

THINGS YOU SHOULD KNOW ABOUT... the P2P PROVISIONS of the HEOA

Scenario

When the Department of Education released its regulations for enforcement of the P2P provisions of the Higher Education Opportunity Act (HEOA), the CIO at a large public university in the Midwest delegated responsibility for ensuring compliance to Walter, the deputy CIO. Walter hadn't paid close attention to the rulemaking process while it was taking place, and he was anxious about what he feared would be a difficult task. He was keenly aware of the friction that had developed over the issue of copyright infringement, and plenty of students at the university had received DMCA notices alleging illegal sharing of files on the institution's network. Walter also understood that the stakes were high—should the institution be found noncompliant, it could lose federal funding.

As Walter began educating himself about the regulations, he was relieved to see that the first rule requires the university to make specific disclosures to students regarding copyright law, the possible penalties for violations, and campus policies. By and large, this requirement was already being addressed by an IT orientation that all incoming students had to complete before being allowed access to the network.

Another rule, however, gave Walter pause. It requires the institution to document and implement a plan that includes one or more “technology-based deterrents” to “effectively combat” unauthorized distribution of copyrighted material. The regulations include a list of such deterrents, and Walter worried that the IT department would need to acquire a new product and make sure it worked well with all of the existing systems. When he looked closer, however, he saw that the university's existing bandwidth shaping tool would satisfy the regulation. The regulations don't fundamentally change what the university was already doing, but they require documentation. Walter was also glad to learn that the regulations do not require a complete elimination of violations but rather a reduction in their frequency. In the end, Walter came to understand that the HEOA makes no changes to copyright law; instead, it sets new standards for colleges and universities to demonstrate their efforts—many of which are already in place—aimed at educating users and respecting intellectual property.

1 What is it?

The Higher Education Opportunity Act (HEOA), signed into law in August 2008, was the first major revision in a decade of the Higher Education Act of 1965. The subsequently negotiated regulations for implementing the act introduce new requirements for institutions of higher education to address the issue of unauthorized distribution of copyrighted material on their networks. These P2P provisions of the HEOA do not change copyright law. Rather, they add a new set of responsibilities that—because the HEOA concerns colleges and universities—do not apply to providers of other networks, such as commercial ISPs. The rules for enforcing the law outline three primary compliance requirements: an *annual disclosure* to students that describes copyright law and the school's policies and sanctions for dealing with violations; a *written and implemented plan* to “effectively combat” on-campus network copyright abuse by using “one or more technology-based deterrents”; and agreement to *offer alternatives to illegal downloading*. The language of the regulations provides a great deal of latitude for compliance, and institutions should ensure that they clearly understand the law and how best to follow it. All colleges and universities seeking continued eligibility for Title IV funds—largely student financial aid—through the Department of Education must comply with the new provisions by July 1, 2010.

2 How does it work?

The *annual disclosure* part of the regulation consists of three parts. The first requires institutions to explicitly tell students that unauthorized distribution of copyrighted material is illegal and exposes them to civil and criminal penalties. Second, institutions must provide students with a statement detailing the nature of the penalties for infringement. Because there's no reason each campus should come up with its own rewrite of federal copyright law, the Department of Education is producing a standardized version, to be available by July 1 and inserted into the *Federal Student Aid Handbook*. The third is an institutional statement describing its own policies and penalties, which would cover any disciplinary actions imposed on students who participate in unauthorized distribution of copyrighted material using the institution's IT system.

Implementation of each school's *plan to combat infringement* is the most complex of the P2P rules. The plan must address infringing activity by utilizing one or more “technology-based deterrents.” Quoting a congressional report, the regulations specify four such deterrents: bandwidth shaping; traffic monitoring to identify the largest bandwidth users; a vigorous program that accepts and responds to Digital Millennium Copyright Act (DMCA) notices of infringement; and implementation of any of a variety of commercial products that are designed to reduce or block illegal file sharing. All types of technology-based deterrents are legitimate in meeting this requirement, and each institution has discretion for which it

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chooses. Additionally, each campus must periodically review its plan. Here, again, institutions are allowed to determine which criteria they will use for this assessment; the stated position of Congress and the Department of Education is that colleges and universities are in the best position to make such determinations. Criteria might, for instance, include recidivism rates—how many repeat offenders a campus has—or the number of DMCA notices an institution receives.

The Department of Education stated that the final condition—to offer alternatives to illegal downloading—is met by providing students with a current list of such legal alternatives. EDUCAUSE has developed a list of such options.

3 Who's doing it?

After the HEOA was signed into law, a 10-month rulemaking process—which included representatives of the entertainment industry, EDUCAUSE (acting on behalf of higher education), and the Department of Education—produced the rules for enforcing compliance with the law. Although most colleges and universities were already taking various steps to limit infringing activity on their networks, the significance of the regulations was to provide a codifying and clarifying framework for compliance. With the new rules in place, institutions have specific guidelines for ensuring that their efforts to address copyright violations are appropriate and sufficient in the eyes of the Department of Education, and the financial-aid eligibility criterion provides an incentive for virtually all institutions to comply with the regulations.

4 Why is it significant?

Institutions of higher education have always taken seriously their responsibility to educate students about intellectual property laws and the consequences of violations. The P2P provisions of the HEOA set a higher bar for compliance than copyright law does, and they provide a consistent framework for campuses to document the efforts that they make in this regard. As the product of a thorough rulemaking process, the regulations used to enforce the law represent the combined efforts of the higher education community and entertainment industries. These regulations, which currently apply only to higher education, are being considered as a model for similar rules that would cover commercial ISPs.

5 What are the downsides?

Although virtually every institution already has policies and procedures in place to address illegal file sharing, the mandates in the HEOA likely represent an adjustment to at least some of those measures and are certainly an administrative task that will consume resources that could be applied elsewhere. Moreover, without a clear understanding of the law, the latitude provided for how each campus chooses to comply with the regulations can result in misunderstandings. One common misconception is that employing a “technology-based deterrent” requires institutions to purchase some sort of commercial product. This is not the case, and even for campuses that decide to obtain a commercial product to meet this regulation, there is no requirement that any specific product or type of product be included in an institution's plan.

Another frequent misinterpretation is that the requirement to “effectively combat” copyright infringement means that colleges and universities must completely eliminate unauthorized activity on their networks. Rather, what's at issue is whether an institution's efforts reduce the incidence of copyright infringement relative to what it would be were the campus not taking any steps. In addition, the requirement that campuses offer legal alternatives to illegal downloading can be misconstrued to mean that they must pay for a legal music service for students; in fact, referring them to a list of available legal alternatives is sufficient.

6 Where is it going?

As Congress and the Department of Education have acknowledged, technology is constantly evolving, and the arms race will continue. New means of engaging in infringing activity will be developed, and new tools and methods to limit that activity will emerge. The requirement to periodically assess the effectiveness of current plans affords the chance to evaluate state-of-the-art technology developments. ISPs, including colleges and universities, are in a unique position to address the issue of copyright infringement. The P2P provisions of the HEOA are part of a trend in which network providers, including domestic commercial ISPs and those in other countries, are required to take action to combat infringing activity. Indeed, governments in countries including Australia, France, New Zealand, and Great Britain have begun investigating whether approaches similar to those of the HEOA P2P provisions effectively address the issue of copyright infringement on the Internet.

7 What are the implications for higher education?

The P2P provisions of the HEOA require campuses to take action against infringing activity on their networks, but they have considerable latitude in how exactly to do this. That flexibility is important to understand so that campuses can meet the requirements with appropriate effort, while still respecting the existing policies of the institution and the culture of higher education. Campuses that prohibit content monitoring, for example, are not required to change those policies in order to be in compliance. The HEOA's P2P provisions align well with institutional missions to prepare students to be good citizens in their understanding of and respect for applicable laws. Finally, universities are among the world's largest producers and consumers of intellectual property, so safeguarding copyright and instilling a healthy respect for copyright law in students is of deeply intrinsic value to higher education.

EDUCAUSE

EDUCAUSE is a nonprofit membership association created to support those who lead, manage, and use information technology to benefit higher education. A comprehensive range of resources and activities is available to all EDUCAUSE members. The association's strategic directions include focus in four areas: Teaching and Learning; Managing the Enterprise; E-Research and E-Scholarship; and the Evolving Role of IT and Leadership. For more information, visit educause.edu.