

Cruel and Unusual Punishment

QED

The recording industry is a dinosaur.

Its existing business model—sponsoring artists' use of massive recording studios and packaging physical copies of their songs to distribute in retail outlets—is obsolete. New technology permits nearly free distribution of high-quality sound recordings over the Internet; what used to require millions of dollars of recording equipment now requires Apple's Garage Band and a few thousand dollars in instruments from Guitar Center.

I look forward to the day when record executives are destitute and there is no multibillion-dollar middleman between artists and fans.

But in the mean time, the recording industry's trade group, the Recording Industry Association of America, is mounting a campaign of fear and intimidation in the hopes of delaying the inevitable. It is pursuing legal action against the very people who purchase the albums and concert tickets that provide its bottom line. In instances where privacy and fair use rights get in the way, it has employed an army of lobbyists to change the law.

And now it has resorted to merely alleging copyright infringement on the basis of dubious information and demanding compensation, as it did to 26 Duke students forwarded "pre-litigation" letters last week. Regardless of whether the students are responsible for the alleged infringement (my column four weeks ago explained why it is highly questionable that they are), they are faced with a choice between paying a \$3,000-\$5,000 settlement or spending much more fighting a federal lawsuit.

A letter sent to a student read, "IF YOU DO NOT RESOLVE OUR CLAIMS AGAINST YOU WITHIN TWENTY (20) CALENDAR DAYS FROM THE DATE OF THIS LETTER, THEN WE WILL FILE SUIT AGAINST YOU IN FEDERAL COURT" [emphasis theirs].

Such efforts to intimidate students are the part of a narrowly targeted campaign that, in any criminal court, would amount to selective prosecution. The latest round of settlement letters were sent only to college students, and then only to students at 16 schools. Seven of those schools are in the Ivy League, two (Duke included) are other prestigious private universities, and the remaining seven are top-tier public universities.

This was no accident.

Our respective schools are prestigious enough that whatever happens to us will prompt news coverage of the RIAA's efforts. Our respective students are young enough to be fazed by a legal threat from the recording industry but are largely from families wealthy enough to shoulder the burden of the offered settlements. And most importantly, our respective universities are docile enough to cooperate with the RIAA.

So far, Duke has both forwarded e-mail pre-litigation notices and sent physical packages of “evidence” to students whose computer addresses were flagged by the RIAA. If the students refuse to identify themselves and settle prior to Dec. 11, it is almost certain that the RIAA will serve subpoenas on the University for their personal identifying information. When that happens, the University has said it will release the students’ names and subject them to litigation, as it did without objection in the case of six students over the summer.

“We need to be assertive in educating students about the importance of protection of intellectual property, and we would not necessarily challenge the process,” said Vice President for Student Affairs Larry Moneta.

Duke’s cooperation has also involved a near-complete abandonment of the students being targeted. Several targeted students who wish to remain anonymous asked Moneta and the University Counsel’s office to make two minimal requests of the RIAA: that the settlement deadline be extended past exam week, and that the settlement offers be adjusted for students on financial aid.

The University’s response: “For the University to be active in requesting deviation just engages the University more in this process than we choose to be,” said Moneta.

What Moneta and other administrators fail to recognize, however, is that this issue is far more complex than the moral question as to whether downloading songs is stealing and the legal question as to whether copyright infringement occurred.

It boils down to this: do the merits of the RIAA’s narrowly targeted campaign to protect its copyrights warrant the cooperation of the University? And should Duke cooperate to the extent that it will abandon its students, act as a conduit for dubious legal threats and willingly release private information about students’ use of the University network?

The response of Harvard Law faculty went something like this (reproducing the directness of the RIAA’s threats): N-O. GO F— YOURSELF.

Since Harvard faculty published op-eds in *The Harvard Crimson* and several national newspapers decrying the RIAA’s “deterrence and education initiatives” and pledged to defend targeted students, Harvard has not received a single pre-litigation letter or been served a single subpoena. And as with Harvard, the RIAA has been reluctant to target users of commercial Internet service providers, which have successfully fought for the privacy rights of their customers.

In *RIAA v. Verizon*, the Court of Appeals for the District of Columbia Circuit invalidated subpoenas issued under the Digital Millennium Copyright Act, protecting individual Internet users from legal threats without a showing of probable cause. In a

2003 *amici* brief on the case, lawyers for the American Civil Liberties Union and the Electronic Frontier Foundation wrote, “the mere *allegation* of unlawful behavior by a private party has *never* sufficed to abrogate the First Amendment rights of speakers and should not suffice to eliminate the privacy rights of ordinary Americans.”

So I say this now to Duke’s Office of Legal Counsel, the faculty of the Law School, Student Affairs and the Office of Information Technology: Twenty-six (and likely many more in the future) of your students deserve more than this. Recognizing the illegality of copyright infringement does not necessitate throwing them under a bus.

For a guide on how to (legally) shield your computer from inspection by the RIAA, go to <http://www.duke.edu/~egw4/>.

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