

Face the Music: The Law and Policy of (Illegal) File Sharing

Kent Wada
Director, IT Strategic Policy – UCLA
kent.bol.ucla.edu

Stetson 30th Annual National Conference
on Law and Higher Education
Orlando, FL – February 23, 2009

Terminology (2007)

- Illegal file sharing
 - Digital theft
 - Digital piracy
 - Illegal file trafficking

Second-Guessing the HEA

Or at least the provisions relating to P2P

HEOA

227 233 434

What does the HEA say? (1)

- SEC 488. (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
 - (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;

TITLE IV – FUNDING! UCLA

What does the HEA say? (2)

- **SEC 493** (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.

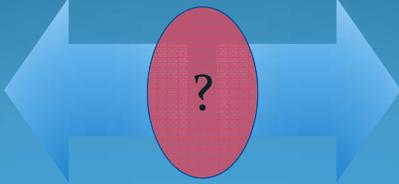
US Department of Education UCLA

Negotiated Rulemaking

- But: the law is already in effect and campuses are required to make a good-faith effort to be in compliance.

The Higher Education and Entertainment Communities

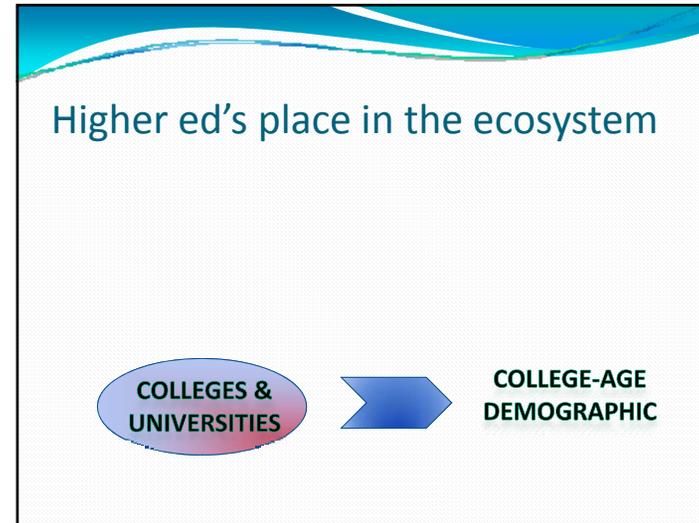
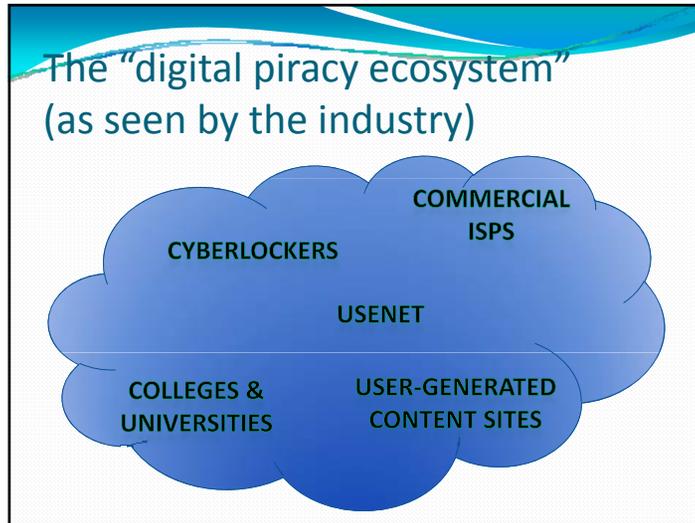
Our mission as higher education is fundamentally different from that of the entertainment industry



UCLA

What does the industry want?

- Reduce digital piracy
 - The industry is an economic engine for the country
 - The industry is being decimated by digital piracy



Higher ed's part of the ecosystem

How much illegal activity is really occurring within HE?

- DMCA claims of copyright infringement as a proxy for the level of digital piracy at an institution
 - But these numbers, used to create the "Top 25" lists sent to Congress, are seriously problematic
- $15\% \times 20\% \cong 3\% ??$

Higher ed's part of the ecosystem

How much illegal activity is really occurring within HE?

- Digital Citizen Project (Illinois State University)
 - > 119,000 potential infringements detected over ~25 days in April 2007

Source: Dimensions of P2P and digital piracy in a university campus, http://www.ece.cmu.edu/~peha/dimensions_of_piracy.pdf

UCLA

Common HE assertions

- We respect intellectual property (copyright, patents, trademarks)
 - Tremendous creators of IP
 - Tremendous consumers of IP
 - Pay millions of dollars annually for access to licensed content
- We are also an economic engine for the country and a critical driver of innovation and the knowledge economy



UCLA

What does higher education need?

- To be able to address illegal file sharing flexibly in order to be able to operate within the legal, policy and cultural contexts of individual institutions.

UCLA

Policy Frameworks



Student Life Institutional/Legal/Technology Rights holder/Alleged Infringer

UCLA

A student life approach

- Part of our educational mission to prepare students for life beyond our walls as ethical and informed citizens
- Want to durably shift student behavior, and not just for the ~20% who live in our residential halls
- Consider violations in light of the Student Conduct Code, not of the network Acceptable Use Policy



Institutional and/or student risk

- Minimizing institutional risk
- In loco parentis
- Use of technology to prohibit technologies, content or communications protocols (with or without white lists)



Third-party view

- Claims of copyright infringement are entirely an issue between a rights holder and the alleged infringer



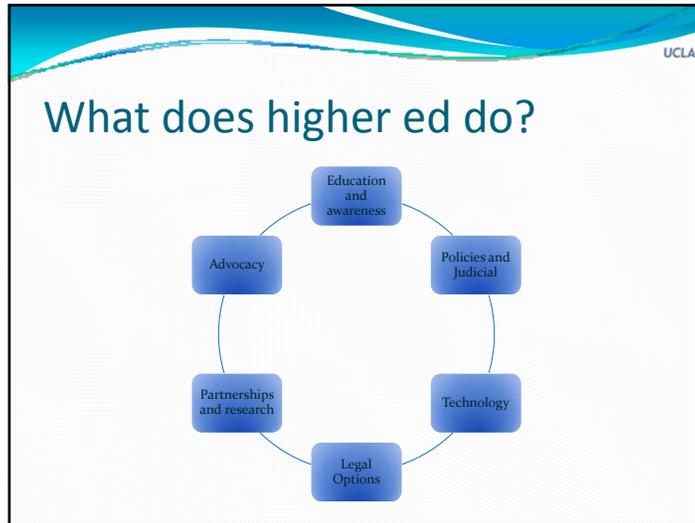
Informal principles for success

1. Create a clear and unambiguous acceptable use policy
2. Ensure all users are made aware of the policy
3. Strictly and consistently enforce the policy
4. Implement a graduated response supported by available technology
5. Policy enforcement must result in tangible consequences

Unofficial comments from David Hughes, RIAA SVP-Technology (with permission)

Current Approaches and Practices

(Mainly the student life approach)
(But we need flexibility)



-
- ### It's all about education
- Awareness
 - Presentations, flyers, ads, articles, parents' orientation, etc.
 - BAYU (Michigan), Think Twice (UCLA), metered network use (Cornell), etc.
 - Academic
 - © and IP as part of the curriculum
 - Research
 - Judicial
 - Due process
 - Escalated response (e.g., "two strikes" or "three strikes")
 - Teachable moments
 - Policies and sanctions (e.g., reconnection fees – Stanford)

-
- ### UCLA teachable moments
- Judicial sanctions are set in the context of all judicial matters.
 - Academic implications versus legal ones
 - Students receiving a first allegation must attend a group discussion session led by the Dean of Students.
 - Students receiving a subsequent allegation must meet with the Dean of Students for sanctioning and attend ethical decision-making workshop; write a five-page essay on misunderstandings and what would make things better; have a mandatory technical review of their computer.

-
- ### Supportive technology
- Standard network technologies: bandwidth management, security and network instrumentation
 - Technologies deployed on an institution's network to curb illegal file sharing (e.g., Audible Magic, Red Lambda)
 - Automation: claim routing, claim management

UCLA

Infringement detection methodology/What is infringement

- Legal implications
 - e.g., *Atlantic v. Howell*
<http://www EFF.org/deeplinks/2008/04/big-victory-atlantic-v-howell-court-rejects-making>
- Judicial implications

UCLA

Beyond DMCA takedown notices

- RIAA early settlement offers (pre-litigation letters)
 - Do you pass them along to students as requested?
 - Privacy
 - Student legal services
- RIAA preservation notices
- RIAA subpoenas
 - Intersection with FERPA
- <http://web.mit.edu/ist/topics/security/copyright/notices.html>
- Records management

EXPIRED

UCLA

Legal options for digital entertainment services

- What they were thinking...

UCLA

Legal options for digital entertainment services

- Where we are (all) thinking: experimentation!
 - Every episode of *South Park* ever online for free!
 - Every episode of *Lost* online in HD for free!

UCLA

Research and partnerships

- ISU Digital Citizen Project (www.digitalcitizen.ilstu.edu)
- UCLA Anderson School of Management field study project
- Campus Computing Project (campuscomputing.net)

- Partnering where we do best: education and research

UCLA

Advocacy

- Legislative activity
 - Federal level, but potentially coming to a state near you
- Realities

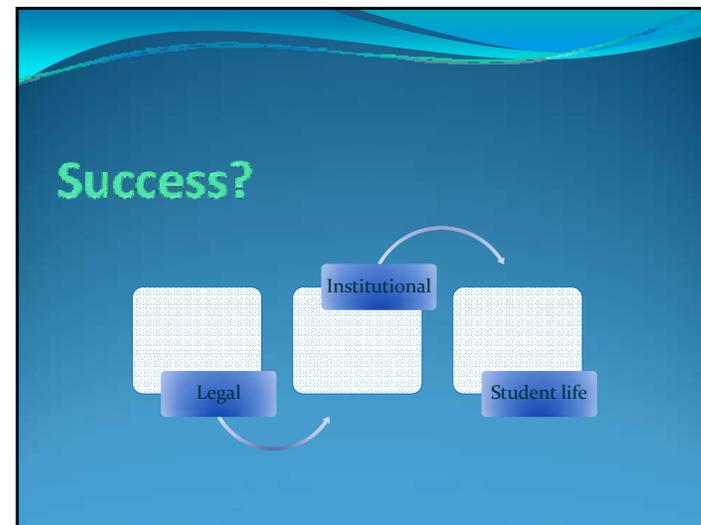
UCLA

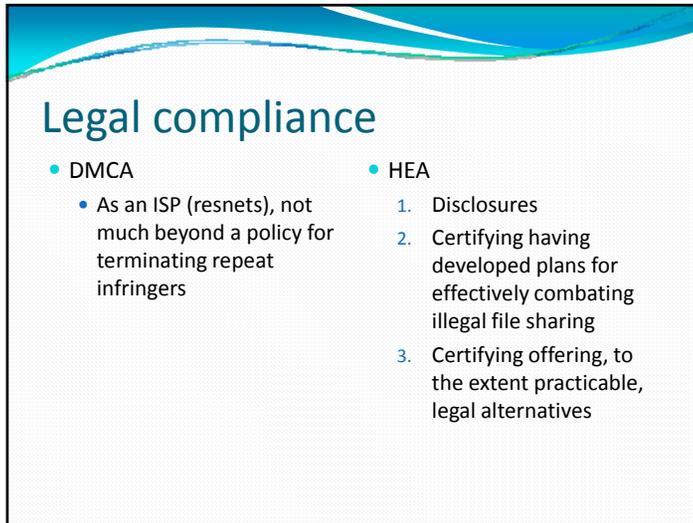
Related factors

- Outsourcing resnet
- Market forces
 - Get the business model right – but this ain't easy

LG confirms 2009 launch for 3G wristphone

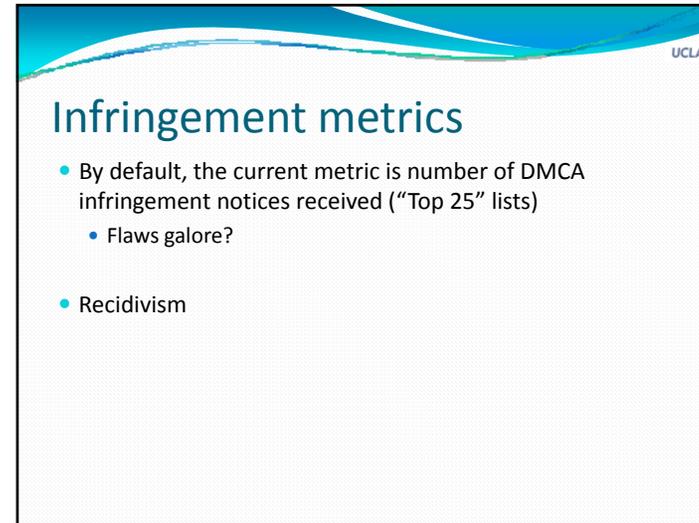
Source: http://www.reghardware.co.uk/2009/01/08/lg_video_watch/





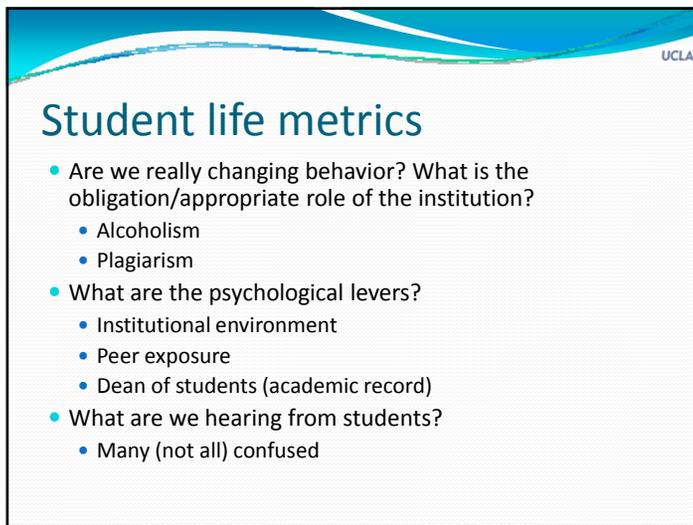
Legal compliance

- DMCA
 - As an ISP (resnets), not much beyond a policy for terminating repeat infringers
- HEA
 1. Disclosures
 2. Certifying having developed plans for effectively combating illegal file sharing
 3. Certifying offering, to the extent practicable, legal alternatives



Infringement metrics

- By default, the current metric is number of DMCA infringement notices received (“Top 25” lists)
 - Flaws galore?
- Recidivism



Student life metrics

- Are we really changing behavior? What is the obligation/appropriate role of the institution?
 - Alcoholism
 - Plagiarism
- What are the psychological levers?
 - Institutional environment
 - Peer exposure
 - Dean of students (academic record)
- What are we hearing from students?
 - Many (not all) confused



Concerns of the Academy



Privacy

- Safeguarding privacy is important to preventing a chill on academic freedom... the right to inquire, the right to learn, the right to teach.
- It's not content monitoring that's of concern per se, but when the routine, automated inspection of traffic crosses the threshold into surveillance, or the monitoring of behavior.
 - Mandatory "grocery store potato chip" assistance crosses a threshold
- The fear of collateral effects



Privacy (2)

- Desirable services or assistance (grocery store card)
 - Redirection
 - Help with legal content
 - Easy enough to do the right thing



Respect for intellectual property

- IP ≠ tactics used to protect IP
- IP ≠ ©
- © ≠ DMCA ≠ infringement



What message are we sending?

- "downloading" ≠ bad
- P2P ≠ bad

