

HEA Reauthorization Set to Become Law with Modified File Sharing Provisions

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President Bush on August 14 signed into law the Higher Education Opportunity Act (the HEOA), culminating a multiple year process of reauthorizing the Higher Education Act of 1965. The HEOA contains a controversial provision (Section 493) to address illegal peer-to-peer (P2P) file sharing on university campuses. The text of the new law is available at:

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h4137enr.txt.pdf.

Two of the main proponents of Section 493 are the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA). RIAA Chairman & CEO Mitch Bainwol applauded the passage of the HEOA stating that “When schools become proactive and adopt a comprehensive approach to the abuse of their networks, that means fewer students engage in illegal file sharing and are forced to face legal consequences. That’s a win-win-win for students, universities and the entertainment community.” Full text of MPAA’s statement is available at:

http://www.mpa.org/press_releases/hea%20passage_d2.pdf. Full text of RIAA’s statement is available at: <http://www.riaa.com/newsitem.php?id=E9D69049-8C13-9F8D-E488-1401A8ECB617>.

The P2P provisions gained momentum after MPAA conducted a study in May 2006 entitled “The Cost of Movie Piracy” which concluded that illegal P2P activities on campuses account for \$197 million in lost revenues to the industry, or only 15% of the total estimated losses. Many in the higher education community challenged the validity of the study and earlier this year MPAA conceded that its yet to be publicly released study was factually flawed. Nonetheless, notwithstanding higher education associations’ lobbying efforts, Congress acquiesced to MPAA’s and RIAA’s urging to impose new burdensome and potentially costly requirements on colleges and universities albeit in a form different than the language originally sought by MPAA and RIAA and somewhat watered down from the version that previously had passed the House of Representatives.

The HEOA imposes two significant responsibilities on institutions with the intent to reduce illegal file sharing on campus Internet networks. First, institutions are required to “certify” that they have developed technology-based plans to “combat the unauthorized distribution of copyright material.” Second, they are required to “offer alternatives” to illegal file sharing or P2P distributions “to the extent practicable.”

Pages 115-117 of the Conference Committee report that released with HR 4137 clarifies what Congress intended by these requirements. The report is available at:

http://help.senate.gov/Hearings/2008_07_29_E/2008_07_29_E.html. MPAA plans to send information booklets to universities suggesting ways to comply with the bill’s requirements. More significantly, Educause, ACE, NASULGC and AAU have published a memorandum (<http://net.educause.edu/ir/library/pdf/epo0815.pdf>) summarizing the requirements of the P2P provisions, what will happen next and what institutions should be doing now.

The first requirement is less burdensome than originally proposed. The Conference Committee report clarifies that any number of technological deterrents, such as “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” are sufficient to satisfy this requirement. The report makes clear that the institution is given the discretion to determine the appropriate policy and select and implement the necessary technological changes. Colleges and universities are permitted to develop policies prohibiting content monitoring.

The second requirement is stronger than initially proposed. Institutions must “certify” that they “will offer alternatives” to illegal file sharing. The Conference Committee report suggests numerous ways to fulfill this requirement. For example, institutions can contract to provide legal file sharing services to students, they can provide links to legal file sharing services, or develop their own service. The report emphasizes the fact that the policy is flexible and can be satisfied by a wide range of different procedures. Significantly, Section 493 only requires institutions to provide alternatives “to the extent practicable.” This allows institutions to make judgments based on their particular assessment about the extent of the alternatives they wish to implement. Earlier versions of the provision only required institutions to “plan” for offering alternatives; however, Section 493 mandates that institutions “will” offer alternatives.

Another provision, Section 871, authorizes the Secretary of Education to make grants to help institutions develop “cost-effective technological solutions, to reduce and eliminate the illegal downloading and distribution of intellectual property.” Institutions can also use the grants to develop educational programs aimed to reduce illegal file sharing. The Department of Education is charged with developing the details of the application process, which will begin in fiscal year 2009.

Some have voiced concerns that the language requiring institutions to offer alternatives to illegal file sharing will require them to enter into a contract with Napster or other commercial P2P services. Mark Luker of EDUCAUSE, however, states that the language allows institutions to develop their own P2P system as an alternative to the commercial services. The full text of Mr. Luker’s statement is available at: <http://net.educause.edu/ir/library/pdf/epo0813.pdf>. However, Mr. Luker noted in the Chronicle of Higher Education that students often reject such institutionally developed alternatives because of poor music selection or incompatibility with iPods or similar devices. Mr. Luker observed that “it is particularly disappointing that Congress has chosen to target us with expensive and futile unfunded mandates aimed at dealing with a problem we did not create and cannot solve.” Mr. Luker’s statement to the Chronicle is available at: <http://chronicle.com/weekly/v54/i48/48a01901.htm>.

Additionally, much of the technology endorsed by the Conference Committee report is very expensive. The report specifically recommends the use of Audible Magic’s CopySense Network Appliance and Red Lambda’s “Integrity” program. The higher education associations had hoped to avoid requirements to purchase these, or similar, products because of the high cost of implementing and maintaining them and the relative ease of defeating them.

The Conference Committee report also highlights the actions of some schools as examples of appropriate steps to take. The report specifically cites the actions of the University of Maryland, College Park and its “Project Nethics” that “severely restricts bandwidth for residential networks and block[s] certain protocols.” Under that policy, a third violation can result in eviction from the on-campus housing system. In addition, the report recommends “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.”

Institutions should immediately begin to develop a plan to implement technology-based deterrents to illegal file sharing and identify alternatives to illegal file sharing, either through a commercial service or a university provided service. Although there are a variety of options available to colleges and universities, those options will likely be expensive and burdensome. It is important that institutions take the necessary steps to comply with the mandates of HEOA.

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