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ANTIPIRACY PROVISIONS OF THE RECENTLY ENACTED HIGHER EDUCATION OPPORTUNITY ACT COULD POSE HARSH PENALTIES ON COLLEGES AND UNIVERSITIES FOR NONCOMPLIANCE

At least one provision of the recently enacted "Higher Education Opportunity Act" ("Act") has caused quite a stir in the higher education community (enacted August 14, 2008). A small section of the law carries with it the harsh implication that colleges and universities may lose federal funding if they do not comply with specific antipiracy provisions directed at the unauthorized downloading and distribution of copyrighted material (such as music and movies) over college and university computer networks.

Purpose of the Higher Education Opportunity Act

Generally, the purpose of the Act is to amend the Higher Education Act of 1965 ("HEA"), 20 U.S.C. § 1001 et seq., to revise and reauthorize HEA programs. According to Rep. George Miller [D-CA], sponsor of the bill which ultimately became law, the major issues addressed include "skyrocketing college prices, a needlessly complicated student aid application process, and predatory tactics by student lenders." The bill won bipartisan support in its House vote and passed in the Senate by unanimous consent. A Conference Report, which resolved the differences between the House and Senate versions of the bill, also passed the House and the Senate by huge margins.

Antipiracy Provisions

Sections 488 and 493 of the Act contain antipiracy provisions, each of which is discussed further below. Each of these provisions has an effective date as of the date of the enactment, August 14, 2008. The controversial antipiracy provisions of the Act are found in Section 493.

Section 488 – Antipiracy Provision

In brief, Section 488 requires higher education institutions to make available to their students information related to their "policies and sanctions related to copyright infringement." This information must include an annual disclosure advising students that any unauthorized distribution of copyrighted material, such as peer-to-peer file sharing, may subject the students to civil and criminal liabilities. Additionally, students are required to be informed of the associated penalties for violating Federal copyright laws, and of a description of the institution's policies with respect to unauthorized peer-to-peer file sharing, including institutional disciplinary actions that may be taken against students for such illegal actions while using the institution's information technology system.

Section 493 – Antipiracy Provision

Section 493 requires any higher education institution which participates in any "student assistance" program under the Act to certify that it:

- has developed plans to effectively combat the unauthorized distribution of copyrighted material, including through the use of a variety of technology-based deterrents; and

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- 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.

Technology-based deterrents are championed by the Conferees in the Conference Report, stating that "technology-based deterrents 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." The Conference Report also provides that the intent of this provision is to 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." Further, the Conference Report points out that each institution has the authority to choose which technology-based deterrent meets its unique needs. The Conference Report gives examples of universities (e.g., Indiana and Maryland) that have taken specific steps to combat copyright infringement, and examples of particular technology-based deterrents (e.g., Audible Magic's Copysense® Network Appliance and Red Lambda's Integrity).

Critics View of Section 493's Antipiracy Provision

Critics, however, argue that Section 493's antipiracy provision is vague, as it fails to explicitly set forth what is required of colleges and universities. This section calls for planning but not necessarily implementation of those plans, and the term "plan" is not defined in the statute. Even though this section does not explicitly require implementation, critics argue that this section "would hang an unspoken threat of enforcement over the heads of university administrators" if plans are not in fact implemented.

Section 493's antipiracy provision also fails to explicitly set forth any penalties for noncompliance. It has been suggested that failure to comply with this section could potentially result in the loss of all federal funding for the noncompliant institution, essentially punishing all students at the institution whether or not they engaged in unauthorized downloading and/or distribution of copyrighted material. Loss of federal funding would affect students receiving federal grants, loans, and other types of federal student aid, making school less affordable for those students receiving such assistance (which is directly contrary to one of the main purposes of the bill). Although this section does not explicitly make compliance mandatory, it is understandable how even the perceived danger of losing at least some federal funding would cause an institution to comply with this section (since there is little point of putting this language in the bill if there are no consequences for noncompliance).

Adding credence to this argument is the fact that a proposed amendment by Rep. Steve Cohen [D-Tenn.], which would have prohibited the loss or reduction of federal funding for noncompliance with this antipiracy provision, failed to end up as part of the legislation.

It also has been argued that the implementation of this provision's collective requirements would be inadequate and ineffective at combating illegal downloading, and would raise school fees for all students.

The first of these requirements obligates colleges and universities to develop plans to effectively combat unauthorized distribution of copyrighted material, including through the use of a variety of technology-based deterrents (e.g., network filtering, bandwidth shaping, or various types of network monitoring). This requirement has precipitated a variety of valid concerns, including: the effectiveness of such deterrents to separate out the legal download or peer-to-peer distribution activity from the illegal download or peer-to-peer distribution activity; the slowing of the educational institution's computer network traffic; and privacy concerns due to monitoring of students' online activity. Moreover, the expense for the network filtering, bandwidth shaping, or other types of network monitoring, critics argue, would be passed on to students in the form of additional student fees.

The second requirement obligates colleges and universities to offer legal downloading or peer-to-peer distribution of intellectual property alternatives. Encouraging the use of a specific "alternative" digital media distribution service, especially if that service uses Digital Rights Management or is incompatible with a student's equipment or operating system, potentially limits the educational value of that media, and, of course, a student's ability to use the media freely for popular digital media players like iPods, etc. Additionally, many of these "alternative" services are known for limited media catalogs and the inability to burn the media to CDs, furthering their relative inadequacy.

Furthermore, many critics argue that the antipiracy provision of Section 493 would hold schools disproportionately responsible for illegal downloading that occurs mainly off-campus by students using commercial networks instead of college or university computer networks. In January 2008 the Motion Picture Association of America ("MPAA"), a major proponent of the antipiracy provisions of the legislation, reported that only 15% of industry losses due to illegal file sharing came from students using college networks, a significant revision of their previous claim of 44% which was published in 2005 and is considered to be the centerpiece of MPAA's lobbying efforts. The actual number might be as low as 3% if the number of off-campus students is taken into account. This fact, according to one source, is the "moral equivalent of using a bazooka to kill a fly."

Notably, now that the Act has been enacted into law, the MPAA plans on providing colleges and universities with a "Briefing Book on Campus Digital Piracy" to "assist" colleges and universities with combating digital piracy. This Briefing Book outlines, among other things, the antipiracy provisions of the recently enacted law. (The Briefing Book can be found at the MPAA's web site at www.mpaa.org/BestPracticesBriefingBook.pdf.)

What's Next?

At this point, the higher education community will have to wait to see what action the Department of Education takes to clarify the language of the statute through regulation and/or enforcement actions. If the federal government reduces or eliminates an institution's federal funding for noncompliance, the issue undoubtedly will result in litigation and judicial interpretation. Alternatively, Congress could add explicit penalties for noncompliance in a future amendment to the statute.

Until such time that the current antipiracy provisions are clarified, higher education institutions are left with the vague language of the provisions and the resultant accompanying anxiety.

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