

MEMORANDUM

To: Chief Information Officers and Other Interested Parties

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Date: August 11, 2008

Re: HEOA Requirements and Next Steps Related to Peer-to-Peer (P2P) File Sharing on College and University Networks

Congress recently passed H.R. 4137, the Higher Education Opportunity Act ("HEOA" or the "Act"), a massive piece of legislation to reauthorize the Higher Education Act that the President will soon sign into law.

This legislation imposes an array of new federal regulatory and reporting requirements for colleges and universities. Two of these provisions are designed to reduce illegal uploading and downloading of copyrighted works through peer-to-peer (P2P) file sharing on campus networks. These and many other provisions of the Act go into effect when the President signs the bill. Institutions must take their obligations under the Act seriously and make a good faith effort to comply – as they would with any new federal law. But the law is unclear in certain respects, and ambiguities will need to be clarified through the regulatory process.

What the Law Will Require

First, institutions will be required to make an annual disclosure that informs students that the illegal distribution of copyrighted materials may subject them to criminal and civil penalties and describes the steps that institutions will take to detect and punish illegal distribution of copyrighted materials. Many institutions already provide such information to students.

Second, institutions will be required to certify to the Secretary of Education that they have developed plans to "effectively combat" the unauthorized distribution of copyrighted material. The law does not require the Secretary to collect these plans, nor is the Secretary given the authority to review or approve them. In developing these plans, institutions are required to consider the use of technology-based

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deterrents. Report language that accompanies the law explicitly states that technology-based deterrents include “bandwidth shaping” and “traffic monitoring to identify the largest bandwidth users,” and indicates that certain education and enforcement programs will also qualify. The report language explicitly notes that institutions are **not** required to adopt any particular type of technology-based deterrent, recognizing that even institutions that “prohibit content monitoring” retain the authority to determine their own plans.

Third, “to the extent practicable,” institutions will be required to offer alternatives to illegal file sharing. Both the practicality and selection of alternatives are to be determined by the institution “in consultation with the chief technology officer or other designated officer of the institution.” This is **not** an absolute mandate that institutions offer legal alternatives, but it does mean such alternatives must be carefully considered. By no means does the Act require institutions to offer students free music or videos through legal channels.

What Happens Next

The illegal file-sharing provisions are subject to negotiated rulemaking, which will require (1) a series of regional meetings where public comment is solicited; (2) the publication of draft regulations, which includes a period for public comment; and (3) the publication of final regulations.

In addition, these provisions are subject to the Department of Education’s “Master Calendar,” which requires regulations to be finalized before November 1 of a given calendar year in order to take effect the following July 1. Thus, if the Department’s regulations are finalized by November 1, 2009, the regulations would become effective on July 1, 2010.

What You Should Do Now

As with prior Higher Education Act reauthorizations, the Department of Education is tasked with interpreting and administering the law through regulations. How the Department will interpret and administer the new provisions will be unclear until it issues regulations that address what institutions must do to comply. **Until that happens, as long as an institution acts in good faith and makes a reasonable effort to do what the law seems to require, it appears highly unlikely that the Department will attempt to enforce the provisions.**

As implementation of HEOA begins, we urge you to continue and to expand, as appropriate, your efforts to combat illegal peer-to-peer file sharing. In addition, we strongly urge you to take part in the public discussion of these provisions and participate in the regulatory process to ensure that the Department of Education considers your views when it implements the new requirements.

We will continue to share information with you about the development of these regulations and advise you on how to contribute to that effort.

Enclosure

by demanding documentation that does not exist, or is not readily available, at the time of readmission.

“(6) NO CHANGE IN ACADEMIC STATUS.—A student who is readmitted to an institution of higher education under this section shall be readmitted with the same academic status as such student had when such student last attended the institution of higher education.

“(d) EXCEPTION FROM READMISSION ELIGIBILITY.—A student’s eligibility for readmission to an institution of higher education under this section by reason of such student’s service in the uniformed services terminates upon the occurrence of any of the following events:

“(1) A separation of such person from the Armed Forces (including the National Guard and Reserves) with a dishonorable or bad conduct discharge.

“(2) A dismissal of such person permitted under section 1161(a) of title 10, United States Code.

“(3) A dropping of such person from the rolls pursuant to section 1161(b) of title 10, United States Code.”

SEC. 488. INSTITUTIONAL AND FINANCIAL ASSISTANCE INFORMATION FOR STUDENTS.

(a) INFORMATION DISSEMINATION ACTIVITIES.—Section 485(a) (20 U.S.C. 1092(a)) is amended—

(1) in paragraph (1)—

(A) in subparagraph (G)—

(i) by striking “program, and” and inserting “program,”; and

(ii) by inserting “, and (iv) any plans by the institution for improving the academic program of the institution” after “instructional personnel”; and

(B) by striking subparagraph (M) and inserting the following:

“(M) the terms and conditions of the loans that students receive under parts B, D, and E;”;

(C) in subparagraph (N), by striking “and” after the semicolon;

(D) in subparagraph (O), by striking the period and inserting a semicolon; and

(E) by adding at the end the following:

“(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;

“(D) other strategies identified by the Secretary.

“(2) TECHNICAL ASSISTANCE PROVIDED.—The Secretary shall provide technical assistance to States and public institutions of higher education for the purposes of developing and implementing articulation agreements in accordance with this subsection.

“(3) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to authorize the Secretary to require particular policies, procedures, or practices by institutions of higher education with respect to articulation agreements.”.

SEC. 493. PROGRAM PARTICIPATION AGREEMENTS.

(a) PROGRAM PARTICIPATION AGREEMENT REQUIREMENTS.—

(1) VOTER REGISTRATION; 90-10 RULE; CODE OF CONDUCT; DISCIPLINARY PROCEEDINGS; PREFERRED LENDER LISTS; PRIVATE EDUCATION LOAN CERTIFICATION; COPYRIGHTED MATERIAL.—

(A) AMENDMENT.—Section 487(a) (20 U.S.C. 1094(a)) is amended—

(i) in paragraph (23)—

(I) by moving subparagraph (C) two ems to the left; and

(II) by adding at the end the following:

“(D) The institution shall be considered in compliance with the requirements of subparagraph (A) for each student to whom the institution electronically transmits a message containing a voter registration form acceptable for use in the State in which the institution is located, or an Internet address where such a form can be downloaded, if such information is in an electronic message devoted exclusively to voter registration.”; and

(ii) by adding at the end the following:

“(24) In the case of a proprietary institution of higher education (as defined in section 102(b)), such institution will derive not less than ten percent of such institution’s revenues from sources other than funds provided under this title, as calculated in accordance with subsection (d)(1), or will be subject to the sanctions described in subsection (d)(2).

“(25) In the case of an institution that participates in a loan program under this title, the institution will—

(A) develop a code of conduct with respect to such loans with which the institution’s officers, employees, and agents shall comply, that—

“(i) prohibits a conflict of interest with the responsibilities of an officer, employee, or agent of an institution with respect to such loans; and

“(ii) at a minimum, includes the provisions described in subsection (e);

(B) publish such code of conduct prominently on the institution’s website; and

(C) administer and enforce such code by, at a minimum, requiring that all of the institution’s officers, employees, and agents with responsibilities with respect to such loans be annually informed of the provisions of the code of conduct.

“(26) The institution will, upon written request, disclose to the alleged victim of any crime of violence (as that term is defined in section 16 of title 18, United States Code), or

a nonforcible sex offense, the report on the results of any disciplinary proceeding conducted by such institution against a student who is the alleged perpetrator of such crime or offense with respect to such crime or offense. If the alleged victim of such crime or offense is deceased as a result of such crime or offense, the next of kin of such victim shall be treated as the alleged victim for purposes of this paragraph.

“(27) In the case of an institution that has entered into a preferred lender arrangement, the institution will at least annually compile, maintain, and make available for students attending the institution, and the families of such students, a list, in print or other medium, of the specific lenders for loans made, insured, or guaranteed under this title or private education loans that the institution recommends, promotes, or endorses in accordance with such preferred lender arrangement. In making such list, the institution shall comply with the requirements of subsection (h).

“(28)(A) The institution will, upon the request of an applicant for a private education loan, provide to the applicant the form required under section 128(e)(3) of the Truth in Lending Act (15 U.S.C. 1638(e)(3)), and the information required to complete such form, to the extent the institution possesses such information.

“(B) For purposes of this paragraph, the term ‘private education loan’ has the meaning given such term in section 140 of the Truth in Lending Act.

“(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.”

(B) EFFECTIVE DATE.—The amendment made by subparagraph (A) with respect to section 487(a)(26) of the Higher Education Act of 1965 (as added by subparagraph (A)) shall apply with respect to any disciplinary proceeding conducted by an institution on or after the day that is one year after the date of enactment of this Act.

(b) AUDITS; FINANCIAL RESPONSIBILITY; ENFORCEMENT OF STANDARDS.—Section 487(c)(1)(A)(i) (20 U.S.C. 1094(c)(1)(A)(i)) is amended by inserting before the semicolon at the end the following: “, except that the Secretary may modify the requirements of this clause with respect to institutions of higher education that are foreign institutions, and may waive such requirements with respect to a foreign institution whose students receives less than \$500,000 in loans under this title during the award year preceding the audit period”.

(c) IMPLEMENTATION OF NON-TITLE IV REVENUE REQUIREMENT; CODE OF CONDUCT; INSTITUTIONAL REQUIREMENTS FOR TEACH-OUTS; INSPECTOR GENERAL REPORT ON GIFT BAN VIOLATIONS; PREFERRED LENDER LIST REQUIREMENTS.—Section 487 (20 U.S.C. 1094) is further amended—

The House bill contains no similar provision.

The House recedes.

Section 487. Readmission Requirements for Service Members.

The House bill requires any institution of higher education that requires a student, who is a member of the Armed Forces or a member of the Armed Forces in retired status, whose attendance is interrupted by a call or order to active duty to subsequently reapply for readmission at the time of the conclusion of active duty to justify this requirement in writing to the Secretary.

The Senate amendment contains no similar provision.

The Senate recedes with an amendment to establish a standard process for students who are required to leave an institution because they have been called to active duty to re-enroll at the institution in the same academic standing the student had before leaving the institution. Such process is modeled after the process established for servicemembers to return to employment after serving on active duty in the Uniformed Services Employment and Reemployment Rights Act.

Section 488. Institutional and Financial Assistance Information for Students.

The Senate amendment requires each institution of higher education to make available to current and prospective students information about its plans for improving the academic program of the institution of higher education.

The House bill contains no similar provision.

The House recedes with an amendment to make a technical change.

The Senate amendment alters the requirement that institutions make available to current and prospective students the terms and conditions under which students receive Federal Family Education Loan and Direct Loan to also include Perkins Loans.

The House bill contains no similar provision.

The House recedes.

The Senate amendment and the House bill require institutions to make available to current and prospective students the institution of higher education's policies and sanctions related to copyright infringement, including a description of actions taken by the institution of higher education to detect and prevent the unauthorized distribution of copyrighted materials on the institution of higher education's technology system.

Both the Senate and the House recede with an amendment to replace language in (iv) with language requiring institutions to make available the development of plans to detect and prevent unauthorized distribution of copyrighted material on the institution of higher education's information technology system which shall, to the extent practicable, include offering alternatives to illegal-downloading or

peer-to-peer distribution of intellectual property, as determined by the institution of higher education in consultation with the Chief Technology Officer or other designated officer of the institution.

The Conferees have combined elements from both bills to require institutions to advise students about this issue and to certify that all institutions have plans to combat and reduce illegal peer to peer file sharing.

Experience shows that a technology-based deterrent can be an effective element of an overall solution to combat copyright infringement, when used in combination with other internal and external solutions to educate users and enforce institutional policies.

Effective technology-based deterrents are currently available to institutions of higher education through a number of vendors. These approaches may provide an institution with the ability to choose which one best meets its needs, depending on that institution's own unique characteristics, such as cost and scale. These include bandwidth shaping, traffic monitoring to identify the largest bandwidth users, a vigorous program of accepting and responding to Digital Millennium Copyright Act (DMCA) notices, and a variety of commercial products designed to reduce or block illegal file sharing.

Rapid advances in information technology mean that new products and techniques are continually emerging. Technologies that are promising today may be obsolete a year from now and new products that are not even on the drawing board may, at some point in the not too distant future, prove highly effective. The Conferees intend that this Section be interpreted to be technology neutral and not imply that any particular technology measures are favored or required for inclusion in an institution's plans. The Conferees intend for each institution to retain the authority to determine what its particular plans for compliance with this Section will be, including those that prohibit content monitoring. The Conferees recognize that there is a broad range of possibilities that exist for institutions to consider in developing plans for purposes of complying with this Section.

Numerous institutions are utilizing various technology based deterrent in their efforts to combat copyright infringement on their campuses. According to a report of the Joint Committee of the Higher Education and Entertainment Communities, many institutions of higher education have taken significant steps to deal with the problem. Indiana University, for example, hosts an extensive "Are you legal?" educational campaign for students on the issues, and enforces campus policies on proper use of the network. It acts on DCMA notices by disconnecting students from the network and requires tutorials and quizzes to restore service. Second offenders are blocked immediately and are sent to the Student Ethics Committee for disciplinary action.

Audible Magic's CopySense Network Appliance provides comprehensive control over Peer-to-Peer (P2P) usage on a university's network. The CopySense Appliance identifies and blocks illegal sharing of copyrighted files while allowing other legitimate P2P uses to continue. It filters copyrighted P2P content by sensing an electronic fingerprint unique to the content itself, which is very similar to the way virus filters operate.

Red Lambda's "Integrity" is a network security solution dedicated to the management of file-sharing activities via protocols like P2P, IM, IRC, and FTP. This technology is able to detect all P2P, OS

file-sharing, FTP, IM, proxy use, Skype and application tunneling over HTTP, HTTPS, DNS and ICMP protocols.

The University of Maryland, College Park, severely restricts bandwidth for residential networks and block certain protocols. It designed “Project Nethics” to promote the responsible use of information technology through user education and policy enforcement. A third violation can result in eviction from the university housing system. Montgomery College in Maryland enforces an Acceptable Use Policy on its wired and wireless networks.

Additional existing technological approaches can deter illegal file sharing by automatically processing notices sent by scanning vendors then taking actions such as messaging the user via browser redirection, applying the appropriate sanction and automatically re-enable browsing after a timeout or reconnect fee is paid. Other institutions use technology to appropriately manage their campus networks by limiting and/or shaping bandwidth, such as Packeteer’s packet shaping technology.

The Senate amendment requires institutions to make available to current and prospective student's information on student body, diversity, the placement in employment and types of employment obtained by graduates, the institutions report on fire safety, and the retention rate of certificate or degree-seeking, full-time undergraduate students.

The House bill contains no similar provision.

The House recedes.

The House bill requires institutions to make available to current and prospective students their policies regarding meningococcal vaccinations.

The Senate amendment contains no similar provision.

The Senate recedes with an amendment to clarify that institutions shall disclose policies on all vaccinations, not only meningococcal vaccinations. The Conferees note that institutions of higher education should have a policy on vaccinations of students. Of particular concern are the recent outbreaks of meningitis on college campuses. The Center for Disease Control's Advisory Committee on Immunization Practices has reported that college freshmen, especially those who live in dormitories, are at a modestly increased risk for meningococcal disease compared with other persons of the same age. There are nearly 3,000 cases of meningococcal disease every year in the U.S. According to the Centers for Disease Control and Prevention between ten and twelve percent of the cases are fatal (about 300 to 360). Among those who survive meningococcal disease, approximately twenty percent suffer long-term consequences, such as brain damage, kidney disease, hearing loss or limb amputations.

The Senate amendment and the House bill allow an institution of higher education to adjust the calculation of completion and graduation rates for certain students. Under the Senate amendment and the House bill, if the number of students who leave school to serve in the Armed Forces, on official church missions, or with a recognized foreign aid service of the Federal government represent more twenty percent or more of certificate- or degree-seeking, full-time undergraduate students, the institution of higher education may exclude the time such students were not enrolled from the calculation.