

Date: May 12, 2008

Re: **“Folder-based” vs. “transmission-based” DMCA notices**

As part of our investigation into the recent "spike" in DMCA notifications sent to campuses by the RIAA, EDUCAUSE has learned some details we believe will be of importance to many in the higher education community.

In particular, we've learned that DMCA notices are frequently triggered by the presence in a "shared folder" of a file whose distribution from that shared folder would be unauthorized, rather than by observation of an actual unauthorized transmission of such a file. For simplicity, we'll call these "folder-based" and "transmission-based" DMCA notices.

We are told that the RIAA's DMCA notices are almost completely folder-based, and have been so for many years. (The exception is BitTorrent, where actual transmissions do play a role in the process.) The RIAA says they believed campuses were aware of this but, based on conversations with IT staff from around the higher education community, we know that many campuses were not.

The distinction between folder- and transmission-based infringement claims is important to campuses for a variety of reasons:

1- Confirmation. Upon receipt of a DMCA notice, some campuses use resources such as NetFlow logs to "sanity check" the data included in the notice, attempting to confirm that the claimed infringement was consistent with recorded network activity at the indicated time. Network activity characteristic of a folder-based infringement claim is radically different from network activity characteristic of a transmission-based claim.

2- Judicial charges. In response to a DMCA notice, some campuses initiate formal or informal judicial charges against the individual associated with the identified IP address, apply administrative penalties, or notify the individual and log the complaint for possible future action. In order to appropriately carry out these and other related processes -- and to best capture the "teachable moment" -- the campus must know whether the notice is folder- or transmission-based.

3- Repeat notifications. We are told that the RIAA will not generally send multiple notices based on the presence of a particular file in a particular shared folder on a particular machine. If the IP address of such a machine changes, however -- as is the norm in DHCP-based networks -- it may appear to the RIAA that multiple folder-based infringements have occurred, and multiple notices for the same file on the same machine may be generated.

4- Network filters. Some systems -- such as Audible Magic -- attempt to block transmission of nominally infringing content but do not attempt to block visibility of files in shared folders. Such systems might thus be expected to lower the number of transmission-based notices but would have little or no effect on folder-based notices.

In considering how these observations impact your campus, note the following:

- This message applies only to the RIAA's processes, not those of the MPAA or other content owners. Further, while the RIAA has stated that their DMCA notices are folder-based, they stress that their Early Settlement Letters and lawsuits are transmission-based.

- EDUCAUSE takes no position at this time as to whether the presence of a file in a "shared folder" does or does not constitute copyright infringement. Different courts have rendered different opinions on this so-called "making available" theory, most recently rejecting the theory on April 29 in *Atlantic v Howell* (<http://www.eff.org/deeplinks/2008/04/big-victory-atlantic-v-howell-court-rejects-making>).

- EDUCAUSE also takes no position as to whether it is or is not appropriate for campuses to impose judicial or other sanctions against community members based solely on folder-based infringement claims.

EDUCAUSE and our members take copyright infringement seriously, with campus policies and practices going far beyond what the law requires and far beyond those of commercial ISP's. Without a clear understanding of how DMCA notices are generated, campuses cannot implement their policies appropriately, and so we will continue to seek clarification on these details from the entertainment industry.

We note in closing that the distinction between folder- and transmission-based infringement has no direct bearing on the recent "spike" in DMCA notifications. The RIAA affirms that the spike is due not to an increase in infringing activity on campus networks, but simply to changes in the mechanism used to detect and report the presence of files in shared folders. The number of DMCA notices received by any campus thus cannot be meaningfully correlated with the amount of actual infringement taking place on the campus network. For this reason, EDUCAUSE believes that counting DMCA notices is a completely inappropriate measure of success in combating infringement and an equally inappropriate basis for comparing the amount of infringement taking place campus-to-campus or year-to-year.