

On Making Sausage

Laws are like sausages. It's better not to see them being made.—Otto von Bismarck

On August 14, 2008, U.S. President George W. Bush signed into law the Higher Education Opportunity Act (HEOA) of 2008. This was the first major revision of the 1965 Higher Education Act in ten years. Not surprisingly, the bill became a magnet for pent-up demands, ultimately growing to nearly 1,200 pages.

What's in those pages? Senator Lamar Alexander (R-TN) is uniquely qualified to comment, having served previously as president of the University of Tennessee and as U.S. secretary of education. He called the legislation “a well-intentioned contraption of unnecessary rules and regulations that waste time and money that ought to be spent on students and improving quality.”¹

Buried within the 1,200 well-intentioned, time- and money-wasting pages are a couple of provisions related to copyright infringement on campus networks. The first provision is relatively benign: it requires every college and university in the country to provide students annually with a list of details about copyright law and campus policies for detecting and punishing infringement. Of course, nearly every campus already does this as part of orientation, in some cases quite creatively. For example, the University of Wisconsin at Madison recently introduced an entertaining video (<http://connect.educause.edu/Library/Abstract/UniversityofWisconsinStud/45931>), and Northern Illinois University has created a series of eye-catching posters (http://resnetsymposium.org/wiki/index.php/Filesharing_Posters). Colleges and universities offer brochures and quizzes and videos and posters, along with mandatory face-to-face training sessions and pre-

tests that must be passed before network access is granted.

Studies have repeatedly confirmed that students' file-sharing habits are already well-established long before they start college, beginning as early as third grade.² Those habits develop using Internet connections purchased from commercial broadband companies—connections coming into their homes and the homes of their friends, connections available to nearly 100 percent of U.S. households.³ The irony is that incoming freshmen have been using the Internet for most of their lives without the slightest hint from their network providers that copyright infringement is a problem. Only the campus networks have—voluntarily and aggressively—taken the initiative to pass along this information, and yet it is these same campus networks that are being singled out by Congress for special attention.

The second provision targeting traffic on college and university networks requires all campuses to certify that they (a) have “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.”⁴ EDUCAUSE and many others have long argued that technology-based deterrents to unauthorized Internet file-sharing are disruptive, expensive, immature, likely to under- and over-block, and easily subverted. In January 2008, the Common Solutions Group (CSG) (<http://www.stonesoup.org>), representing the country's top IT campuses, conducted a day-long workshop evaluating the three most-visible content-blocking products. The group concluded: “Current technologies can affect unauthorized sharing. However, their effectiveness is very limited, and they

can suppress legitimate traffic along with infringing traffic. Fully deployed, they are also expensive. Although new approaches may yield effective, inexpensive, operationally benign infringement-suppression technologies in the future, implementing current technologies simply will increase tuition and research costs in higher education and degrade network performance while yielding only modest effects on unauthorized sharing.”⁵ Several months later, the Association for Computing Machinery (ACM), the world's largest educational and scientific computing society, sent a letter to the key legislators involved with the HEOA. The letter stated: “Infringement of copyrighted works on university networks is a serious issue. However, a Federal policy that promotes or requires filtering will indirectly add to the costs of education and university research, introduce new security and privacy issues, degrade existing rights under copyright, and have little or no lasting impact on infringement of copyrighted works.”⁶

Nevertheless, the sausage that emerged from Congress included the requirement that all U.S. colleges and universities develop plans that consider technology-based deterrents to infringement. What exactly does that mean? In addition to the formal text of the HEOA, Congress produced a “Managers' Report,” explaining how the Senate and the House versions of the bill were reconciled into the final product. Although this report language is not itself law, it will play an important role in determining how the law is implemented and interpreted.

The entire HEOA clause containing the reference to technology-based deterrents comprises barely twenty-five words. In contrast, the related language in the “Managers' Report” covers two pages and does include some indication that the writers heard the arguments submitted by EDUCAUSE, the CSG, and the ACM. In

particular, the report language recognizes that technology-based deterrents can take many forms, including bandwidth shaping and traffic-volume monitoring, and also “a vigorous program of accepting and responding to Digital Millennium Copyright Act (DMCA) notices.” The report acknowledges that plans will reflect the “institution’s own unique characteristics.” In summary, the report says that there is “a broad range of possibilities that exist for institutions to consider in developing plans” and that the intent is “for each institution to retain the authority to determine what its particular plans for compliance . . . will be, including those that prohibit content monitoring.” The report provides no guidance as to the interpretation of the “alternatives to illegal downloading” clause and, in particular, no indication about what “to the extent practicable” means.⁷ “To the extent practicable” is a popular phrase in the HEOA, appearing nineteen times, each equally undefined. This part of the sausage remains especially raw.

Many laws end with the president’s signature, but since the HEOA operates through the U.S. Department of Education (USDE), there’s much more to come. In particular, we now begin the process of “negotiated rulemaking” (known as “NegReg”) by which the USDE will establish the detailed implementation and regulations required by the bill. A further comment by Senator Alexander suggests the scale of the task: “The current stack of federal rules for higher education institutions is nearly as tall as I am, and this bill more than doubles it, creating 24 new categories and 100 new reporting requirements.”⁸

The first step in this “NegReg” process is a series of public hearings to be held at various locations around the country, soliciting input from the range of stakeholders affected by the bill. On the basis of that input and other comments from interested parties, and as guided by the report language, the USDE will publish draft regulations. After a public-comment period and one more set of revisions, the final regulations will be published. This particular part of the process is governed by the USDE’s “Master Calendar,” which stipulates that rules going into effect on July 1 of any year must be finalized by November 1 of the previous year. Thus, the earliest emergence of detailed rules

implementing the Higher Education Opportunity Act of 2008 is likely to be July 1, 2010. Stale sausage, indeed.

What about between now and then? Even though the final interpretation may not be known for a year or more, the law is in effect now, and all campuses must make a good-faith effort to comply with it, taking into account the guidance and flexibility provided by the report language. Campuses should also provide input to the USDE on these provisions, either by participating in one of the regional hearings or by directly submitting a written statement.

The problem of unauthorized Internet file-sharing has always been taken very seriously by U.S. higher education, with vigorous instruction and enforcement programs that go well beyond the requirements of law. Despite the inappropriate and misdirected requirements of the Higher Education Opportunity Act, there is every reason to expect higher education to continue its responsible approach to one of society’s thorniest problems.

For further information, including the list of USDE regional hearing locations, see the general EDUCAUSE resource page for P2P issues at <<http://www.educause.edu/P2PFS>>.

Notes

1. “Alexander Says Greatest Threat to Higher Education Is Overregulation, Not Underfunding,” press release, July 31, 2008, <http://alexander.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=8c2f01f5-7dd3-4c32-9f4c-0231c358dc80>.
2. See the Digital Citizen Project at Illinois State University: <<http://www.digitalcitizen.ilstu.edu>>.
3. National Telecommunications and Information Administration, U.S. Department of Commerce, “Networked Nation: Broadband in America, 2007” (January 2008), <<http://www.ntia.doc.gov/reports/2008/NetworkedNationBroadbandinAmerica2007.pdf>>.
4. Higher Education Opportunity Act, <<http://thomas.loc.gov/cgi-bin/query/F?c110:6:./temp/~c110y5b4ju:e8721>>.
5. “Infringement-Suppression Technologies: Summary Observations from a Common Solutions Group Workshop,” <<http://www.stonesoup.org/docs/copyright-technology.pdf>>.
6. ACM letter, April 15, 2008, <http://www.acm.org/usacm/weblog/wp-content/USACM_Filtering_Final.pdf>.
7. “Joint Explanatory Statement of the Committee of Conference,” <http://help.senate.gov/Hearings/2008_07_29_E/Statement_of_Managers.pdf>.
8. “Alexander,” press release, July 31, 2008.

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