru www.campuscomputing.net.

institution's network, without unduly interfering with educational and research use of the network. Each plan must be periodically reviewed using "relevant assessment criteria", and must employ one or more "technology-based deterrents", including (i) bandwidth shaping, (ii) traffic monitoring, (iii) accepting and responding to DMCA notices, and (iv) commercial products designed to reduce or block illegal file sharing.

- (b) Periodically review legal alternatives for acquiring copyrighted material, make the results of that review available to the community, and, to the extent practicable, offer those legal alternatives to the community.
- (c) Provide the community annually with information summarizing copyright law and documenting institutional policies and procedures for dealing with the unauthorized distribution of copyrighted material.

These regulations exist in an environment of great variation and of rapid change.

The regulations take pains to recognize the wide variation among campuses:

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.

The Manager's Report accompanying the HEOA makes this note of changing technology:

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 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.

Throughout the legislative, regulatory, and implementation process, EDUCAUSE has worked with all parties to help our community plan for and comply with the HEOA, offering a series of workshops, an extensive online resource center, a comprehensive list

of legal sources of online content, and links to compliance information for a selection of representative and role-model campuses¹². EDUCAUSE plans to remain engaged, and is prepared to work with the IPEC on related activities.

Although we do not yet have the experience and analysis that will emerge from implementation of the HEOA, we respond to the IPEC request for “specific examples” with three. They are chosen because they represent thoughtful selections of differing methodologies across a spectrum of campuses. In all cases, the cited references will lead to a great deal of additional detail.

1. UCLA’s “Creating a Culture of Change” approach to illegal file-sharing, through education, discipline, and the promotion of legal alternatives.¹³
2. The BAYU (“Be Aware You’re Uploading”) program at the University of Michigan, combining technology and education while not interfering with transmission of content.¹⁴
3. The Illinois State University Digital Citizen project, featuring extensive student surveys and implementation and evaluation of a variety of policies and technologies.¹⁵

¹² <http://oit.ucla.edu/policy/illegalfilesharing/documents/jd-testimony-20070308.pdf>.

¹³ http://www.getlegal.ucla.edu/illegal_file_sharing_FAQ.htm.

¹⁴ <http://www.bayu.umich.edu>.

¹⁵ <http://digitalcitizen.illinoisstate.edu>.