By Tracy Mitrano

Copyright, Civil Rights, and Middle Age

For the current generation of teenage and young-adult college and university students, the politics of copyright is what the civil rights movement was for today's middle-age Baby Boomer generation. Beneath the surface of the various claims and controversies lie critical political issues, such as control over the content of the Internet, the liability of ISPs (Internet service providers, including U.S. colleges and universities), the future of fair use, and the core democratic principles of free speech and inquiry. The more exposure these cases receive, the greater will be the opportunity to bring these critical issues out of the lobbying halls of Congress and into the forefront of American democratic society, where they more appropriately belong.

Originally, copyright was neither an "inalienable right" nor "property" (intellectual property is a late-nineteenth-century legal concept) under the U.S. Constitution. Rather, the framers of the Constitution made a policy decision to balance an incentive for artists to create works with the need for the public to access and use those materials. Intentionally, the framers finitely restricted both the scope of what constituted copyright and the period that artists would be able to hold on to their material. Over time, however, some artists, together with the publishing and entertainment industries, have successfully lobbied Congress to expand both fields. For example, as I write, the words hitting this page fall under the purview of the current copyright law, with no registration or notice required; in addition, the original fourteen years of protection have expanded to seventy years plus the life of the author.

American society seemed willing to accept this jealous expansion of copyright protection until technological developments placed the quality of that control in a meaningful light. The digitization of information, combined with network services, provided radically new means of access and use as well as unprecedented levels of copyright enforcement, leading to the possibility of significant restrictions to fair-use exceptions. The file-share program Napster, with a centralized database, explosively illustrated the power of this medium; its importance can be measured not only by the tens of millions of people who used it before its demise but also by the rapidity with which the entertainment industry pursued that end legally. File-sharing technologies that do not maintain databases and are separate from the protected material shared (technologies that the U.S. District Court, Central District of California, recently decided were legal)[1] took Napster's place with most users hardly missing a beat.

Many of those users are college and university students. Having grown up with digital technologies and communications, being emotionally invested in entertainment products as a symbol of their burgeoning identities, and typically lacking vast financial resources, contemporary teenagers and young adults enthusiastically embrace file-share programs and their content much as an earlier generation, coming of age in the 1920s, popularized the automobile as a symbol of individuality and freedom. The ease of downloading songs, the micro-mastery of utilizing the file-share programs, and the flexibility of accessing single songs (instead of buying a whole CD for one favored track) render file-sharing nearly irresistible, especially when students can avail themselves of the big (and fast) bandwidth of college/university residential networks.

As beacons for free speech and inquiry, U.S. higher education institutions cannot afford to confuse legal neutrality on questions of ISP liability with ignorance on the politics of digital copyright.

As the Digital Millennium Copyright Act (DMCA) agent for Cornell University, I can attest to how difficult it is to divest students of what seems to many of them to be a staple of their college experience. So accustomed have they become to downloading entertainment material that many seem surprised when presented with infringement notices, notwithstanding the considerable media attention

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devoted to this issue and the copyright education provided by Cornell. Often the technology itself is a stumbling block. Many students do not understand that these programs share out to the Internet the very song or movie that they just downloaded. Because these programs also operate on the fastest "feed," high-speed campus networks automatically turn individual students into "distributors" every time they turn on their computer. And though I do not believe for a moment that "everyone is doing it," the volume of file-sharing technologies on our network is unquestionably high with programs that are commonly used to trade popular music, games, and videos.

Imparting the political significance of this entire enterprise remains the real challenge for colleges and universities. The congressional hearing in late February 2003, in which members of Congress berated leaders of higher education for "doing nothing" about compliance,[2] underscored what anyone aware of the history of copyright already knows: the same money that bought the DMCA and the Copyright Term Extension Act can also purchase congressional histrionics on a subject that, sadly, most members of Congress appear to know very little about. When Senator Orrin Hatch (R-Utah) recently advocated destroying computers that are found to violate copyright, he displayed a similar ignorance of digital technologies, not to mention the law in general; after all, when was the last time the courts destroyed the car of a serial speeder or an intoxicated hit-and-run driver?[3]

What should concern us all is legislators' lack of information about what colleges and universities are doing to address this issue. Campuses across the country expend extraordinary and increasingly precious resources on copyright compliance. A vast array of personnel and offices become involved—from the legal counsel who reviews compliance, to the agent who processes the notices, to the network operation center that blocks Internet access, to the judicial administration system that handles the discipline, to the many people and offices that make copyright education a centerpiece of civics training for the entire campus community. Indeed, one could easily argue that the confluence of digital technologies and big pipes has placed colleges and universities in the role of educating American society on this issue. Lawrence Lessig of Stanford, Pamela Samuelson of Berkeley, and Edward Felten of Princeton have taken the lead, together with many others, especially in the library and information technology communities.

Recent legal events such as the *Recording Industry Association of America v. Verizon* case provide an opportunity for us all to become better apprised of the politics of digital copyright.[4] What began as an expedient resistance to administrative burden on Verizon's part quickly turned into a public relations coup for privacy principles. Although only time will tell whether higher education ISPs will become recipients of "Verizon subpoenas," campuses should ask themselves, in advance, whether they should comply with the law as it is taking shape for commodity ISPs or whether higher education's special mission suggests a policy of resistance.

As beacons for free speech and inquiry, U.S. higher education institutions cannot afford to confuse legal neutrality on questions of ISP liability with ignorance on the politics of digital copyright. Compliance coupled with education is our duty. Larger questions inform that quest: Is national copyright policy, heavily influenced by copyright holders and legislated by Congress, out of balance? What effect does a possible imbalance have on a democratic society that relies on the availability of materials in the public domain? How is it that the intersection of copyright law and networking technology has generated a "nation of felons"? What would be a "fair" approach to copyright—one that would satisfy society, artists, and the content industry? How should society impart ethics and legal education about the Internet not merely to college and university students but to all users, especially younger ones in middle school and high school? Finally, as the entertainment industry moves to new business models, which model will best serve to right any imbalance?

In *Eyes on the Prize,* the luminous 1987 documentary series on civil rights, a late-middle-aged African-American man recounts how his involvement in civil rights began with the concern for the future of his children and grandchildren, until one day it dawned on him that having grown up in the segregated South and having endured the slings and arrows of unfair race laws, he was fighting for himself as well as his family. And so it may be for the copyright issue today. Though copyright is one of the most important political issues for the teenage and young-adult generation, those in the generation that embraced civil rights out of a passion for openness and democracy may come to realize that they too have much to gain by getting responsibly engaged in the politics of digital copyright.

Notes

1. *Metro-Goldwyn-Mayer Studios Inc. et al. v. Grokster Ltd. et al.* (April 25, 2003): <http://www.cacd.uscourts.gov/CACD/RecentPubOp.nsf/bb61c530eab0911c882567cf005ac6f9/b0f0403ea8d6075e88256d13005c0fdd?OpenDocument> (accessed July 1, 2003).
2. Declan McCullagh, "Congress Targets P2P Piracy on Campus," *CNET News.com,* February 26, 2003, <http://news.com.com/2100-1028-986143.html> (accessed July 1, 2003); Andrea L. Foster, "Lawmakers Demand That Colleges Crack Down on Illegal File Sharing," *Chronicle of Higher Education,* February 27, 2003, <http://chronicle.com/free/2003/02/2003022701t.htm> (accessed July 1, 2003).
3. "Senator Takes Aim at Illegal Downloads," *USA Today,* June 19, 2003, <http://www.usatoday.com/tech/news/techpolicy/2003-06-18-hatch-wants-computers-dead_x.htm> (accessed July 1, 2003). Senator Hatch's idea is not as far-fetched as one might think. The entertainment industry has been lobbying for legal protection against "hacking" into computers they allege are sharing material they own. Such a provision was in the draft of the USA-PATRIOT Act and was removed only at the eleventh hour of its drafting.
4. The RIAA sought, under section 512 of the DMCA, subpoena power for the names of users alleged to have violated copyright. In July 2002 the RIAA served a subpoena on Verizon, which it sought to quash. On January 21, 2003, the district court ruled in favor of the RIAA, at which time the RIAA then served a second subpoena. Verizon appealed that decision and lost at the circuit court level on April 24, 2003. On June 5 the court ordered Verizon to turn over the names, and Verizon complied. See <http://www.cdt.org/copyright/030121verizon.riaa.decision.pdf> and <http://www.dcd.uscourts.gov/02-ms-323a.pdf> (both accessed July 1, 2003).

Tracy Mitrano has a doctorate in American history and a juris doctor law degree. She is the Director of Policy for the Office of Information Technologies at Cornell University and the Co-Director of the EDUCAUSE/Cornell Institute for Computer Policy and Law. This article represents her views and not the views of Cornell University.