Chapter Three: Intellectual Property

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By the time the office phone rang at 10:30 in the morning, I had already fielded a number of calls from the distraught parents of students whom the RIAA alleged had committed copyright infringement. I tried to place the area code on the Caller ID. It seemed as if I knew it from somewhere in my past growing up in Rochester, but in the moment I could not place it. I answered by stating my name: “Tracy Mitrano, Cornell University DMCA Officer.” A low-pitched woman’s voice growled, “I’m a doctor, not a lawyer. Do I need a lawyer to talk to you?” No pleasantries, no context. Apparently, neither were necessary. “No,” I replied, “I do not represent Cornell legally, nor is Cornell suing your son or daughter. We are simply passing on the information about an alleged complaint.” Without missing a beat, she replied, “This call better go well for the sake of international relations. I am calling from Toronto.”

As nippy as she was, she was not the worst. Earlier that morning — in the middle of January and at the beginning of the spring 2008 semester — I had comforted a mother who was sobbing on the phone. Because Cornell is an “Ivy League” university, the stereotype is that all the students come from wealthy families. But Cornell is also New York State’s land grant institution and has three state schools within it (Human Ecology, Industrial and Labor Relations, and Agriculture and Life Sciences). Proudly, it attracts a significant percentage of students with financial needs. The mother I spoke to earlier in the day was among those families. All she could imagine was bankruptcy. The family had already stretched their budget to send a daughter to Cornell. No matter how I tried to explain that there was an out, to the tune of a $3,000 settlement, all she could see was financial ruin. Later that day I would speak with a first-generation Asian mother whose approach was red-fury. Again, trying to distinguish Cornell from the actual plaintiff, a record label, was not easy. “You’re a blood-sucking attorney!” she screamed. Her anger was so alarming, I called the Dean of Students [so I could?] be in comforting touch with her daughter.

At first take, the claims were shocking. With the trade group for the music industry, the Recording Industry Association of America (RIAA), overseeing the process, the labels that they represented used the lowest statutory damage per infringement, $750, when looking at the image of the student’s file-share directory, which sometimes contained thousands of songs. The alleged totals were in the hundreds of thousands of dollars. Still, that was a modest number. File-share programs transmit songs on a continuous basis, especially on the fast networks of research universities. Had their detection systems been able to do the multiplication, the number would easily have risen into the millions. Nor did
parents tend to understand that it was the RIAA, on behalf of the record labels that they represent, that alleged the suit. Receiving a message from Cornell, and not reading it carefully, it appeared — alarmingly — to be a notification that the university was bringing suit against their student. On top of tuition and expenses in the endowed colleges, which could easily add up to $50,000 per year, Cornell was suing their child for copyright infringement?! This method of riling up students, their parents, and institutional administrators was precisely what was behind the RIAA’s madness.

Baffled by how to get to the individuals behind the Internet Protocol addresses (IP) that popped up on their file-share detection programs, the RIAA came up with a clever strategy. Each institution had a DMCA agent, a role established in the Digital Millennium Copyright Act under the safe harbor provisions. The RIAA sent the claim with a cover letter to the institution. If the student responded within 30 days, RIAA promised to accept a $3,000 settlement. If they did not, the settlement figure would go up, beginning with a John Doe subpoena and ending with the filing of a claim in the federal district court. Not wanting to be in the middle, but with little choice but to comply, senior leadership — the Vice President of Student Affairs, Susan Murphy, and Vice President of Information Technologies, Polley McClure — determined that Cornell would pass the settlement letters on to the students. That’s when my phone started ringing.

My experience of being a DMCA officer for twelve years at Cornell, in the thick of the “copyright wars,” was a rich one. The Settlement Letter event was the nadir, and a long history informed it. Famously known to disrupt industries, the Internet can count music among the first. The popularity of music and the small file size made it both an immediate market and a technological target. Moreover, the smug attitude with which that industry had locked up their monopolistic hold over their product in the twentieth century added fuel to the fire of social norms readily willing to shift. Ethical and legal claims of “theft” hardly moved users, especially youth with few resources, to resist the temptation of “free” music, and in the bite-sized bits they wanted, rather than being forced to buy entire albums to get one favored song off of it. As the technological means by which users accessed music moved from separate components — receivers, phonographs, and compact disc players — to computers, and later to iPods and smartphones, people required digital forms of the music at their fingertips without the intercession of “record stores.” Monetary losses competed with the unwelcomed surprise of how quickly technological and social forces undermined the once near-ubiquitous control they exercised over the market for music.

Looking over the twentieth century, the music industry probably reached its peak in the 1970s. Consolidating small record labels that had fanned out across the country over the first half of the century, and surviving the payola scandals in the second half, the recording industry locked up control by pushing the pen
of legislators who wrote and promulgated the 1976 Copyright Act. Although a complex law that incorporated fair use, classroom exceptions, and mandatory licensing, four essential characteristics marked this law as a representative of “thick” copyright protection. First, the scope of copyright had shifted dramatically from its late-eighteenth century start from a carefully circumscribed set of defined documents for “original work in a tangible medium,” with the threshold for “original” set as a “spark of creativity,” in other words, low. Second, the term limits reached all-time highs: life plus 50 years for an individual, and 75 years for a corporation, meant that anything created in the course of one’s life would remain under the law’s protection. While bolstering incentive, these extended terms out-balanced innovation. That degree of protection meant that — apart from specific exceptions, such as fair use, which heavily weighted the market effect as one of its four elements — protected content was not available to other artists. Third, damages were also at record levels. Beginning at $750 and cresting at $150,000 per infringement, the content industry built steep protection. Fourth, it redoubled enforcement: copyright operated in both criminal and civil courts.

With this monumental legal stroke, the industry effectively merged the market, technology, legal, and dominant cultural aspects of music. The average consumer did not have the technology to copy vinyl records. Teenagers of that era could copy songs from the radio onto cassette tapes, but the quality was poor. To make a copy involved another process, and then the physical handing over of that cassette. Did it occur? Sure. I was a good, middle-class Catholic school girl and did it. Because I, and millions of others, did not do so for profit, under the 1976 law it was not illegal. Even so, it hardly made a dent in the music industry’s enormous profits. If I, like so many millions of baby boomer peers, enjoyed a song enough, I bought the 33, and later the compact disk. For those intent on infringement for profit’s sake, entry costs were high, because one had to purchase special equipment, and there were grave consequences if caught. With civil liability at $150,000 per pop, and criminal liability brought the potential of incarceration, meant making the choice to be an intentional infringer was fraught with considerable personal and financial investment. In the meantime, as popular music became the hallmark of the baby-boomer generation — a cultural means by which many young people came to define themselves — sales, and profits, went through the roof.

Anxiety within the music industry began to set in with the introduction of digital tape. Not only was the quality vastly improved — it had almost perfect fidelity — but now the equipment existed for more consumers to make copies. The RIAA ran to Congress and successfully lobbied for the Audio Home Recording Act of 1992. This Act included government-issued technological specifications, early legal anti-circumvention measures, and royalties to offset projected infringement. This Act also introduced a decade of aggressive legislative
measures designed to counter new technological effects on music industry profits. History suggests the Audio Home Recording Act of 1992 was akin to Jefferson’s “alarm bell in the night.” It did not signal great change, but as a defensive measure against technological improvements, it laid the foundation for what was to come with the Internet.

Indeed, a far greater danger than digital tape was a TCP/IP network. By 1993, the Internet had transitioned from a closed network under the authority of the Department of Defense to one open to the public under the Department of Commerce. The RIAA immediately pulled their lobbying strings to have Congress pass the No Electronic Theft Act of 1997. This Act raised the statutory damages at the highest level from $150,000 per infringement to $250,000. More importantly, it eliminated the profit element from the foundational 1976 Act. It was this change that would ultimately lead to Digital Millennium Copyright Act (DMCA) notices, law suits, and Settlement Letters. If there ever were a moment when Congress could have carved out a consumer digital “fair use” for the literal “sharing” of music or other content, it passed with the promulgation of this Act. This observation comes with an intriguing thought: with respect to copyright reform, eliminating this aspect of the law would alter the balance of power that the content industry has over consumers, and remove incentives for intentional criminals in one fell swoop.

But Congress demonstrated its obsequious relationship with the content industry one year later when it passed the Copyright Term Extension Act (CTEA). On the surface, the CTEA was simple: it increased the term limits another twenty years from those set in the 1976 Act. Thus, 70 years plus the life of the author, and 95 years for a corporation, became the new limits for works under copyright protection henceforth from January 1, 1978. Another way to view this shift is to recognize that Congress effectively kept content, which was pending release into the public domain, out of that sphere and with the owner. This shift spoke directly to its actual intent. Nicknamed the “Mickey Mouse Protection Act,” its immediate impetus was derived from the Disney Corporation, which wanted to extend their ownership of Mickey Mouse. Created in 1928, Mickey Mouse cartoon images would soon fall into the public domain, in which case new artists could use the content to create more art. With its trademark diluted, it would be more difficult for the Disney Corporation to protect it. Demonstrating the complementary nature of these intellectual property components, the CTEA was a case study in how copyright and trademark law reinforce each other in the market.

For example, critics of the CTEA viewed it as the wholesale destabilization of copyright policy from its august constitutional beginnings in U.S. History. Ratified in 1788, the U.S. Constitution under Article I, the powers of Congress, granted the federal legislature with the power “To promote the progress of science and
useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” The Founding Fathers recognized that hand-in-hand with democracy were required the economic underpinnings of innovation and incentive necessary to foster a free market. Public policy sought balance between the two qualities in order to prime the market’s pumps on an enduring basis. At every legislative development, beginning with the first U.S. Copyright Act passed by Congress in 1790, balance between these qualities, and in light of surrounding circumstances, became the crucial test.

Article I, section 8, also encapsulated British legal antecedents. The concept of “exclusive rights” belonged originally to the Stationer’s Act of 1557. This Act reflected absolute monarchical control of the mercantile market. The Crown granted to one company only the authority to publish official documents. A bulwark against counterfeiting was embedded in this law, as the Crown strove to stem the tide of the printing press’s disruptive effects. The notion of “limited times” derived from the 1710 Statute of Anne. This Statute mirrored capitalism’s emerging grip a hundred and fifty years later, in granting the Stationers “exclusive rights” to individual authors for a limited period, originally one of 14 years, renewable once for a finite total of 28. With Shakespeare as the standard-bearer of British letters, these legal developments laid the foundation for the vaunted British novel of the eighteenth and nineteenth centuries, which would become a pinnacle of modern literature in the Anglophone world.

For term limits, the first U.S. Congress borrowed straight from their British forefathers. The first grant was for 14 years, renewable once. What is important to note, however, is that the scope of both the British and American copyright laws applied only to certain kinds of documents, writings, and maps, for which the author had to undertake a relatively arduous process of registration. Still an agricultural economy throughout most of the nineteenth century, the United States did not require copyright protection. Significantly, given the high mantel that the U.S. would assume once it developed its own indigenous cultural imprints, the U.S. in these years flagrantly infringed upon British copyrights. With no treaties to protect British works, those vaunted novels became fair game for publishers and a slowly burgeoning, English consumer public. Although evidencing a steady climb, the protections added throughout that century in the United States were modest. Every couple of decades Congress added on more years of protection, while the Supreme Court carved out what would later become the doctrine of “fair use” rights.

Commensurate with the rise of the “American Century,” Congress passed a more robust copyright law in 1909. That Copyright Act brought the term limit up to 57 years total. More notable was the expansion in scope — which came to include piano rolls, a source of popular music of that era. No less a personality
than Mark Twain appeared before Congress to testify. The quintessential American author offered Britain no apologies for a century of infringement, while bemoaning the loss of his royalties. If literature is the first horse out of the cultural gate, music nonetheless became the U.S. hallmark: blues, jazz, Gershwin, swing, big bands, Broadway musicals and Elvis Presley, soul and rock-n-roll. American music, theater, and film emerged during the twentieth century as powerful a hegemonic cultural force as the military-industrial-complex would exercise over geo-political fronts.

The RIAA both shaped and was shaped by those larger developments. To profit from this embarrassment of cultural riches was, after all, the American way. With profit came control. Once reaping the lucrative benefits and becoming a major player in the emerging information global economy, the content industry’s control over global markets, secured with the Berne Convention Implementation Act, was not something that the incumbents would willingly relinquish, or at least not without a fight. The Home Video Recording Act may have rung the alarm bell, but it was the Copyright Term Extension Act (CTEA) that became the opening salvo of combat. The industry’s response to critics of the CTEA was not in the least bit philosophical. “Intellectual property,” a term that the RIAA claims to have created in the 1950s, comprised 45% of U.S. exports. Taking a page out of General Motor’s playbook, the content industry — music, film, books, and increasingly supported by the software industry and the strong pro-copyright protectionist sentiments of Microsoft founder Bill Gates — argued that what was good for them was good for America. Legislators, long accustomed to filling their war chests with lobbying dollars, and for the most part ignorant of the public policy aspects of copyright on both economic and cultural fronts, abandoned serious discourse. President Clinton, well known to hobnob with musicians and actors in the Southern California entertainment set, proudly signed the CTEA into law without much explanation or, for a man who loves to pontificate, much context to set the record straight in the minds of opponents who objected vehemently to it.

Among those opponents was a rising star from a place not previously accustomed to producing popular advocates: Lawrence Lessig, a professor of law at Harvard Law School. Once a specialist of Soviet law, Lessig reconfigured his scholarship around the Internet in the aftermath of the Soviet Union’s collapse. The connection may not be as strange as some people might think. If one’s interest in the Soviet Union derives first from an interest in Marx, then there is likely to be a kind of “universalist” or, as Freud might suggest, “oceanic” emotion associated with it. Interest in the Internet can have the same effect. Both Marxism and the Internet have expansive, international aspects. For as down and dirty as the practicalities get — revolutions fought in the name of Marx, or the costly effects of cyberwar fought on the Internet — something aspirational springs forth. That idealistic component contributed to heightening
the public profile of Eldred v. Ashcroft, the case against the CTEA that went all the way to the Supreme Court.

Eric Eldred, a publisher and an early advocate of public-domain works, chaffed under the CTEA. Before its passage, he had planned to publish on the Internet a range of literary works that came in under the CTEA’s umbrella: documents still under copyright published before January 1, 1978. The essential pleading of his complaint alleged a constitutional violation of Article I, section 8. “Perpetuity by installment” became the leading phrase to explain the complaint. Lawrence Lessig offered his services to make oral arguments on behalf of the plaintiff. Filed originally in U.S. District Court in 1999, oral arguments before the Supreme Court were heard three years later. Almost a full twelve months after that, for a total of four years having passed while the law remained in effect, the Court in a 7-2 decision found for the government.

According to the majority, in an opinion written by Justice Ginsburg, Congress had the right to enact copyright law, including term extensions, so long as they did not violate the Constitution outright. Time will tell whether periodic extension acts will result in the plaintiff’s claim of “perpetuity by installment,” but at the moment a plain reading of the law did not explicitly speak to it. Concurring justices added separation of powers and stare decisis doctrines to the majority’s decision. No matter how much against public policy, or, as Eldred had originally argued, public trust the CTEA might have been, it was within Congress’s power to extend term limits. For the Supreme Court to say otherwise on the basis of the facts would interfere too much with the authority of Congress and upset the social order set by laws, even when, as many in the majority acknowledged, those laws are ill-considered and imperfect. With a court that usually divides down 5 to 4 lines, a 7-2 majority put the issue to rest, a sobering conclusion to an emerging public opinion about and interest in copyright.

Unlike the CTEA, which did not directly address digital content, the DMCA, promulgated in the same year, did. Two principal components make up the Act: a procedure for “notice and take down” of alleged infringing content, or the section 500 provisions; and the anti-circumvention provisions — a substantive addition to copyright law since the 1976 Act — found in section 1200.

Section 500 is a DMCA Officer’s bible. The DMCA contains four “safe harbor” provisions. Those provisions, if followed, act as a defense in the event that a copyright holder brings an infringement action subsequent to having followed the procedures outlined in this Act. Of course, what is unstated in this law is that it is a choice that the copyright holder is free to make. If, rather than sending a notice according to this law, a copyright holder goes directly to federal district court and commences an action, even pertaining to digital content, nothing in the DMCA will protect the defendant. There is no ultimate “safe harbor” based
on transmission of content on the Internet. Why, then, bother with this
procedural aspect of the law? Two overarching reasons account for it: First,
because the Internet would hardly be a world-historical phenomenon if it did
not underpin revolutionary changes in the production and transmission of the
commerce, communications, and content, the content industry had to find
some legal, procedural approach to address that arena and the exponential
volume of protected content it envelops.

Second, as commanding as the content industry was — and largely remains —
of the United States Congress, that industry implicitly acknowledged that in
some ways it had met its public policy match. The Clinton Administration, and
Vice President Al Gore in particular, acted as the midwife to a public Internet via
a number of laws that transferred its access from the government to the public.
In keeping with the hope that information technologies and the Internet would
reinvigorate the economy, Congress wanted to give the Internet every
opportunity to flourish. The 1996 Communications Decency Act section 230 is an
example. Notwithstanding successful First Amendment challenges to the
professionality aspect of that law, section 230, which provides immunity to
Internet Service Providers (ISP) for common torts such as defamation and libel,
remains in effect. Notably, the exception to that rule is “intellectual property.”
The trade-off, however, was that the content industry had to provide ISP some
cover. Section 500 of the DMCA accomplished that feat.

The key safe harbor of these provisions is the one for ISP, when acting in the
capacity of a “conduit.” In that role, the ISP cannot be “serving” content but
only in the act of transmitting it. The ISP does have the responsibility to
“terminate the user” of repeated infringements — a howler of legislative drafting
that is the epitome of a Freudian slip (the language should say something along
the lines of “terminate the account of the user of [with?] repeated infringers”), but
the legislation does not clarify how that term is defined or who has the
responsibility to determine that status. The other principal safe harbor is the one
with which many are more familiar: notice and take down. This one applies
when the ISP is also the server of content alleged to be infringing. If the ISP
sends a notice to the user and “expeditiously” removes the content from transit,
the ISP has an affirmative defense in the event that it is brought into an action
for infringement. When I began my position as Director of Information
Technologies Policy at Cornell in April of 2001, a lot of confusion existed in higher
education over the distinctions between these two different forms of safe
harbor. It was therefore one of the first tasks I set for myself in this new role: how
to distinguish the different statutory safe harbors in the legislation and how to
protect Cornell from liability.

Mine is as useful an odyssey as anyone else’s to share, given the wonderful and
strange journeys so many people in higher education information technology
took. At age 22 in 1981, the year I graduated from college, I had set higher education administration as my career goal. If anyone had suggested at the time that the role would be in information technology, I would have asked, "what’s that?" with innocent curiosity. Anything in technology hardly seemed up my alley as an undergraduate English literature and history major, with a doctorate in American history, and ultimately a law degree. But beneath the curriculum vita lay three undetected factors. The first was that science was my strength in high school, until a misbegotten math class ended that future path. The second was that by nature I am an innovator (or at least that is what all the personality tests, such as Meyers-Briggs, concluded), so using language skills in an area of science to translate new technological developments was a surprisingly natural fit. Finally, I was gratefully married to an electrical engineer for ten years. Through his association and generosity, I was the first in my law school class to be on the Internet when it opened to the public, and to have a laptop computer upon which I typed my notes. Professor Peter Martin, the inspired founder of the Legal Information Institute, modeled a segue from law to technology.

Professor Martin also bridged copyright from its meanings to me as an English major to someone who would translate that work for information technologies. I took his intellectual property class, which included copyright, trademark, patent, and trade secrets, because I wanted to understand how it was legal that J. D. Salinger stopped the publication of a 1986 biography. Copyright was at that time — I took the course in the fall of 1993 — a backwater area of law school curriculum. Not only was the course an elective, but the class was filled with engineering majors who suffered through copyright to get to patent. When I took the class, I thought it a throwback to my past. I had no notion it would become the gateway to a professional future.

University Counsel let me know that I would be assuming the duties of DMCA Officer for Cornell as I was settling into the IT Policy role. I was not entirely sure what that meant, even though my predecessor, Margie Hodges Shaw, had also functioned in that capacity and naturally enough, in Cornell's case, because both Margie and I had law degrees. Not so, however, for the many others at colleges and universities around the country who came to it straight from technology. Although connected immediately to EDUCAUSE (a nonprofit association whose mission is to advance higher education through the use of information technology), through a joint management of the Institute for Computer Policy and Law with Margie and Steve Worona (erstwhile of Cornell but recently moved to the EDUCAUSE Policy Office in D.C.), I was unsure about what the DMCA officer was supposed to do. So, with the help of Pat McClary, associate university counsel whose portfolio included copyright, I dove into a study of it. Thus the process for management of take-down notices that I
established in the fall of 2001 represented a fulfillment of my educational and career aspirations.

As a conduit ISP, Cornell was not legally liable for the infringing traffic between a computer serving content from somewhere on the Internet to one connected to its network, which it did not own or control, or vise versa. That was important information. Year 2001 represented the final moments before the Napster injunction shut down its network. It had been generating notices for two prior to that point. Meanwhile the pile of take-down notices that one of the guys manning the HelpDesk maintained electronically collected proverbial dust. I mulled that state of affairs while I established a campus-wide process to address those notices about which Cornell did have liability, i.e., content served from computers it owned and were connected to the network. I then turned my attention to the unattended pile of “conduit” notices.

Until or unless the university became aware that these notices were going to “repeat offenders,” we were not required to do anything. But I kept thinking about potential liability for remaining unaware. I did a search for case law on the subject; there wasn’t any that I could find, and I double-checked that conclusion with Patti, who confirmed it. The DMCA did not even define what “repeated” meant. No ISP had been found negligent under copyright law, or a state tort, for not tracking the notices to find repeat offenders. We did have cases of high-bandwidth users in those days, because of the varied quality of network connections to residence halls. Some users hogged bandwidth. Given finite amounts, their use choked others. Network administrators shaped the bandwidth to manage the traffic. Cornell’s first IT policy, promulgated in 1990 in the aftermath of the Robert Morris computer worm incident (see the chapter on Security for details), spoke directly to this point and reserved the university’s right to act on behalf of the community to restrict high end-users. But because Cornell also dedicated itself to not monitoring content, no assumptions were made about copyright in these cases.

Then the educator part of me kicked in. When I applied to graduate school in 1981 in American history, it was to follow an inspired professor I had had at the University of Rochester, Elizabeth Fox-Genovese, and to begin on my path to being a college administrator. I did not learn that I enjoyed teaching until required to do so, to satisfy graduate stipend requirements. From then on, I spent the better part of 15 years in classrooms. Something of that coaching sensibility remained with me and I applied it to these circumstances. Cornell could use the notice and take-down provisions of the DMCA to identify the users and instruct them on foundational tenets of law and technology.

How and in what ways Cornell educated users for whom it received take-down notices changed over time. At first, the IT department made arrangements with
the Judicial Administrator (JA). Progressive discipline allowed for the JA to first warn and instruct students on both the law and the use of their technology that put them in harm’s way. Repeat offenders would incur more discipline. With Patti’s oversight, Cornell set for itself the definition of “repeat” as three consecutive times (as opposed to “simultaneous,” since sometimes a student would receive several take-down notices at the same time). Their penance? A one-month suspension of wide-area network access, i.e., the Internet. (Local-area network access remained available so they could access the course-management system, library, and other materials for academic study.) A few years into this process two changes occurred. As the number of students who received DMCA notices multiplied, the JA became overwhelmed (and occupied with the rise in more serious adjudications). To meet with each student and to discuss the actions individually no longer remained feasible. Cornell had to find another approach for addressing first-time offenders. Also, a portrait of the typical students receiving the notices became clear. It was not, as might have been earlier assumed, the sophisticated students in computer science or engineering. On the contrary, those students tended to use means to obfuscate their role in infringing upon file sharing, largely by using the vast intranet that avoided the copyright holder’s Internet detection systems. Thus, it was the students who were less sophisticated technologically that were frequent targets. To meet both challenges, Cornell needed a standard educational program about digital copyright.

The program began with a five-page document that addressed the legal and technological aspects of file sharing. Hardly a scholarly work, it nonetheless functioned as a reasonably durable tool to inform students of the basics. Content owners targeted campus networks. Once installed, file-share programs functioned continuously, whether or not the user was actively engaged in an exchange. Distribution of content for which the user had neither ownership nor permission constituted infringement. Also, Cornell received notices for uploading only, not downloading. No “fair use” defense was possible under those circumstances, because it was being delivered out to other users. Infringement was actionable in both civil and criminal court. Statutory damages are really high, especially if calculated on the multiple functionality of a file-share program that runs continuously on Cornell’s high-speed network.

Calling upon Cornell’s modest distance education, for-profit subsidiary — eCornell — for delivery, and its in-house course developers for planning, we created a mini-course that included an exam set at a 75% pass rate. With that program, education remained at the forefront of Cornell’s efforts in the digital copyright field. The University’s Institute for Internet Culture, Policy and Law, a local variant of the nationally facing ICPL, brought in a number of speakers to talk about copyright, including Alan Davidson, formerly of the Center for Democracy & Technology; Steve McDonald, RISD (Rhode Island School of
Design) University Counsel and NACUA (National Association of College and University Attorneys) Fellow; and Miriam Nisbit, formerly of the American Library Association. We hosted a public debate on “file sharing” that attracted hundreds of students. And to top off all of these efforts, we held a nationally streamed panel discussion with no less than Carey Sherman, President of the RIAA (and Cornell alum); Dan French, legal counsel for the MPAA (Motion Picture Association of America); and Fred Von Lohmann of the Electronic Frontier Foundation.

That evening may have been the most memorable in all my Cornell administrator experience. Prior to the public discussion, we all met at Banfi’s restaurant in Cornell’s Statler Hotel for aperitivo. I ordered a fruity pinot noir to be served to our guests. It was delicious! By the time the speakers fanned out on the stage, everyone was in a good mood. And still students learned a lot. When Carey Sherman distinguished between the physical CD that a student could own and the “intellectual property” of its content, which the student did not, one could almost see a light bulb appear over the students’ heads. The politics of the RIAA’s positioning aside, it was what we all wanted that evening to be: not advocacy for one position or the other, not for or against “file-sharing” (stand-in word for “infringement” in those years), but information about copyright with which students could make their own decisions and form their own political positions. That copyright was a political topic was perhaps the most important, singular insight worth the pinot’s price.

As a leader in information technology policy, Cornell maintained a steady drumbeat against an industry that attempted to tarish higher education with the broad brush stroke of infringement. A couple of stories stand out. Around the time of the Congressional hearings on file-sharing and higher education in 2002, the ones that featured a near inquisition of several college and university presidents (including Graham Spanier of Penn State University), Vice President McClure embarked on a project internal to Cornell that had absolutely nothing to do with copyright or file-sharing: Network Usage-Based Billing (NUBB) system. A creative approach to the enterprise components of the university’s decentralized administration, NUBB attempted to level the playing field for Cornell’s unequal distribution of finances for network services across its fourteen colleges, some wealthy and from the endowed side of the university, and others from the state contractual colleges, which did not have the same resources. Some of the differences were visual. Walking anywhere around the Law School, for example, one never saw a stray network wire or cable. However, on a tour of the “Ag Quad,” which housed the College of Agriculture and Life Sciences, one could see cables weaved in and out of windows. “Hublets,” or little set boxes that stretched one connection to another, decorated both the inside and outside of the campus. The notion that instead of paying per “jack,” or network connection, a college would pay for its bandwidth use was not a
perfect solution; when the former Dean of Engineering, Kent Fuchs, became Provost, he almost immediately deployed his administrative position to dismantle the system as an affront to the research missions of the university. But set in its original context — as an approach grounded in fairness — it was an inspired move.

Imagine everyone’s surprise when RIAA President Carey Sherman announced to the press his alma mater said it was okay to infringe copyright so long as you paid for bandwidth! The wheels of public relations had obviously gone too far. Just as the music industry became the canary in the coal mine for all that the Internet would disrupt, the music industry caricatured higher education as the willful evil genius of copyright infringement. Sloppy public relations became a hallmark of the content industry. In 2007, EDUCAUSE’s Vice President of Policy, Mark Luker, forced the MPAA to disclose data behind the claim that U.S. colleges and universities made up 15% of all copyright infringement on the Internet, a figure widely touted in Congress and in messages that the content industry sent to campus leaders across the country. Many months later, after the impression had long been set at the 15% mark, the MPAA quietly announced that it had made a mathematical error. The number, according to their own data points, was 3%. As broadband replaced dial-up, and as so many more parts of the globe became connected, that number would continue to shrink. No matter. Picking on colleges and universities was good press. Content owners continued to make higher education pay for simply being present at the start with fast networks and an apt demographic. Smarting over its loss of profits and prestige, the content industry essentially bullied higher education into being its public relations foil.

Looking back over the history of these events, it is clear that public relations were the principal motivation behind the settlement-letter debacle. Launched in January of 2008, the campaign never made the RIAA a dime. But the intent of the campaign was not to make a profit. It was to prime the Congressional pump to insert file-share provisions into the Higher Education Act (HEA) Reauthorization, which was coming up for a vote later that year. From 1998, when these provisions went into law, until 2010, higher education institutions in their capacities as ISPs enjoyed the protection from claims of infringement so long as they acted as a “conduit.” The Higher Education Opportunity Act (HEOA) of 2008 fundamentally altered that status. In a bill designed originally to provide funding for college students, the content industry managed to push yet another legislator’s pen to include “file-share” provisions specific to their wants. The file-share provisions, which went into effect on July 1, 2010, require campus ISPs to take one of four actions: act on take-down notices; address high bandwidth users; throttle bandwidth; or filter content. Two of these actions were antiquated from the start. In the Shawn Fanning-Napster era, followed by other popular file-share programs such as Kazaa or LimeWire, high bandwidth usages could sometimes be associated with infringement. By the time FaceTime and
Netflix applications came into popular usage, that association was lost. High bandwidth usage became consistent with legal uses and was no longer a sure enough sign of infringement. Likewise, bandwidth throttling worked to take the proverbial edge off but was, and remains, a very primitive swipe at infringement. Contraindicated for higher education in general, this action was especially inimical for research institutions that often have programs that use extremely high bandwidth volumes for mission-related purposes. As has already been explained in the chapter on Free Speech, content filtering runs counter to the vast majority of U.S. colleges' missions, and has a complementary privacy component to network usage that this action would affect.

The content industry placed tremendous pressure on higher education in the years from 2002, when they coached Congress to hold veritable show trials simply because colleges were ISPs to a particular demographic, until 2008, when they pressured Congress to include file-share provisions into legislation designed to provide students with financial aid. In retrospect, higher education's enduring values ultimately circumscribed the content-industry's efforts. Industry leaders disgraced themselves, using higher education as their punching bag, while waiting for the market to shift — and money was what it was all about. When asked repeatedly why the music industry would not put its oeuvre online and sell it, Carey Sherman would lecture listeners, including me, on how difficult it would be to get all of the copyright stakeholders to agree on compensation. It is impossible to get them all together to agree, he would say; it just can’t be done, there’s no way to do it.

A Harvard Law graduate, Mr. Sherman is a very intelligent man. He would list songwriters, lyricists, musicians, and many more that all get their copyright cut. I appreciated the background education on the music industry, but I never believed him for a minute. It was a stall game. Representing the industry, Sherman had to use that tactic while his cohorts worked the angles with Steve Jobs and everyone else to get the right price. The iTunes Store began selling music as early as 2003, at the same time that Jobs released the iPod3, not coincidentally. Within a few more years — years that the content industry continued to spend untold millions on settlement-letter campaigns, lawsuits both in and outside of higher education, public relations debacles, and lobbying Congress — not only would there be multiple sources by which an individual could legally purchase digital content, but streaming would create a complementary market also. In the meantime, the content industry contributed to the creation of a generation of criminals. For all their high-minded talk about “stealing” and “ethics,” the content industry created a self-fulfilling prophecy. I do not absolve students. But nor do I demonize them for common file-sharing copyright infringements. I have never once file-shared a song, movie, game, or any infringing content. For some of my favorites, I have paid three and four times over for content. But I have also lost my taste, once quite enriched, for
music. I just can't seem to separate the industry from the music. Nor can I forgive them for modeling to students such brazen hypocrisy about ethics, intent, and a life lived with purpose. Finally, I cannot ignore the essential fact that they placed their profits above all else, including throwing the premier public service institution of American society — higher education — under the bus in the process.