



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF POSTSECONDARY EDUCATION

THE ASSISTANT SECRETARY

DCL: GEN-10-08

Subject: Institutional requirements for combating the unauthorized distribution of copyrighted material by users of the institution's network

Summary: This letter reminds institutions that participate in the Title IV, HEA programs of the new requirements for combating the unauthorized distribution of copyrighted material by users of an institution's network. This letter also provides a sample summary of civil and criminal penalties for copyright infringement that may be used by institutions to meet one of the requirements of the regulations.

Dear Colleague:

The Higher Education Opportunity Act of 2008 (HEOA) (Pub. L. 110-315) added provisions to the Higher Education Act of 1965, as amended, (HEA) requiring institutions to take steps to combat the unauthorized distribution of copyrighted materials through illegal downloading or peer-to-peer distribution of intellectual property. These requirements were effective upon enactment of the HEOA, August 14, 2008.¹ On October 29, 2009, the Department published final regulations implementing the statutory requirements (74 FR 55902). These regulations go into effect July 1, 2010. The final regulations are available at <http://www.ifap.ed.gov/fregisters/FR102909GeneralandNonLoanProgrammaticFinalRule.html>.

This letter describes the requirements of the final regulations and provides a sample summary of civil and criminal penalties for copyright infringement that may be used by institutions to meet one of the requirements of those regulations.

Institutional plans

Under 34 CFR 668.14(b)(30), an institution, as a condition of participation in any Title IV, HEA program, must have developed and implemented written plans to effectively combat the unauthorized distribution of copyrighted material by users of the institution's network without unduly interfering with the educational and research use of the network. An institution must include in its plans:

- The use of one or more technology-based deterrents;
- Mechanisms for educating and informing its community about appropriate versus inappropriate use of copyrighted material, including the consumer information an institution must provide, upon request, in accordance with 34 CFR 668.43(a)(10) (described below). These mechanisms may include any additional information and approaches determined by the institution to contribute to

¹ As the Department noted in the December 2008, Dear Colleague Letter that provided a summary of the provisions of the HEOA (GEN-08-12), because passage of the HEOA required program participants to implement a large number of new provisions before receiving guidance from the Department, during subsequent reviews of compliance with the HEOA, we will take into account whether any written guidance had been provided by the Department during the period under review.

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- the effectiveness of the plans, such as including pertinent information in student handbooks, honor codes, and codes of conduct in addition to e-mail and/or paper disclosures;
- Procedures for handling unauthorized distribution of copyrighted material, including disciplinary procedures; and
 - Procedures for periodically reviewing the effectiveness of the plans to combat the unauthorized distribution of copyrighted materials by users of the institution's network using relevant assessment criteria. It is left to each institution to determine relevant assessment criteria. No particular technology measures are favored or required for inclusion in an institution's plans, and each institution retains the authority to determine what its particular plans for compliance will be, including those that prohibit content monitoring.

In recognition of the diversity among institutions and how technology is continuously evolving, it is up to an institution's discretion to determine how many and what type of technology-based deterrents it uses as a part of its plans—although every institution must employ at least one. Technology-based deterrents include bandwidth shaping, traffic monitoring, accepting and responding to Digital Millennium Copyright Act (DMCA) notices, and commercial products designed to reduce or block illegal file sharing. An institution also has discretion to determine what relevant assessment criteria are for reviewing the effectiveness of its plans. In some cases, appropriate assessment criteria might be process-based, so long as the institution's information system information does not contradict such a determination. Such process-based criteria might look at whether the institution is following best practices, as laid out in guidance worked out between copyright owners and institutions or as developed by similarly situated institutions that have devised effective methods to combat the unauthorized distribution of copyrighted material. In other cases, assessment criteria might be outcome-based. The criteria might look at whether there are reliable indications that a particular institution's plans are effective in combating the unauthorized distribution of copyrighted material. Among such indications may be "before and after" comparisons of bandwidth used for peer-to-peer applications, low recidivism rates, and reductions (either in absolute or in relative numbers) in the number of legitimate electronic infringement notices received from rights holders. An institution is expected to use the assessment criteria it determines are relevant to evaluate how effective its plans are in combating the unauthorized distribution of copyrighted materials by users of the institution's networks.

Offering of legal alternatives

34 CFR 668.14(b)(30) also requires that an institution, in consultation with the chief technology officer or other designated officer of the institution, to the extent practicable, offer legal alternatives to illegal downloading or otherwise acquiring copyrighted material, as determined by the institution. An institution must periodically review the legal alternatives for downloading or otherwise acquiring copyrighted material, and make the results of the review available to its students through a Web site or other means.

The Department anticipates that individual institutions, national associations, and commercial entities will develop and maintain up-to-date lists that may be referenced for compliance with this provision.

Consumer Information

Under 34 CFR 668.43(a)(10), an institution must include information regarding institutional policies and sanctions related to the unauthorized distribution of copyrighted material in the list of institutional information provided upon request to prospective and enrolled students. This information must:

- Explicitly inform its students that unauthorized distribution of copyrighted material, including peer-to-peer file sharing, may subject a student to civil and criminal liabilities;
- Include a summary of the penalties for violation of Federal copyright laws; and
- Describe the institution's policies with respect to unauthorized peer-to-peer file sharing, including disciplinary actions that are taken against students who engage in illegal downloading or unauthorized distribution of copyrighted materials using the institution's information technology system.

Under 34 CFR 668.41(c), an institution must provide to enrolled students an annual notice containing a list and brief description of the consumer information it must disclose and the procedures for obtaining this consumer information. An institution must add to this list information regarding institutional policies and sanctions related to the unauthorized distribution of copyrighted material. Consistent with current regulations (34 CFR 668.41(a)), an institution must provide this annual notice on a one-to-one basis through a direct individual notice to each enrolled student. This notice must be made through an appropriate mailing or publication, including direct mailing through the U.S. Postal Service, campus mail, or electronic mail. Posting on Internet or Intranet Web sites does not constitute notice. If the institution discloses the consumer information by posting the information on a Web site, it must include in the notice the exact electronic address at which the information is posted, and a statement that the institution will provide a paper copy of the information on request.

Although an institution is required to disclose the required information only to students, we encourage institutions to make the information available to employees and the general public if they believe it will be beneficial.

Sample summary of Federal civil and criminal penalties

The Department has worked with representatives of copyright holders and institutions to develop a sample summary of the civil and criminal penalties for violation of Federal copyright laws (34 CFR 668.43(a)(10)(ii)) that an institution may use to meet the requirement that an institution include such a summary in the information it provides upon request to prospective and enrolled students. The use of this sample summary is optional.

Summary of Civil and Criminal Penalties for Violation of Federal Copyright Laws

Copyright infringement is the act of exercising, without permission or legal authority, one or more of the exclusive rights granted to the copyright owner under section 106 of the Copyright Act (Title 17 of the United States Code). These rights include the right to reproduce or distribute a copyrighted work. In the file-sharing context, downloading or uploading substantial parts of a copyrighted work without authority constitutes an infringement.

Penalties for copyright infringement include civil and criminal penalties. In general, anyone found liable for civil copyright infringement may be ordered to pay either actual damages or “statutory” damages affixed at not less than \$750 and not more than \$30,000 per work infringed. For “willful” infringement, a court may award up to \$150,000 per work infringed. A court can, in its discretion, also assess costs and attorneys’ fees. For details, see Title 17, United States Code, Sections 504, 505.

Willful copyright infringement can also result in criminal penalties, including imprisonment of up to five years and fines of up to \$250,000 per offense.

For more information, please see the Web site of the U.S. Copyright Office at www.copyright.gov, especially their FAQ’s at www.copyright.gov/help/faq.

Thank you for your continued participation in the Title IV programs. If you have any questions regarding this letter, please contact Wendy Macias by e-mail at wendy.macias@ed.gov or by phone at 202-502-7526.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel T. Madzelan", with a long horizontal flourish extending to the right.

Daniel T. Madzelan
Delegated the Authority to Perform
the Functions and Duties of the
Assistant Secretary for
Postsecondary Education