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GRADUATED RESPONSE SYSTEMS AND THE MARKET FOR COPYRIGHTED WORKS

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Over the last two decades, technological developments have disrupted the ability of copyright holders to monetize their creations by limiting their ability to exercise exclusive control of the reproduction and distribution of their works. The digitization of media has made the copying and distribution of copyrighted content ubiquitous. Data storage costs are dropping rapidly, download speeds are increasing, and internet accessibility is proliferating thanks to broadband, Wi-Fi, and mobile devices. Streaming technologies, peer-to-peer ("P2P") file exchanges, and social media sites allow consumers to become active, if unknowing, copyright infringers. As a result of these technological developments, the scope of copyright infringement has grown, which in turn, has increased enforcement costs. Content owners seek mechanisms to deter infringement and restore lost profits in their copyrighted works.

Content owners hope that a new copyright enforcement model—so-called "graduated response systems" ("GRS")—will help stem infringement of copyrighted works and encourage consumers to return to legal markets.[1] GRS are an approach to copyright enforcement that prescribes a series of escalating consequences for an individual accused of infringing copyrighted works.[2] The consequences for infringement can include automatic redirection to a different homepage and reduction in internet download speeds.[3] Both public and private entities can administer GRS.[4] Privately ordered GRS are systems that are administered by private entities rather than government

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1. *See* Kristen Hainen, *Music, Movie, TV and Broadband Leaders Team to Curb Online Content Theft*, COPYRIGHT INFORMATION CENTER (July 7, 2011), http://www.copyright information.org/node/704.

2. *See* Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81, 128 (2010).

3. *See* Memorandum of Understanding Between ISPs (SBC Internet Services, Inc. et al) and Content Owners (RIAA et al.) (July 6, 2011), http://www.copyrightinformation.org/sites/default/files/Momorandum of Understanding.pdf [hereinafter 2011 MOU Agreement].

4. *See* Annemarie Bridy, *ACTA and the Specter of Graduated Response*, 26 AM. U. INT'L L. REV. 559, 569–73 (2011).

bodies.[5] The framework of any privately ordered GRS is defined, at least in part, by contract rather than exclusively by statute, regulation, and case law.[6]

As more consumers turn to the Internet for entertainment, news, and media, content owners believe that business models that seek to capitalize on collaborations between copyright owners and internet service providers ("ISPs") have created a market climate that makes GRS implementation by ISPs the most efficient and fair mechanism for enforcing their copyrights.[7] Furthermore, advancements in the software technologies used to identify and filter infringing works have improved the ability of copyright owners and ISPs to effectively implement GRS.[8]

In 2011, a consortium of major ISPs and content owners adopted a Memorandum of Understanding ("MOU") that will create industry standards for implementing uniform GRS.[9] The signatories to the MOU hope that privately ordered GRS can help create an internet landscape where the difficulty of accessing infringing material outweighs the benefits of acquiring content without paying for it.[10] But many critics argue that the MOU represents another step in a troubling trend of overbroad expansion of the scope of copyright protection given to rightsholders, citing threats to the general benefits of the Internet, free speech, innovation, and fair use of copyright works.[11]

This Note argues that the 2011 MOU between content owners and ISPs, which sets up privately ordered GRS, is a crucial step in copyright holders' efforts to reduce widespread online copyright infringement and to attract consumers into legal digital markets to access their works. Given the changes in the internet landscape over the last decade, the time has come to implement privately ordered enforcement mechanisms that fairly allocate the burden of enforcement between ISPs and content owners. As broadband access and mobile networks have proliferated, people increasingly consume copyrighted content over the Internet, and ISPs now play a greater role than

5. *See* Bridy, *supra* note 2 at 81.

6. *See id.*

7. *See* Bridy, *supra* note 4 at 572.

8. *See* Rob Frieden, *Internet Packet Sniffing and Its Impact on the Network Neutrality Debate and the Balance of Power Between Intellectual Property Creators and Consumers*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 633, 645 (2008) (stating that many ISPs will likely adopt "smart" technologies to monitor and direct traffic on their networks).

9. *See* 2011 MOU Agreement, *supra* note 3.

10. *See* Part II, *infra*, for a discussion of the motivations underlying the adoption of the 2011 MOU.

11. *See* Part IV, *infra*, for a discussion of criticisms of GRS and the 2011 MOU Agreement, *supra* note 3.

ever before in the distribution of creative content.[12] Furthermore, ISPs have an additional financial incentive to curb online piracy because the unauthorized distribution of creative content creates a significant burden on their data pipelines.[13] Private ordering of copyright enforcement offers greater speed, flexibility, and adaptability to deal with the rapidly changing landscape of the Internet than publicly ordered enforcement regimes, which rely on the slow, expensive, and unpredictable processes of legislation and litigation.[14]

Furthermore, the "graduated responses" prescribed by the MOU are less severe and more closely tailored to a user's infringing offense than the statutory consequences an infringer faces through litigation.[15] Likewise, an enforcement system based on ubiquitous filtering of all users' activities is fairer—and likely more effective—than a system that depends on "making an example" out of a few individual users through selective policing and litigating.[16] While the MOU will improve copyright protection for creators and the creative industries, the parties to the MOU should include procedural safeguards that allow consumers to fairly defend against infringement claims. Ultimately, parties to the MOU should seek to design a copyright enforcement regime that is transparent, predictable, and narrowly tailored. If all parties' interests are correctly balanced and consumers are offered convenient, attractively priced options for digital works, content owners may be able to bring many consumers back into the legal market.

Part I of this Note provides a historical background of the enforcement mechanisms that rightsholders have employed in response to advancements in digital technology—especially the rise of P2P networks—that led to dramatic increases in copyright infringement. Part II examines the factors that led to the development and adoption of GRS and the 2011 MOU. Part III explores the procedures, mechanisms, and protections established by the terms of the 2011 MOU. Part IV discusses the potential benefits of implementing privately ordered copyright enforcement mechanisms and GRS. Part IV also outlines many of the criticisms of the MOU and GRS. Finally, Part V weighs the benefits GRS offer to creators, content owners, consumers, and ISPs, and suggests that the parties to the 2011 MOU should

12. *See* Preserving the Open Internet, Broadband Industry Practices, 76 Fed. Reg. 59,192, 59,194 (Sept. 23, 2011).

13. *See id.* at 59,209.

14. *See* Alain Strowel, *Internet Piracy as a Wake-up Call for Copyright Law Makers—Is the "Graduated Response" a Good Reply?*, 1 WIPO J. 75, 77–79 (2009).

15. *See* discussion in Section IV.A.4.

16. *See id.*

implement procedures to safeguard consumers' interests in privacy, fair use, and free speech.

I. BACKGROUND: A HISTORY OF COPYRIGHT ENFORCEMENT IN THE DIGITAL AGE

Despite widespread piracy, the absolute value of copyrights to U.S. gross domestic product has continued to expand as the United States transitions increasingly to an information-based economy. One study stated that copyrights added $932 billion to the U.S. economy in 2010 alone and that almost 5.1 million Americans are employed by core copyright industries.[17] An increasing percentage of the population of developed nations earn a living in fields affected by copyright law.[18] Moreover, the global economy produces exponentially more copyrightable content than it did prior to digitalization and the expansion of the Internet.[19] This growth is partially attributable to the rise in global population, the increase in per capita wealth, and the decrease in production and distribution costs.[20] Furthermore, rises in per capita income have also increased the leisure time and money available to people to consume entertainment and expressive content.[21]

The digitization of copyrighted works and the growth of the Internet facilitated a widespread rise in online infringement of copyright works. This dematerialization of copyrighted works has weakened the creative industries' ability to exclusively control the copying and distributing of their works, and content owners have struggled to find an adequate deterrent to digital piracy. Although estimates of the economic loss caused by online infringement vary depending on the methodologies and underlying assumptions used in

17. STEPHEN E. SIWEK, INT'L INTELLECTUAL PROP. ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2011 REPORT 4, (2011), http://www.iipa.com/pdf/2011CopyrightIndustriesReport.PDF.

18. *See* Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1078–79 (2006) (quoting the research of Richard Florida, which categorizes scientists, engineers, artists, musicians, lawyers, physicians, and teachers as "the creative class," Florida found that 30% of the American workforce were members of this 'class'—38 million people—whereas only 10% of the workforce was so categorized in 1900, 15% in 1945, and 20% in 1980).

19. *See* United Nations Conference on Trade and Development, Sao Paolo, Braz., June 13–18, 2004, *Creative Industries and Development*, ¶ 11–30, U.N. Doc. TD(XI)/BP/1, (June 4, 2004).

20. *See id.*

21. *See id.* ¶ 13.

calculations, the losses are substantial.[22] The Recording Industry Association of America ("RIAA") claims that sound recordings sales in the United States dropped by 40% from 1999 to 2008, representing a loss in revenue of almost $6.1 billion.[23] Although exact figures on consumers' listening habits are difficult to calculate, the RIAA's decrease in sales would not seem to reflect a decrease in the amount of time spent listening to music by consumers given the ubiquitous use of iPods, smartphones, and laptops.[24] Assessing the effects of online file-sharing is also made difficult by the fact that for those copyright owners who lack the resources to pursue legal action, the cost of enforcement frequently outweighs the commercial value of their copyrights, and thus, those owners rarely even pursue litigation against infringing users.[25]

Part I of this Note recounts a history of some of the biggest issues in copyright enforcement since the onset of the digital age. Section I.A defines the competing interests of content owners, ISPs, and users that have given rise to the heated debates about the role that copyright should play in light of recent technological advances. Section I.B discusses the enforcement mechanisms that content owners have employed in attempting to protect their copyrighted works over the last two decades.

A. DEFINING THE COMPETING INTERESTS OF CONTENT OWNERS, ISPS, AND USERS

This Note frames much of its discussion about copyright enforcement around the interests of three main groups: content owners, ISPs, and users. Each of these groups has been affected very differently by the digitization of media and the growth of the Internet and, frequently, the interests of these groups have stood in conflict and competition.[26] This Section attempts to define each group's interests and to discuss these groups' divergent views of what should constitute an ideal copyright enforcement system.

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22. *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-10-423, INTELLECTUAL PROPERTY: OBSERVATIONS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS 9–15 (Apr. 2010).

23. *2008 Consumer Profile*, RECORDING INDUSTRY ASS'N OF AM., (2008), http://76.74.24.142/CA052A55-9910-2DAC-925F-27663DCFFFF3.pdf.

24. *See U.S. Music Consumption: How Many Are Buying & Who's Listening?*, BRIDGE RATINGS (Aug. 29, 2007) http://www.bridgeratings.com/press_08.29.2007-Music Consumption.htm.

25. *See Remedies for Small Copyright Claims: Hearing Before the Subcomm, on Courts, the Internet, and Intellectual Property of the H. Comm on the Judiciary*, 109th Cong. 1 (2006) (statement of the U.S. Copyright Office), *available at* http://www.copyright.gov/docs/regstat032906.html.

26. *See* S. REP. NO. 105-190, at 7, 10 (1998).

1. Content Owners

The term "content owners," as discussed in this Note, includes creators—such as writers, directors, and musicians—as well as those parties whose economic interests are associated with the creative industries—such as record labels, distributors, and studios. Content owners' interests are often represented through major industry groups such as the Motion Picture Association of America ("MPAA"),[27] the Recording Industry Association of America ("RIAA"),[28] and the American Society of Composers, Authors, and Publishers ("ASCAP").[29] Generally speaking, content owners' economic goal is to maximize their revenue from the sale and licensing of their copyrighted works.[30] Additionally, for some content owners, the right to control the production of derivative works based on their original creations is important for economic reasons as well as reasons of maintaining artistic integrity.[31] It should be noted that such a discussion of parties' interests is obviously a simplification of a complex problem. Persons working in the creative fields may differ greatly in their views about the ideal scope of copyright law and in their perceptions of the effects of online file-sharing. ISPs and users are likely similarly diverse in their viewpoints.

Content owners believe that the growth of the Internet and file-sharing technologies have given rise to an unprecedented level of piracy that has cut into their revenue streams and weakened their ability to exclusively control the use of their works.[32] Furthermore, many content owners worry that file-sharing has become so commonplace that many consumers now believe that music, news, and movies should rightfully be available for free.[33] Some

27. *See About Us*, MOTION PICTURE ASSOCIATION OF AMERICA, http://www.mpaa.org/about (last visited Feb. 2, 2012).

28. *See id.*

29. *See About ASCAP*, AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, http://www.ascap.com/about/ (last visited Feb. 2, 2012).

30. *See* Olivier Bomsel & Heritiana Ranaivoson, *Decreasing Copyright Enforcement Costs: The Scope Of A Graduated Response*, 6 REV. OF ECON. RES. ON COPYRIGHT ISSUES 13, 13–16 (2009).

31. *Cf.* 17 U.S.C. § 103 (2006) (protecting a copyright holder's exclusive right to create derivative works); 17 U.S.C § 106(a) (giving visual artists the exclusive right to prevent the "intentional distortion, mutilation, or other modification" of their works).

32. *See generally* ROBERT LEVINE, FREE RIDE: HOW DIGITAL PARASITES ARE DESTROYING THE CULTURE BUSINESS, AND HOW THE CULTURE BUSINESS CAN FIGHT BACK (2011) (arguing that online distributors of media, such as YouTube, are "parasites" that reap all of the profits and benefits from the distribution of the creative works without compensation to artists while simultaneously driving down the price that those artists can demand for their works).

33. *See id.*

content owners believe that these changes threaten to discourage future artists from creating new works.[34]

For content owners, one of the most important goals of any copyright enforcement system is to maximize revenue streams by discouraging unauthorized uses of their copyrighted works.[35] To effectively accomplish this goal, a copyright enforcement regime must efficiently identify infringing uses and prevent or punish infringement so as to deter piracy.[36] Furthermore, content owners must be able to keep the cost of enforcement lower than the amount of potentially recoupable lost revenues.[37] Finally, under any copyright enforcement regime, content owners must also offer users attractive means for accessing works legally.[38] To do so, content owners must make works available at a price that consumers perceive as fair, and furthermore, those content owners must provide convenient means for distributing and storing those works. For content owners, successful copyright enforcement regimes ideally incorporate normative measures, such as educational tools, to legitimize the paid market for copyrighted works.[39]

2. ISPs

The term "ISPs," as used in this Note, refers to two different types of internet service providers: network providers such as Comcast, Verizon, and AT&T—whose cables and towers make up the physical infrastructure of the Internet—and application providers such as Facebook, Google, and Twitter—whose services are provided over the Internet. For network providers, access to creative content is important as a means of encouraging users to subscribe to their services in order to download, stream, and share copyrighted works.[40] Given the large file size of movies, TV shows, and music, access to creative content further attracts users to pay for high-speed broadband services.[41] For application ISPs, creative content serves as a means to attract and maintain users looking to access and share entertainment and media through their websites.

For both types of ISPs, a copyright enforcement regime should provide clear and predictable guidelines about which uses of copyrighted content on

34. *See id.*
35. *See* Bomsel & Ranaivoson, *supra* note 30, at 13–18.
36. *Id.*
37. *Id.*
38. *See* INT'L FED'N PHONOGRAPHIC INDUS., DIGITAL MUSIC REPORT 2009: NEW BUSINESS MODELS FOR A CHANGING ENVIRONMENT 4 (2009).
39. *See id.* at 26.
40. *Id.* at 19–24.
41. *Id.*

their networks and websites are acceptable and which uses might subject an ISP to secondary liability for infringement.[42] If an ISP's potential liability is difficult to assess, the cost associated with defensive litigation strategies increases and affects its profitability.[43] Accordingly, most ISPs favor an enforcement regime that limits their liability for the actions of their users.[44]

Relatedly, ISPs prefer an enforcement regime that allows them to negotiate with content owners for licenses granting broad authorized access to copyrighted works at competitive prices in order to attract users to their sites.[45] This is especially true for application ISPs—such as Spotify, Netflix, and Amazon—who compete with one another to attract users with the breadth of their entertainment offerings and the convenience of access to that content.[46]

Likewise, ISPs seek enforcement mechanisms that are cheap to implement and maintain. Network ISPs may have an interest in limiting the trafficking of pirated works on their networks because some studies suggest that such trafficking creates a disproportionate strain on their networks' bandwidth.[47] Thus, for ISPs, automated filtering and takedown systems are preferable to mechanisms for detecting and resolving infringement incidents that rely on costly individualized human review.[48]

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42. *Cf.* Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1384–87 (2010) (stating that the uncertainty of liability for the infringing acts of their subscribers forces ISPs to devote financial resources to be prepared to respond to the threat of lawsuits).

43. *Id.*

44. *Id.*

45. *Cf.* TIMOTHY WU, THE MASTER SWITCH 294 (2010) (suggesting that Apple's ability to successfully negotiate with record labels led in part to the rapid success of the online iTunes store).

46. *See* Parmy Olson, *Spotify Loses $42 Million On Licensing Costs*, FORBES (Oct. 11, 2011), http://www.forbes.com/sites/parmyolson/2011/10/11/spotify-loses-42-million-on-licensing-costs; Julianne Pepitone, *Netflix's Vanished Sony Films Are An Ominous Sign*, CNNMONEY (July 11, 2011), http://money.cnn.com/2011/07/08/technology/netflix_starz_contract/index.htm.

47. *See* Preserving the Open Internet, Broadband Industry Practices, 76 Fed. Reg. 59,192, 59,206–10 (Sept. 23, 2011) (stating that broadband providers may implement reasonable practices to prevent the unlawful transfer of content to manage their networks and "to ensure that heavy users do not crowd out others"); *cf.* Christopher S. Yoo, *Network Neutrality After Comcast: Toward a Case-by-Case Approach to Reasonable Network Management*, *in* NEW DIRECTIONS IN COMMUNICATIONS POLICY 55 (Randolph J. May ed., 2009) ("The economics of two-sided markets indicate that it may be socially beneficial for content and application providers to subsidize the prices paid by end users. The fact that the Internet has become increasingly dominated by advertising revenue paid to content and application providers rather than network providers makes this particularly likely to be true.").

48. *See* Yu, *supra* note 42, at 1384–87.

Furthermore, in order to ensure users' continued use of their services, ISPs also favor a copyright regime that does not require enforcement measures that users might perceive as violating their privacy or as being unfair or unduly burdensome.[49] For application ISPs, attempting to maximize the profitability of their business while respecting their users' privacy creates a tenuous balance of interests. Unlike network ISPs, who derive most of their revenue from paid subscriptions, most application ISPs rely on advertisement revenues to fund their services. An application ISP's ability to demand higher prices from advertisers is directly related to how well that ISP is able to individually target a given user's tastes and interests through data tracking. Yet, in order to maintain subscribers, an application ISP must convince its users that its terms of service are not overly invasive of privacy.

3. Users

The term "users," in this Note, is used to refer to all persons who access creative content via the Internet. This includes subscribers to network ISPs' broadband and wireless services, as well as users of application ISPs' websites and services. Users' interests are often articulated and advocated for by public interests groups, such as the Electronic Frontier Foundation[50] and the Center for Democracy and Technology.[51] It should be noted that users have widely divergent preferences in the way they choose to access content. Some users may weigh the convenience of access more heavily than price, whereas other users may look at price alone.[52] For those concerned primarily with price, free access to media serves as a motivation for seeking out unauthorized, pirated content.[53]

An ideal copyright enforcement regime for many users allows for wide access to copyrighted works at the lowest price possible. Furthermore, users disfavor any copyright enforcement mechanisms that they perceive as intruding on their privacy or as creating an unfair, harsh, or burdensome

49. *Id.*

50. *See About EFF*, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/about (last visited Feb. 23, 2012).

51. *See CDT Mission and Principles*, CENTER FOR DEMOCRACY AND TECHNOLOGY, https://www.cdt.org/mission (last visited Feb. 22, 2012).

52. *See* Courtney Boyd Myers, *Showdown: Spotify vs Rdio vs Grooveshark vs Pandora*, THE NEXT WEB (July 14, 2011), http://thenextweb.com/apps/2011/07/14/showdown-spotify-vs-rdio-vs-grooveshark-vs-pandora.

53. *See* INT'L FED'N PHONOGRAPHIC INDUS., *supra* note 38, at 23 (citing statistics that 7 out of 10 downloaders of unauthorized file-sharing are driven primarily by the availability of free content).

process for adjudicating suspected infringement incidents.[54] Likewise, many users favor an enforcement regime that allows for a broad and permissive interpretation of fair uses.[55] User-generated content ("UGC"), which often involves the creation of derivative works of copyrighted content, represents a large portion of the material accessed on popular content sharing websites, such as YouTube.[56] Furthermore, the increasing role of the Internet as an outlet for free speech and for organizing democratic movements has increased users' concerns that an overly strict enforcement regime could censor protected speech and stifle political participation.[57]

Thus, an ideal copyright enforcement regime must seek to balance the various interests of content owners, ISPs, and users.

B. A BRIEF HISTORY OF COPYRIGHT ENFORCEMENT STRATEGIES

Section I.B summarizes the various copyright enforcement mechanisms that content owners have employed to try to protect their works in the digital age. Section I.B.1 discusses content owners' efforts to prevent unauthorized copying through technological measures, such as digital rights management software. Section I.B.2 looks at how the competing interests of content owners and ISPs led to the passage of the Digital Millennium Copyright Act ("DMCA"). It also discusses the DMCA's framework for enforcing copyright protections and its shortcomings given the evolving landscape of the Internet. Section I.B.3 recounts content owners' efforts to enforce their copyrights through litigation. Section I.B.4 examines how the federal government is expanding its efforts to protect the content owning industries. Finally, Section I.B.5 summarizes the current viability of various copyright enforcement mechanisms available to content owners and argues that the strategies employed thus far have largely proven unsuccessful.

1. Digital Rights Management

The first major tactic employed by content owners to prevent unauthorized reproduction and distribution was the development of digital

54. *See* PRINCIPLES FOR USER GENERATED CONTENT SERVICES, http://www.ugcprinciples.com (last visited Feb. 23, 2012).

55. *See id.*

56. *See* Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1508 (2008).

57. *See* Letter from Access to Rep. Lamar Smith, Chairman, Comm. on the Judiciary (Nov. 15, 2011), *available at* https://s3.amazonaws.com/access.3cdn.net/bea9ca8d08d08c45c7_rvm6bx96w.pdf (stating that H.R. 3261, the Stop Online Piracy Act, "sends an unequivocal message to other nations that it is acceptable to censor speech on the global Internet").

rights management ("DRM") technologies.[58] DRM acted as a software lock to restrict consumers' ability to copy and distribute purchased media.[59] However, savvy computer users quickly showed that they were capable of circumventing most DRM technologies through hacking.[60] Less savvy users were annoyed that the content industries had placed inconvenient restrictions on their legally acquired copies.[61] Furthermore, many critics also felt that companies had unfairly employed DRM technologies to lock buyers into a single distribution platform or device and that DRM had also obstructed legitimate fair uses.[62] Although many content owners continue to view DRM technologies as an important means for protecting their works, most copyright owners now recognize that DRM technologies alone cannot effectively deter copyright infringement.[63]

2. The Digital Millennium Copyright Act: Its Origins and Inadequacies

As the Internet and proprietary online networks grew in scope and popularity during the late 1980s and early 1990s, policy makers struggled to

58. *See* Daniel J. Gervais, *Electronic Rights Management and Digital Identifier Systems*, J. ELECTRONIC PUBLISHING (March 1999), *available at* http://quod.lib.umich.edu/cgi/t/text/text-idx?c=jep;view=text;rgn=main;idno=3336451.0004.303 (summarizing the policies and legal issues involved in the use of DRM to protect copyright); *The Decade in DRM (and announcing Day Against DRM, 2010)*, DEFECTIVE BY DESIGN (Feb. 25, 2010, 12:19 PM) http://www.defectivebydesign.org/decade-in-drm (providing a timeline of developments in the use of DRM technologies).

59. *See* Damian Kulash, Jr., *Buy, Play, Trade, Repeat*, N.Y. TIMES, Dec. 6, 2005, at A27 (discussing how Sony BMG had installed software on its audio CDS that limited how many copies users could make of its discs).

60. *See generally* Bruce Schneier, *The Futility of Digital Copy Prevention*, CRYPTO-GRAM NEWSLETTER (May 15, 2001), http://www.schneier.com/crypto-gram-0105.html#3 (arguing that technological means for encrypting copyrighted material are inherently capable of being circumvented); Ruth Suehle, *The DRM Graveyard: A Brief History of Digital Rights Management in Music*, OPENSOURCE.COM (Nov. 3, 2011), http://opensource.com/life/11/11/drm-graveyard-brief-history-digital-rights-management-music (describing failed efforts by content owners and technology companies to use DRM to enforce copyright).

61. *See The Pros, Cons and Future of DRM*, CBC NEWS (Aug. 7, 2009, 4:12 PM), http://www.cbc.ca/news/technology/story/2009/08/06/tech-digital-locks-drm-tpm-rights-management-protection-measures-copyright-copy-protection.html.

62. *See, e.g.*, Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Copyright Management Systems*, 15 HARV. J.L. & TECH 41, 83, (2001); *see also* Fred von Lohmann, *Fair Use and Digital Rights Management: Preliminary Thoughts on the (Irreconcilable?) Tension between Them*, ELECTRONIC FRONTIER FOUNDATION (Apr. 16, 2002), http://w2.eff.org/IP/DRM/fair_use_and_drm.html (discussing how DRM prevents consumers from fair uses of material they have purchased, such as converting files into newer formats for their own private use).

63. *See, e.g.*, Marcus Yam, *RIAA: We Didn't Say 'DRM is Dead'*, TOM'S GUIDE (July 22, 2009, 1:00 PM), http://www.tomsguide.com/us/riaa-drm-dead-mp3-music,news-4281.html (discussing the RIAA's statements that DRM usage by content owners continues, but is in decline).

define the role that ISPs should play in policing copyright infringement on their networks.[64] Moreover, ISPs, content owners, scholars, and politicians debated the scope of liability that ISPs should face for the infringing activities of their online users.

In 1996, the member states of the World Intellectual Property Organization ("WIPO") adopted the WIPO Copyright Treaty to address the inadequacies of contemporary legal regimes and deal with developments in information technologies. In 1998, the treaty was incorporated into U.S. law through passage of the DMCA.[65] In crafting the DMCA, Congress attempted to balance the competing interests of ISPs and content owners.[66] Content owners had successfully advocated for the inclusion of anti-circumvention provisions in the DMCA, which made it illegal for anyone to knowingly bypass technological barriers for protecting a copyrighted work, such as DRM mechanisms.[67] Similarly, the DMCA prohibited tampering with copyright management information.[68] On the other hand, ISPs won broad "safe harbor" provisions to limit their liability for the infringing activities of their users. Section 512 of the DMCA created new liability limitations based on four categories of activity by an ISP: (1) transitory communications; (2) system caching; (3) storage of information on systems or networks at the direction of users; and (4) information location tools.[69] ISPs that persistently

64. *See* Bruce A. Lehman, U.S. Patent and Trademark Office, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, 114–24 (1995), http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf. In 1993, President Clinton created the Information Infrastructure Task Force ("IITF") in order to develop his Administration's vision for a comprehensive information and telecommunications policy framework. *Id.* at 1. In its 1995 white paper on the National Information Infrastructure, the IITF rejected arguments that the Internet's potential for growth would be jeopardized by a copyright regime under which ISPs could be liable for the infringing activities of their users. *Id.* at 117–24. The IITF believed that ISPs were best positioned "to know the identity and activities of their subscribers and to stop unlawful activities." *Id.* at 117. The IITF also believed that because ISPs benefitted from infringing activities through increased usage and added subscribers, they should also bear some of the enforcement costs and be liable for infringement. *Id.* at 117–18.

65. *See* The Digital Millennium Copyright Act Of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C.).

66. *See* Cassandra Imfeld & Victoria Smith Ekstrand, *The Music Industry and the Legislative Development of the Digital Millennium Copyright Act's Online Service Provider Provision*, 10 COMM. L. & POL'Y 291, 299–301 (2005).

67. *See* S. REP. NO. 105-190, at 7, 10 (1998); *see also* 17 U.S.C. § 1201(a)(1) (2006).

68. 17 U.S.C. § 1201.

69. 17 U.S.C. § 512 (2011).

store information at the direction of their users must comply with a "notice and takedown" regime to remain immune from liability.[70]

All ISPs claiming safe harbor protection under the DMCA must meet the conditions for eligibility listed in Section 512(i), which requires that ISPs (1) adopt a policy that provides for the termination of access for repeat infringers in appropriate circumstances and (2) accommodate technical measures used by copyright holders to identify and protect their works.[71] However, Section 512(m) expressly precludes courts from construing any provision in Section 512 to mean that ISPs have an affirmative duty to monitor their services to actively seek out infringing activities in to order to qualify for safe harbor protections.[72]

Some critics argue that the DMCA is ill-equipped to address many issues arising from the technological developments of the last decade.[73] When the DMCA was drafted, ISPs' technical capacity to monitor and police the content flowing through their networks was more limited than that of today.[74] Placing the policing burden on copyright holders under a notice-and-takedown regime no longer makes sense given the availability of powerful and cheap technologies for monitoring and filtering infringing uses.[75] To strengthen their ability to claim safe harbor under the DMCA, many operators of P2P networks have designed their networks in ways that limit their knowledge of their users' activities.[76] Yet these operators of such networks still profit from the trafficking of pirated content via advertisement sales.[77] However, many courts have been reluctant to hold that constructive knowledge of general infringement should cause an ISP to lose its safe

70. *See* 17 U.S.C. § 512(c) (providing that ISPs that merely serve as temporary conduits for information transfer fall under the scope of 512(a)'s protections and are not subject to the notice-and-takedown framework).

71. *See* 17 U.S.C. § 512(i).

72. *See* 17 U.S.C. § 512(m).

73. *See, e.g.*, Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 717 (2011); Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 638 (2006).

74. *See* Lital Helman & Gideon Parchomovsky, *The Best Available Technology Standard*, 111 COLUM. L. REV. 1194, 1203 (2011) (discussing the superior ability of ISPs relative to content owners to implement technological filters to screen for copyrighted works).

75. *Cf.* Frieden, *supra* note 8, at 645 (stating that many ISPs will likely adopt "smart" technologies to monitor and direct traffic on their networks and that by choosing "to operate [as] a non-neutral conduit, the ISP, internationally or not, should incur greater responsibility for the content it carries").

76. Peter S. Menell & David Nimmer, *Legal Realism in Action: Indirect Copyright Liability's Continuing Tort Framework and Sony's De Facto Demise*, 55 UCLA L. REV. 143, 187 (2007).

77. *See id.*

harbor protection.[78] Nonetheless, the legal uncertainty of what constitutes actual knowledge of infringement increases the risks faced by ISPs and slows innovation,[79] while also driving up the costs of enforcement for content owners.

Most recently, the Internet has become host to far more generative and interactive content, further making application of the DMCA problematic.[80] Courts addressing liability under the DMCA in cases involving P2P networks and websites with UGC have struggled to reach consistent outcomes.[81] UGC frequently transforms, criticizes, or parodies copyrighted works, and therefore, may constitute fair use of copyrighted material.[82] Since a fair use analysis is often quite difficult even for trained lawyers and judges, some argue that current filtering technologies are inadequate to protect fair uses of copyrighted materials.[83] Furthermore, as the business models of ISPs move beyond that of mere information relays towards that of hosts of interactive content and social media, ISPs and content owners now have incentives to explore private agreements in order to reduce infringement, avoid liability, monetize the consumption of media, and gain a possible economic advantage over their competitors.[84]

78. *See, e.g.*, Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514, 525 (S.D.N.Y. 2010) (stating that "[g]eneral knowledge that infringement is 'ubiquitous' does not impose a duty on the service provider to monitor or search its service for infringements"); UMG Recordings, Inc. v. Veoh Networks Inc., 665 F. Supp. 2d 1099, 1112 (C.D. Cal. 2009) *aff'd sub nom.* UMG Recordings, Inc. v. Shelter Capital Partners LLC, 09-55902, 2011 WL 6357788 (9th Cir. Dec. 20, 2011) (finding that actual awareness must include knowledge of "red flags," regardless of whether the defendant had knowledge of the "general proposition that infringing material is often uploaded").

79. *See* Mitchell P. Goldstein, *Service Provider Liability for Acts Committed By Users: What You Don't Know Can Hurt You*, 18 J. MARSHALL J. COMPUTER & INFO. L. 591, 641 (2000).

80. *See* Michael Sawyer, *Filters, Fair Use, and Feedback: Generated Content Principles and the DMCA*, 24 BERKELEY TECH. L.J. 363, 371, 402 (2009).

81. *See id.* at 367.

82. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).

83. *See* Burk & Cohen, *supra* note 62, at 55 (stating that "an algorithm-based approach to fair use is unlikely to accommodate even the shadow of fair use as formulated in current copyright law").

84. *See* Bridy, *supra* note 2, at 81–84. Bridy notes that "[t]he policy underlying § 512(a)—that providers acting as passive conduits and automatically transmitting material chosen by others should not be held liable if that material turns out to be infringing—was not without antecedent in copyright law when the DMCA was enacted in 1998," yet "[c]ontroversially, ISPs—including cable, DSL, and wireless broadband providers—have not been subject to the common carrier requirements that define the regulatory space for wire-based telephony." *Id.*

3. Litigation as Enforcement: Limitations and Criticisms

Copyright holders have two main litigation options to enforce their rights under current U.S. law.[85] Rightsholders can bring suits against individual infringers or against the companies whose technologies facilitate unauthorized distribution of their copyrighted works.[86] The DMCA places the burden of online copyright enforcement on the copyright owner to identify infringers under a notice-and-takedown framework.[87] Furthermore, infringement suits are often expensive, lengthy, and uncertain.[88] The stratospheric damages sought (and occasionally won) by copyright owners have virtually guaranteed that many if not most individual infringers are judgment proof.[89] Lawsuits against individual users have often turned public opinion against content owners, as many people see such suits as a contest between an innocent David and a greedy Goliath.[90] Thus, content owners have generally preferred to target organizations that enable illegal file-sharing because of the potential for greater damages awards and lower litigation costs.[91]

85. *See* Christopher M. Swartout, *Toward A Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement*, 31 NW. J. INT'L L. & BUS. 499, 504 (2011).

86. *See id.*

87. *See* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1113 (9th Cir. 2007) ("The DMCA notification procedures place the burden of policing copyright infringement-identifying the potentially infringing material and adequately documenting infringement-squarely on the owners of the copyright. We decline to shift a substantial burden from the copyright owner to the provider.").

88. *See* Bridy, *supra* note 73, at 720; *see, e.g.*, Lisa Lerer, *Viacom's Expensive Suit*, FORBES.COM (March 28, 2007) http://www.forbes.com/2007/03/27/youtube-viacom-google-tech-cx_ll_0328google.html (stating that the lawsuit between YouTube and Viacom could generate $350 million or more in legal fees).

89. *See* Sony BMG Music Ent. v. Tenenbaum, 672 F. Supp. 2d 217 (D. Mass. 2009) (awarding initially $675,000 in damages); Capitol Records, Inc. v. Thomas-Rasset, 799 F. Supp. 2d 999 (D. Minn. 2009) (awarding $1.5 million in damages).

90. *See* Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725, 735 (2005).

91. *In re* Aimster Copyright Litig., 334 F.3d 643, 645 (7th Cir. 2003) ("The swappers [of infringing files], who are ignorant or more commonly disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement, are the direct infringers. But firms that facilitate their infringement, even if they are not themselves infringers because they are not making copies of the music that is shared, may be liable to the copyright owners as contributory infringers. Recognizing the impracticability or futility of a copyright owner's suing a multitude of individual infringers ('chasing individual consumers is time consuming and is a teaspoon solution to an ocean problem,'), the law allows a copyright holder to sue a contributor to the infringement instead, in effect as an aider and abettor.").

Shortly after the DMCA was drafted, Napster transformed the way people used and perceived the Internet.[92] File-sharing of copyrighted content skyrocketed and the record industry soon took notice.[93] After negotiations broke down between the RIAA and Napster, the RIAA's member labels filed suit against Napster in late 1999.[94] The district court granted a preliminary injunction against Napster's unauthorized distribution of copyrighted content, which was later upheld by the Ninth Circuit.[95]

However, even where content owners have successfully been able to shut down one file-sharing site, similar sites sprouted up almost immediately to take their place.[96] The RIAA's member labels brought suits against many of the companies that introduced new P2P file-sharing networks.[97] However, the decentralization of P2P software employing bit torrent technology has complicated the RIAA's ability to clamp down on these companies through injunctions.[98] Given the vast number of content sharing sites, actively pursuing all cases of infringement would require a virtually unlimited amount of time and financial resources. Thus, while content owners still bring lawsuits against the operators of P2P networks, court-ordered injunctions appear unlikely to ever fully stop online piracy.

Following the RIAA's consistent failure to shut down file-sharing sites, the RIAA embarked in 2003 on a campaign of infringement suits against

92. *See.* Menell & Nimmer, *supra* note 76, at 178.

93. *See* Susan Stellin, *Technology Briefing: Internet; Napster Use Quadrupled In 5 Months*, N.Y. TIMES, Sept. 12, 2000, at C6.

94. A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 925–27 (N.D. Cal. 2000) *rev'd on other grounds*, 239 F.3d 1004, 1014–19, 1024–27 (9th Cir. 2001).

95. *Id.*; A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014–19, 1024–27 (9th Cir. 2001).

96. *See Napster Eclipsed by Newcomers*, WIRED (Sept. 6, 2001), http://www.wired.com/techbiz/media/news/2001/09/46596.

97. *See RIAA v. The People: Four Years Later*, ELECTRONIC FRONTIER FOUNDATION (2007), http://w2.eff.org/IP/P2P/riaa_at_four.pdf (listing RIAA member's lawsuits against other operators of P2P networks); *see also* MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 933–37 (2005) (holding that one who distributes file-sharing software while affirmatively promoting its copyright-infringing use could be held liable for secondary infringement, even if the device has substantial non-infringing uses). The Court distinguished *Grokster* from the "staple article of commerce" safe harbor from *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984), stating that it did not apply where there was evidence of intentional promotion of copyright-infringing use. *Grokster*, 545 U.S. at 933–37.

98. *See* Swartout, *supra* note 85, at 518–19; *see also* Eric Bangeman, *Study: BitTorrent Sees Big Growth, LimeWire Still #1 P2P App*, ARS TECHNICA (Apr. 21, 2008), http://arstechnica.com/old/content/2008/04/study-bittorren-sees-big-growth-limewire-still-1-p2p-app.ars (reporting that bit torrent platforms account for the vast majority of P2P file-sharing).

individual infringers.[99] The campaign's purpose was to deter the public from engaging in infringing conduct through the threat of costly lawsuits.[100] While some of the individual users in these cases faced massive statutory damages for their illegal file-sharing activities,[101] copyright infringement remained widespread.[102] Furthermore, judges have not been inclined to let massive statutory damages awards stand in cases involving individual downloaders.[103] In some of the most closely followed cases, judges reduced damages on remittitur or struck down damage awards as violations of the Due Process Clause because they were seen as grossly disproportionate to any demonstrated actual harm.[104]

Critics debate whether the lawsuits against individuals have succeeded in discouraging infringement.[105] Some critics contend that these lawsuits succeeded only in triggering a consumer backlash against the record industry.[106] Dramatic increases in the penetration of broadband access both

99. *See* David Kravets, *File Sharing Lawsuits at a Crossroads*, *After 5 Years of RIAA Litigation*, WIRED (Sept. 4, 2008, 2:55 PM), http://www.wired.com/threatlevel/2008/09/proving-file-sh/.

100. *See id.* (quoting an RIAA spokesperson as stating that the goal of the litigation campaign was "simply to get peer-to-peer users to stop offering music that does not belong to them").

101. *See, e.g.*, Sony BMG Music Ent. v. Tenenbaum, 672 F. Supp. 2d 217 (D. Mass. 2009) (initially awarding $675,000 in damages); Capitol Records, Inc. v. Thomas-Rasset, 799 F. Supp. 2d 999 (D. Minn. 2009) (awarding $1.5 million in damages).

102. Swartout, *supra* note 85, at 504.

103. *Id.*

104. *See* Capitol Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010); Sony BMG Music Entm't v. Tenenbaum, 721 F. Supp. 2d 85, 89 (D. Mass. 2010). *But see* Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487 (1st Cir. 2011) (rejecting the district court's Due Process argument and holding that the judge should have first consider remittitur and non-constitutional grounds for lowering the damages award).

105. *See* Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1, *available at* http://online.wsj.com/article/SB122966038836021137.html (stating that one report commissioned by the RIAA indicated that while the percentage of Internet users illegally downloading music had stayed constant for a number of years, the volume of shared music had increased); *cf.* INT'L FED'N PHONOGRAPHIC INDUS., *supra* note 38, at 22 (finding that "globally around 95% of music tracks are downloaded without payment to the artist"); *IFPI's Mission*, INT'L FED'N PHONOGRAPHIC INDUS., http://www.ifpi.org/content/section_about/index.html (last visited Oct. 31, 2011) (stating that the IFPI "represents the recording industry worldwide with some 1400 members in 66 countries and affiliated industry associations in 45 countries").

106. *See* Jacob Ganz, *The Decade in Music: The Way We Listen Now,* NATIONAL PUBLIC RADIO (Dec. 2, 2009), http://www.npr.org/templates/story/story.php?storyId=121023882; Joseph Palenchar, *Music Habits Continue to Shift*, TWICE (Mar. 17, 2009), http://www.twice.com/article/258446-Music_Consumption_Habits_Continue_To_Shift_NPD.php (stating that "[a]lthough the number of paid downloads is up, music purchasing overall—including CD sales—is down").

domestically and abroad complicate any attempt to measure the RIAA's litigation campaign's effect on stemming piracy.[107] However, surveys indicate that the campaign successfully raised consumer awareness of the potential for lawsuits for file-sharing activities.[108]

By late 2008, the RIAA had abandoned its campaign after having filed complaints against almost 35,000 people—many of whom settled rather than face the risk of massive statutory damages.[109] The reasons behind the RIAA's decision are not entirely clear.[110] The RIAA indicated that the move away from litigation was a strategic shift towards cooperative relationships with ISPs.[111] However, many claim that the litigation campaign had backfired, causing resentment among consumers while doing little to stifle rampant infringement.[112]

The last few years have also witnessed the emergence of a new form of business based upon copyright litigation.[113] Some companies have employed a business model mirroring that of the non-practicing entities in patent law—so-called "patent trolls." These businesses acquire a portfolio of IP rights either directly or through representation agreements with rightsholders, identify potential infringers (often through subpoenas to ISPs), send out demand letters, and negotiate settlements by leveraging the threat of expensive litigation and high statutory damages.[114]

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107. *See* Rep. of the Broadband Comm'n for Digital Dev., *Broadband: A Platform for Progress*, in U.N. EDUC., SCIENTIFIC AND CULTURAL ORG. 3 (June 2011), http://www.broadbandcommission.org/Reports/Report_2.pdf (finding that the number of fixed broadband subscribers per 100 people in the developing world increased from 10% to 25% from 2005 to 2010); s*ee also* Hughes, *supra* note 90, at 725 (analyzing the success of lawsuits in removing infringing content from the Internet).

108. David A. McGill, *New Year, New Catch-22: Why the RIAA's Proposed Partnership with ISPs Will Not Significantly Decrease the Prevalence of P2P Music File Sharing*, 27 ENT. & SPORTS LAW 7, 9 (2009) (suggesting that, according to an RIAA spokesperson, the proportion of consumers who thought that file-sharing was illegal increased from thirty-seven percent in 2003 to seventy-three percent in 2008).

109. *See* McBride et al, *supra* note 105.

110. *See id.* (stating that critics believe the RIAA abandon the suits because they were ineffective and expensive while RIAA spokespersons claim that the recording industry instead decided to focus its efforts on collaborations with ISPs).

111. *See id.*

112. *See id.*

113. *See* Nate Anderson, *US Anti-P2P Law Firms Sue More in 2010 than RIAA Ever Did*, ARS TECHNICA (Oct. 7, 2010), http://arstechnica.com/tech-policy/news/2010/10/us-anti-p2p-law-firms-sue-more-in-2010-than-riaa-ever-did.ars.

114. *See, e.g.*, Josh Halliday, *ACS: Law Gets More of Copyright Fines than Rights Holders*, GUARDIAN (Oct. 5, 2010, 7:10 PM), http://www.guardian.co.uk/technology/2010/oct/05/acs-law-filesharing-copyright-claims; *see also Sample Settlement* Agreement, DIGITAL RIGHTS CORPORATION, http://digitalrightscorp.com/joomla/index.php?option=com_content&

Some copyright litigation businesses represent creators, including independent film makers who have seen their works shared widely on P2P networks long before official release.[115] Other litigation groups have actually brought suit on their own behalf after signing assignment agreements with the original rightsholders. Most notorious of these so-called "copyright trolls" is Righthaven, which reportedly sought out cases of copyright infringement, then bought the rights to the infringed work in order to pursue settlements and statutory damages.[116] In a handful of tersely worded decisions, judges found that Righthaven had no standing to sue because it had never truly been assigned the copyrights that it was litigating.[117] Righthaven now is on the verge of bankruptcy after a number of its cases have been dismissed and attorneys' fees were awarded to defendants.[118]

4. A More Active Government Role in Copyright Enforcement

Because of the vast amount of money and labor involved in copyright-related industries, the United States and other nations have sought to establish trade protections for their intellectual property assets.[119] In 2010, copyright-related industries accounted for nearly a trillion dollars of the U.S. economy.[120] Over 5 million Americans are employed in copyright-related

view=article&id=71&Itemid=278 (explaining that Digital Rights Corporation, one of the copyright litigation companies, operates by sending out blanket notice-of-infringement letters to users accused of possessing unauthorized copyrighted works with offers to release the users from liability in exchange for a small predetermined settlement fee agreement of $10 per infringing work).

115. *See* Eriq Gardner, *"Hurt Locker" Suits Target Pirates*, REUTERS (May 11, 2010), http://www.reuters.com/article/2010/05/12/us-hurtlocker-idUSTRE64B0AU20100512.

116. *See* Steve Green, *Legal Attack Dog Sicked On Websites Accused of Violating R-J Copyrights*, LAS VEGAS SUN (Aug. 4, 2010, 2:00 AM), http://www.lasvegassun.com/news/2010/aug/04/unlikely-targets-emerging-war-media-content/.

117. *See, e.g.*, Righthaven LLC v. Newsblaze LLC, 2:11-CV-720-RCJ-GWF, 2011 WL 5373785 (D. Nev. Nov. 4, 2011) (stating that "[c]ourts in this district have found that the [Righthaven's assignment agreement] does not confer Righthaven standing to sue for copyright infringement because the [agreement] deprives Righthaven of any of the rights normally associated with ownership of an exclusive right and only leaves Righthaven the bare right to sue").

118. *See Righthaven Says It May Have To File For Bankruptcy*, VEGAS INC. (Sept. 9, 2011, 9:53 AM), http://www.vegasinc.com/news/2011/sep/09/righthaven-says-it-might-have-file-bankruptcy/.

119. *See Intellectual Property*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-topics/intellectual-property (last visited Feb. 25, 2012) (stating that the U.S. Trade Representative "uses a wide range of bilateral and multilateral trade tools to promote strong intellectual property laws and effective enforcement worldwide, reflecting the importance of intellectual property and innovation to the future growth of the U.S. economy").

120. *See* SIWEK, *supra* note 17, at 4.

industries.[121] Furthermore, domestic and international lobbying by the major content industries has pressured governments to assume a more active role in copyright enforcement. The U.S. Advisory Committee for Trade Negotiations ("ACTN"), a committee in the Office of the U.S. Trade Representative, and the International Intellectual Property Association ("IIPA"), an industry association, spearheaded efforts to integrate intellectual property enforcement standards into international trade agreements.[122] The ACTN has worked to include the major players in the American intellectual property private sector in shaping U.S. trade policy.[123] The TRIPS agreement, which required member states to create criminal penalties for counterfeiting and piracy, represented one of the first major steps in an evolving trend among developed nations to coordinate their efforts to rigorously safeguard the intellectual property assets of domestic industries in global markets.[124]

Reflecting the United States' growing interest in protecting its intellectual property assets, the 2008 Pro-IP Act created a federal intellectual property enforcement coordinator position in order to align U.S. copyright enforcement efforts.[125] As part of these coordinated efforts, the U.S. Immigration and Customs Enforcement and the Department of Homeland Security have taken down more than 120 domain names of websites that were trafficking in unauthorized copyright content and counterfeit goods.[126] This campaign, dubbed "Operation in Our Sites," has drawn sharp criticism from some who argue that the takedowns sidestep due process rights by taking away a suspect's assets before that person can defend himself in a

121. *Id.*

122. *See* Peter Drahos, *Global Property Rights in Information: The Story of TRIPS at the GATT*, 13 PROMETHEUS 6, 10 (1995), *available at* http://www.anu.edu.au/fellows/pdrahos/articles/pdfs/1995globalproprightsinfo_drahos.pdf.

123. *See id.*

124. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 61, Apr. 15, 1994, 1869 U.N.T.S. 299.

125. *See* 15 U.S.C. §8111(a) (2006) (stating "[t]he President shall appoint . . . an Intellectual Property Enforcement Coordinator . . . to serve within the Executive Office of the President").

126. *See ICE Declares 'Mission Accomplished' On Domain Seizures*, TECHDIRT (June 10, 2011), http://www.techdirt.com/articles/20110608/20310614626/ice-wants-european-countries-to-join-domain-seizure-party.shtml.

judicial proceeding.[127] Supporters of the campaign argue that foreign-based websites present a growing threat to American intellectual property assets.[128]

A number of bills have been recently proposed in Congress that would create new mechanisms for the federal government to shutdown sites that appear to be distributing unauthorized copies of copyrighted works. In 2010, Senator Leahy introduced the Combating Online Infringement and Counterfeits Act ("COICA") that would have given increased authority to federal law enforcement agencies to seize the domain names of sites accused of being "dedicated to infringing activity," [129] but the bill never made it to a floor vote after intense pressure from internet companies, online pundits, and public campaigns.[130] In early 2012, two similar bills, the Stop Online Piracy Act ("SOPA"), in the House, and the Protect IP Act ("PIPA"), in the Senate, attracted even greater public attention to the issue of intellectual property enforcement on the Internet.[131] On January 18, 2012, a large number of internet companies, including Wikipedia and Google, voiced their opposition to the bills in unison, warning visitors to their sites that the two pieces of legislation threatened freedom of expression on the Internet.[132] Although many in the content-owning industries had hoped that the bills would create new tools for copyright enforcement, both pieces of legislation were quickly abandoned after millions of individuals signed online petitions calling for their halt.[133]

127. *See* Andrew McDiarmid, *Mozilla Questions Takedown Demand,* CENTER FOR DEMOCRACY & TECHNOLOGY (May 6, 2011) http://www.cdt.org/blogs/andrew-mcdiarmid/mozilla-questions-takedown-demand; James Temple, *Don't Be Overzealous in Copyright*, SF GATE (June 15, 2011), http://articles.sfgate.com/2011-06-15/business/29659679_1_internet-copyright-legal-challenge-sports-sites.

128. *See Piracy of Intellectual Property: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary* , 109th Cong. 1 (2005) (statement of Marybeth Peters, U.S. Register of Copyrights) (stating that "piracy, and especially global piracy, is probably the most enduring problem [she has] encountered").

129. *See* Combating Online Infringement and Counterfeits Act of 2010, S. 3804, 111th Cong. (2010), *available at* http://www.govtrack.us/congress/bill.xpd?bill=s111-3804.

130. *See* Nate Anderson, *Revised 'Net Censorship Bill Requires Search Engines To Block Sites, Too*, ARS TECHNICA (May 11, 2011), http://www.wired.com/epicenter/2011/05/revised-net-censorship-bill/2/.

131. *See* Stephanie Condon, *PIPA, SOPA Put on Hold in Wake of Protests*, CBS NEWS (Jan. 20, 2012), http://www.cbsnews.com/8301-503544_162-57362675-503544/pipa-sopa-put-on-hold-in-wake-of-protests/.

132. *See id.*

133. *See id.*

5. Where Copyright Enforcement Efforts Stand Today

Content owners continue to rely on a hodgepodge of enforcement mechanisms to protect their copyrighted works. Although DRM technologies have proven vulnerable to hacking and are widely disliked by consumers, content owners continue to develop new technological means to prevent unauthorized copying.[134] The DMCA's notice-and-takedown framework is still widely used by content owners to remove allegedly infringing works from their networks.[135] However, as lawsuits such as *YouTube v. Viacom* demonstrate,[136] the conditions for safe harbor protections are still widely disputed and millions of dollars worth of copyrighted materials are contested in incredibly expensive litigation.[137] Likewise, content owners continue to pursue litigation against the operators of P2P networks, but few rightsholders hold on to any hope that lawsuits alone will curb online piracy.[138] Given the shortcomings of current enforcement mechanisms, content owners continue to look for new tools to fight online piracy and to attract users to revenue-generating distribution models.[139]

II. EVENTS LEADING TO THE 2011 MEMORANDUM OF UNDERSTANDING

Most content owners believe that litigation measures and legislation have done little so far to stop the hemorrhaging of their profits.[140] After witnessing the disruption of the music business due to the digitization of media and the growth of the Internet, other creative content industries, including the television and movie industries, began to look for alternative models to control and capitalize on their works. Many content owners are now considering collaborative relationships with ISPs to develop private enforcement mechanisms—often in the form of GRS—that rely on infringement detecting technologies, standardized terms of service ("TOS"), end user license agreements ("EULA"), and acceptable use policies.[141] For content owners, GRS offer the obvious benefit of reducing the costs and

134. *See supra* Part I.B.1.

135. *See supra* Part I.B.2 & I.B.3.

136. Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514, 525 (S.D.N.Y. 2010).

137. *See* Lisa Lerer, *Viacom's Expensive Suit*, FORBES.COM (March 28, 2007), http://www.forbes.com/2007/03/27/youtube-viacom-google-tech-cx_ll_0328google.html (suggesting that the lawsuit could generate $350 million or more in legal fees).

138. *See supra* Part I.B.3.

139. *See infra* Part II.

140. *See* INT'L FED'N PHONOGRAPHIC INDUS., *supra* note 38, at 22.

141. *See* Bridy, *supra* note 2, at 2.

risks of litigating against accused infringers while shifting some of the cost burden onto ISPs. But the reasons why ISPs have been willing to assume a greater burden in copyright enforcement are more complicated. This Part will explore some of the factors that gave rise to the development and adoption of GRS domestically and abroad.

A. THE ORIGIN OF GRADUATED RESPONSE SYSTEMS

A number of foreign governments have adopted a "three strikes and you're out" graduated response model, in which a user's internet connection is temporarily downgraded, suspended, or terminated by the user's ISP after three notices of copyright infringement.[142] In a typical GRS, a content owner identifies an infringing use of its copyrighted work and notifies the appropriate ISP about that infringing activity.[143] The ISP then responds to the infringing activities of a given user with a series of prescribed consequences.[144] Subsequent accusations of infringement result in the administering of a stronger punishment—or a "graduated response." Although some of these publicly ordered regimes rely on content owners to manually issue takedown notices similar to the requirements of the DMCA, other more automated—and controversial—systems depend upon filtering technologies to monitor infringement and police individual users' "strikes."[145] Systems relying on filtering technologies might be overly broad compared to systems relying on manual notices because filters are unlikely to be sufficiently sophisticated to recognize all fair uses.[146] However, technological filtering systems for monitoring online content can be more widely and evenly applied than manual systems, which are inherently restricted by human limitations given the vast scope and scale of the Internet.

Several countries, including France, the United Kingdom, and South Korea, have already adopted GRS through legislation into their copyright enforcement regimes.[147] The majority of these countries have designed their systems to be regulated by administrative bodies, rather than through traditional judicial channels.[148] However, there have been challenges to the

142. *See* Yu, *supra* note 42, at 1376.

143. *See* Bridy, *supra* note 2, at 84.

144. *See id.*

145. *See id.*

146. *See* Sawyer, *supra* note 80, at 383.

147. *See* DIGITAL ECONOMY ACT, 2010, c.24 §§ 3–18 (U.K.) (creating legal duties to prevent online copyright infringement); *see also* Jeremy de Beer & Christopher D. Clemmer, *Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?*, 49 JURIMETRICS J. 375, 393–96 (2009) (describing France's graduated response regime, HADOPI, as well as South Korea's preventative obligation scheme).

148. *See* DIGITAL ECONOMY ACT, c.24 §§ 3–18; de Beer, *supra* note 147, at 393–96.

legality of certain "responses" such as denials of service in the absence of judicial proceedings and due process protections.[149] France's laws are among the toughest of the GRS and create fines of €1,500 for individuals identified as an infringer for a third time.[150] However, France's GRS framework ostensibly strives to create a regime for handling claims of online copyright infringement that is efficient and fair.[151] After vocal criticism of the initial procedural framework, accused users under HADOPI have gained a significant degree of procedural protections.[152]

The idea of an administrative system for enforcing copyrights is not new. In 2005, Mark Lemley and Anthony Reese suggested creating a copyright dispute resolution system modeled on the Internet Corporation for Assigned Names and Numbers ("ICANN") Uniform Dispute Resolution Policy, which had been successfully used to resolve domain name disputes involving trademarks.[153] Lemley and Reese hoped that a special administrative system for resolving copyright enforcement issues would reduce the burdens and inefficiencies associated with litigation.[154] Although such a system has yet to be adopted domestically, the 2010 Joint Strategic Plan on Intellectual Property Enforcement described a similar system—albeit without any real enforcement means beyond educational mechanisms.[155]

In the United States, GRS has thus far been implemented solely by contractual agreements between private entities rather than through public administration.[156] Compared to publicly administered systems, privately ordered GRS can quickly and flexibly be adapted to respond to changes in the Internet landscape. Publicly ordered enforcement regimes tend to rely on the slow and expensive processes of formal adjudication or litigation. Furthermore, privately administered systems are funded by the parties to the agreement, whereas publicly administered systems are paid for by public taxes and fees. However, public systems established by the state are more transparent and democratically accountable than privately ordered regimes,

149. *See* de Beer, *supra* note 147, at 393–96.

150. *See FAQ*, L'HADOPI, http://www.hadopi.fr/faq.html (last visited Dec. 9, 2010).

151. *See* Bridy, *supra* note 73, at 735–36.

152. *See id.*

153. *See* Mark A. Lemley & R. Anthony Reese, *A Quick and Inexpensive System for Resolving Peer-to-Peer Copyright Disputes*, 23 CARDOZO ARTS & ENT. L.J. 1 (2005).

154. Bridy, *supra* note 73, at 735–36.

155. *See* Exec. Office of the President, *2010 Joint Strategic Plan on Intellectual Property Enforcement* 33, 44–45 (2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf.

156. *See id*; *see also* Hainen, *supra* note 1.

thus making public systems more readily accepted by public interest advocates.

B. CHANGING BUSINESS MODELS AND ALIGNING ECONOMIC INTERESTS

Part of the reason for ISPs' willingness to partner with content owners may reflect changing business models wherein ISPs' and content owners' commercial interests overlap more now than when the DMCA was first passed. In the late 1990s, the drafters of the DMCA had attempted to satisfy the interests of ISPs, who felt that contributory liability and strict regulation threatened to curtail the expansion of broadband and the burgeoning potential of the Internet.[157] Most content owners, meanwhile, believed that online file-sharing amounted to nothing more than brazen piracy that threatened their ability to generate revenue from their copyrighted works.[158] Moreover, at that time, online commerce was still largely in its infancy, and few content owners fully recognized the Internet's potential as a legitimate market for copyrighted goods.[159]

The division between content owners and ISPs is not as clearly defined as it was when the DMCA was originally passed. As broadband and Wi-Fi access has increased, people increasingly consume copyrighted content over the Internet, and ISPs now play a greater role than ever before in the distribution of creative content.[160] Furthermore, network ISPs have an additional financial incentive to curb online piracy because the unauthorized distribution of creative content creates a significant burden on their data pipelines.[161] Many ISPs, especially application ISPs, are investing in licensing content to attract users.[162] Likewise, the acquisition of content owning companies by ISPs, such as Comcast's recent purchase of NBC Universal, has given ISPs a vested interest in protecting their content holdings.[163]

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157. *See* Yu, *supra* note 42, at 1385–86.

158. *See* S. REP. NO. 105-190, at 5 (1998).

159. *See* Bomsel, *supra* note 30, at 24.

160. *See* Preserving the Open Internet, Broadband Industry Practices, 76 Fed. Reg. 59,192, 59,194 (Sept. 23, 2011).

161. *See Technical Report: An Estimate of Infringing Use of the Internet*, ENVISIONAL (Jan. 2011), http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf (reporting that the transmission of infringing material accounts for about a quarter of all Internet traffic).

162. *See* Yu, *supra* note 42, at 1386 (describing Comcast's ten-year licensing deal with CBS to provide online access to CBS's content).

163. *See* Sam Gustin, *New Anti-Piracy Tactic Turns ISPs Into Copyright*, PAIDCONTENT.ORG (July 11, 2011, 3:31 PM) http://paidcontent.org/article/419-no-more-lawsuits-isps-take-lead-in-policing-piracy-with-six-strikes-pla/.

Similarly, some ISPs are developing their own content, such as Google's announcement in 2011 that it plans to create original programming on YouTube.[164]

By licensing copyrighted works, these companies hope to offer consumers breadth of content and convenience of access without having to account for the risk of litigation costs associated with providing unauthorized access to content. Many companies, such as Hulu, Netflix, and Spotify, are now staking the competitiveness of their business models on licensing and collaboration with content owners.[165] While the record industry was still struggling to adapt after the emergence of P2P networks, Apple demonstrated that a convenient online pay-for-content system was commercially viable when it licensed songs from all five major record companies and offered them for sale via its iTunes store.[166]

C. LOBBYING EFFORTS TO CREATE A COLLABORATIVE FRAMEWORK

The widespread rise of GRS has resulted at least in part from content owner industries that have lobbied internationally—often through governmental trade bodies—to create regulatory regimes around the globe.[167] Representative groups like the International Federation for the Phonographic Industry ("IFPI") and the International Intellectual Property Alliance ("IIPA") were at the forefront of these efforts to require ISPs to adopt measures to police copyrighted works.[168]

The Anti-Counterfeiting Trade Agreement ("ACTA") is an international treaty for establishing international standards on intellectual property rights enforcement.[169] The United States signed on to the ACTA in October of 2011, although the Administration has stated that the treaty does not require any changes to existing law to implement its provisions.[170] The ACTA

164. *See* Don Reisinger, *Google Gearing Up Original YouTube Programming*, CNET (Oct. 27, 2011) http://news.cnet.com/8301-13506_3-20126342-17/google-gearing-up-original-youtube-programming/.

165. *See* Olson, *supra* note 46; Pepitone, *supra* note 46.

166. John Markoff, *Apple Sells 70 Million Songs in First Year of iTunes Service*, N.Y. TIMES, Apr. 29, 2004, at C10.

167. *See* Bridy, *supra* note 4, at 559.

168. *See id.*

169. *See* Anti-Counterfeiting Trade Agreement, Oct. 1, 2011, *available at* http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf.

170. *See* Press Release, Office of the U.S. Trade Representative, ACTA: Meeting U.S. Objectives, (Oct. 2011), *available at* http://publicintelligence.net/anti-counterfeiting-trade-agreement-final-version-may-2011/ (stating that ACTA fulfills the Administration's goals of ensuring "enhanced international cooperation; promotion of sound enforcement practices; and a strengthened legal framework for IPR [Intellectual Property Rights] enforcement in

establishes an international legal framework that promotes, but does not require, the development of collaborative efforts between content owners and ISPs.[171] Even though the ACTA does not mandate the development of GRS, the treaty reflects content owners' desire for ISPs to shoulder a greater part of the enforcement burden.[172] However, many public interest organizations voiced concerns that the ACTA prioritizes content owners' interests over individual rights of free speech, privacy, fair use, and due process.[173]

U.S. politicians have also pressured ISPs to work with content owners to develop new copyright enforcement strategies by threatening to make legislative changes to the copyright enforcement regime. In 2008, Andrew Cuomo, then New York's attorney general, convened leaders from the ISP and content owning industries in order to put pressure on the two industries to develop partnerships to address copyright infringement.[174] Cuomo stated that he believed that it was in the public interest to have two of the state's leading industries working together rather than in opposition.[175] According to a spokesperson, Cuomo felt that it was preferable that the two sides develop a privately ordered compromise, rather than create the potential for new lawsuits or require serious government intervention.[176]

The White House has similarly put pressure on ISPs and content owners to develop industry-based, privately ordered mechanisms for copyright enforcement. In December 2009, Vice President Joe Biden hosted a roundtable on enforcing copyright infringement with some of the country's top officials, including Attorney General Eric Holder, Obama advisor Valeria Jarrett, Homeland Security Secretary Janet Napolitano, U.S. Intellectual Property Enforcement Coordinator Victoria Espinel, and the heads of the

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the areas of criminal enforcement, enforcement at the border, civil and administrative actions, and distribution of copyrighted material on the Internet").

171. *See* Anti-Counterfeiting Trade Agreement, Oct. 1, 2011, *available at* http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf.

172. *See id.*

173. *See Government Blocks Release of Documents on Secret IP Enforcement Treaty*, ELECTRONIC FRONTIER FOUNDATION (Jan. 29, 2009), https://www.eff.org/press/archives/2009/01/29.

174. *See* Greg Sandoval, *Should You Fear New ISP Copyright Enforcers?*, CNET (July 7, 2011), http://news.cnet.com/8301-31001_3-20077659-261/should-you-fear-new-isp-copyright-enforcers/; *see also* Bill Dedman & Bob Sullivan, *ISPs are Pressed to Become Child Porn Cops*, MSNBC.COM (Oct. 16, 2008), http://www.msnbc.msn.com/id/27198621/#.TrMYoFYu6UM (stating that Cuomo had previously used threats of lawsuits to put pressure on ISPs to voluntarily assist the attorney general's office in its efforts to fight the distribution of child pornography).

175. *See id.*

176. *See id.*

FBI and Secret Service.[177] The meeting also included many of the top executives of content industry leaders, such as Warner Music Group, Sony Pictures, NBC, Universal Music, HarperCollins, Walt Disney, News Corp., and Viacom as well as the heads of the MPAA and RIAA.[178] The White House has officially expressed its approval of collaborative efforts between ISPs and content owners as an important step in reducing infringement of American intellectual property.[179] However, Vice President Biden's meeting notably did not include representatives from ISPs, academia, or public interest groups.[180]

The circumstances that led to the development and adoption of GRS represent an alignment of business interests between ISPs and content owners, as well as the belief among content owners that the current mechanisms for deterring widespread online piracy have proven inefficient, unpopular, and otherwise untenable. The widespread growth of GRS also arose directly out of content owning industries' concerted lobbying effort to establish a new mechanism for enforcing copyright protections.

III. A MEMORANDUM OF UNDERSTANDING BETWEEN U.S. CONTENT OWNERS AND INTERNET SERVICE PROVIDERS

In 2011, a consortium of U.S. ISPs and content owners signed a Memorandum of Understanding ("the MOU") that will create a common framework for developing a "copyright alert system"—in other words, a graduated response system—for privately regulating copyright enforcement.[181] Many of the United States' largest ISPs and content owners, including major players in the music, television, and movie industries, have signed on to the MOU.[182] The MOU is not the first attempt by U.S.

177. *See* Nate Anderson, *Biden's "IP Roundtable" Brings Together Big Content*, ARS TECHNICA (Dec. 15, 2009), http://arstechnica.com/tech-policy/news/2009/12/bidens-ip-roundtable-brings-together-big-content-fbi.ars.

178. *See id.*

179. *See* Victoria Espinel, *Working Together to Stop Internet Piracy*, THE WHITE HOUSE BLOG (July 07, 2011), http://www.whitehouse.gov/blog/2011/07/07/working-together-stop-internet-piracy.

180. *See id.*

181. *See* 2011 MOU Agreement, *supra* note 3.

182. *See* Hainen, *supra* note 1 (listing signatories to the Memorandum of Understanding to include Walt Disney Studios Motion Pictures, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Warner Bros. Entertainment Inc., Universal Music Group Recordings, Sony Music Entertainment, Warner Music Group, EMI Music, AT&T, Cablevision Systems Corp., Comcast Corp., Time Warner Cable, Verizon, the IFTA which represents the

companies to establish privately ordered copyright enforcement mechanisms,[183] but the scope and scale of the agreement represents an unprecedented agreement by private entities to coordinate their efforts to curb online copyright infringement.[184] However, several key companies are noticeably absent from the list of signatories to the MOU, including Apple, and Google—the operator of the hotly contested user-generated content hosting site YouTube.[185]

The stated purpose of the MOU is to strengthen protections of creative content by developing industry-wide best practices for notifying and educating users accused of copyright infringement about the legal basis and consequences of copyright law.[186] The MOU also seeks to encourage users to pursue legal means for acquiring content.[187] Under the MOU's graduated response framework, content owners and ISPs will work together to issue "copyright alerts" to subscribers accused of infringing activities.[188] Furthermore, the MOU outlines plans for a system of "mitigation measures" that ISPs will implement to respond to users after multiple accusations of infringement.[189]

Additionally, the MOU establishes a Center for Copyright Information to develop public education programs about copyright laws.[190] The Center for Copyright Information will assist in developing, implementing, and administering each ISP's copyright alert program, as well as assessing the system's effectiveness.[191] The agreement also creates an Independent Review Program to which subscribers can appeal and dispute accusations of infringement.[192] The Independent Review Program and the Center for Copyright Information will be funded in equal part (50% each) by the participating ISPs and by the participating content owners.[193] The Center for

Independent Producers & Distributors of Film & Television Programming, and A2IM which represents 283 small and medium-sized music labels).

183. *See* Nate Anderson, *Verizon to Forward RIAA Warning Letters (But That's All)*, ARS TECHNICA (Nov. 13, 2009) http://arstechnica.com/tech-policy/news/2009/11/verizon-to-forward-riaa-warning-letters-but-thats-all.ars (suggesting that Verizon, Comcast, AT&T, and Cox all had agreements in place with various content owning studios or labels).

184. *See* Hainen, *supra* note 1.

185. *See id.*

186. *See* 2011 MOU Agreement, *supra* note 3.

187. *Id.*

188. *See id.* § 4(G), at 7.

189. *Id.*

190. *Id.* § 2(A), at 3.

191. *Id.*

192. *Id.* § 4(H), at 14.

193. *Id.* §§ 2(E), 4(H), at 4, 14.

Copyright Information will be governed by an executive committee, which will be made up of three members selected by the content owner members and three members chosen by the ISPs.[194]

The MOU places the burden of identify infringing uses and giving notice to ISPs on content owners.[195] Each content owner is to develop a written description of the processes it uses to identify infringing uses on P2P networks.[196] A technical independent expert appointed by the executive committee of the Center for Copyright Information will evaluate the accuracy and effectiveness of the process used by each content owner to identify infringing works.[197] Although the independent expert will work in consultation with privacy experts to develop recommendations to improve the processes employed by each content owner, failure to adopt a recommendation will not constitute a breach of the agreement.[198]

Currently, many ISPs email their subscribers when they receive notice from content owners that infringing use is taking place that is associated with that subscribers' account.[199] However, ISPs vary in their policies and procedures, which are currently designed to comply with the safe harbor requirements of the DMCA. A number of ISPs, including YouTube and Facebook, have already adopted policies that facilitate and standardize a process for copyright holders to file § 512(c) takedown notices for infringing activities on their sites.[200] In some ways, these measures resemble the procedures outlined in the MOU. For example, if YouTube receives a copyright infringement notice from a content owner, that uploader of that video is required to complete "YouTube Copyright School," which involves watching an educational video on copyright law and YouTube's terms of service.[201] Google will remove "strikes" from a user's account if he successfully completes "copyright school" and refrains from further

194. *Id.* § 2(B), at 4.
195. *Id.* § 4(A), at 4.
196. *Id.*
197. *Id.* § 4(B), at 4.
198. *Id.*
199. *See* Nate Anderson, *Verizon to Forward RIAA Warning Letters (But That's All)*, ARS TECHNICA (Nov. 13, 2009), http://arstechnica.com/tech-policy/news/2009/11/verizon-to-forward-riaa-warning-letters-but-thats-all.ars.
200. *See Content Management*, YOUTUBE, http://www.youtube.com/t/dmca_policy (last visited Oct. 30, 2011); *DMCA Notice of Copyright Infringement*, FACEBOOK, http://www.facebook.com/legal/copyright.php?copyright_notice=1 (last visited Oct. 30, 2011).
201. *See* Jennifer Martinez, *Google to Sentence YouTube Users to "Copyright School"*, POLITICO (April 14, 2011), http://www.politico.com/news/stories/0411/53035.html.

infringing activities.[202] Google's general policy regarding multiple accusations of infringement is to suspend YouTube users after accumulating three copyright strikes.[203]

The MOU also presently bears resemblance to Section 512(i) which requires ISPs seeking safe harbor to "adopt and reasonably implement . . . a policy that provides for the termination in appropriate circumstances" of subscribers who are repeated infringers of copyrighted materials.[204] However, under the MOU, ISPs are not just seeking safe harbor from liability. They are actively partnering with content owners to identify and address infringement outside of a litigation context.

A. TERMS OF THE MEMORANDUM OF UNDERSTANDING

1. Copyright Alerts and Mitigation Measures

Rather than adopting the "three strikes, you're out" model embraced by a number of foreign governments, ISPs who signed the MOU agreed to implement a graduated response system into their user policies that is "substantially similar" to the framework laid out in the terms of the MOU.[205] The MOU's graduated response system framework includes four phases or steps: the Initial Educational Step, the Acknowledgement Step, the Mitigation Measures Step, and the Post Mitigation Measures Step. ISPs will issue up to six alerts through these steps to warn subscribers that they are infringing copyright material.[206]

As part of the Initial Educational Step, each participating ISP, upon receiving a first notice of infringing activity associated with an account, will send a subscriber an alert intended to educate the subscriber about the ISP's copyright policy.[207] This alert will include information specifically identifying the subscriber's allegedly infringing activity as well as information about U.S. copyright law and the ISP's terms of service and/or acceptable use policies.[208]

After a subscriber has received one or two educational copyright alerts,[209] additional notices of infringing activities will trigger the Acknowledgment Step. At this phase, an ISP will send two further copyright alerts that will

202. *Id.*
203. *Id.*
204. 17 U.S.C. § 512(i) (2006).
205. *See* 2011 MOU Agreement, *supra* note 3.
206. *Id.* § 4(G), at 8.
207. *Id.*
208. *Id.*
209. *See id.* (stating that under the MOU, ISPs may elect to send either one or two copyright alerts at the "educational step").

require a subscriber to acknowledge receipt of the notices by clicking through a landing page or pop-up window.[210]

When a subscriber is accused of infringing activity, after already having received two acknowledgement alerts, the subscriber will then move to the Mitigation Measures Step. During this phase, the ISP will then send one "mitigation measure copyright alert" and will apply the prescribed mitigation measure.[211] At the mitigation stage, ISPs have a range of mitigation measures available for users accused of multiple infringing activities including slowing internet connection speeds, downgrading the service tier to which a user is subscribed, temporarily redirecting a user to a different home page until the subscriber contacts the ISP for further action, and temporarily redirecting to a copyright education site or a landing page site informing the user that they must contact the ISP.[212] Alternatively, ISPs have the discretion to skip straight to the step of disconnecting an accused user's internet connection or restricting the user's access to a given site.[213]

In the event that a participating ISP receives notice of further infringing activities associated with a subscriber's account after mitigation measures have been applied, the subscriber will move to the final phase—the Post Mitigation Measures Step. At this phase, the ISP will send one more mitigation measure alert and will apply a different mitigation measure, which may include termination of service and notice to the subscriber that he may be subject to a possible lawsuit for copyright infringement.[214] However, it should be noted that almost every ISP already includes a termination of service provision in its policies because the safe harbor provisions of the DMCA limit an ISP's liability only when that ISP provides for the termination of service of repeat infringers.[215]

2. Dispute Resolution Mechanisms and the Independent Review Board

The MOU also outlines the procedures by which a subscriber can dispute an accusation of infringement. Users will not be able to challenge any alert until the mitigation stage, after the fifth or sixth copyright alert.[216] However,

210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* § 4(G), at 8.
215. *See* 17 U.S.C. § 512(i) (2006) (stating that to be eligible for safe harbor protections, an ISP must adopt and inform users of a "policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers").
216. *See* 2011 MOU Agreement, *supra* note 3 § 4(H), at 14.

at that point, a user may contest any previously issued copyright alert unless that user failed to properly raise an objection to that alert during a prior appeal.[217] In order to contest the finding of infringement, a user must pay $35 and appeal to the Independent Review Program.[218] The executive committee of the Center for Copyright Information will appoint an Administering Organization to process all disputes.[219] Each dispute will be decided by a "neutral" individual reviewer, who must be a lawyer, but who need not be qualified to be an arbitrator.[220] In reaching their decision, reviewers are to apply the relevant legal principles as determined by U.S. federal courts.

Because the MOU creates a privately ordered enforcement regime, an accused user cannot avail himself of the full range of defenses available under U.S. copyright law. The MOU instead lays out six possible defenses that will be considered:

> (i) Misidentification of Account—where a subscriber's account has been misidentified as the account responsible for the infringing act.
>
> (ii) Unauthorized Use of Account—where another party is the actual infringer, and the infringing use was made without the subscriber's knowledge and the subscriber could not have reasonably prevented the infringing use.
>
> (iii) Authorization—where the allegedly infringing use was in fact authorized by the copyright owner.
>
> (iv) Fair Use—where the subscriber's use constitutes fair use.
>
> (vi) Misidentification of File—where the file alleged to contain an unauthorized copy of a work has been inappropriately identified as consisting primarily of the copyrighted work at issue.
>
> (vii) Work Published Before 1923—where the allegedly infringed work was published prior to 1923.[221]

The MOU defines specific rules for each defense category.[222] Because the defenses here are created by contract, rather than by copyright law, the

217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *See* 2011 MOU Agreement, *supra* note 3, Attachment C, § 1; *see also* 2 MELLVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9:11 (Matthew Bender. Rev. Ed. 2010) (stating that under U.S. copyright law, works published prior to 1923 were not granted an extension of protection by the 1976 Copyright Act, and as such, have now passed into the public domain).
222. *Id.*

defenses do not necessarily mirror the more familiar defenses available to a defendant in a court of law. For instance, to successfully defend under "misidentification of account" a subscriber must show that the ISP misidentified the IP address at which the allegedly infringing act took place, and/or that the ISP inaccurately linked the identified IP address to the subscriber's account.[223] According to the MOU, the reviewers will assume a rebuttable presumption that the automated systems for identifying and storing infringing IP addresses work accurately.[224]

Furthermore, the "unauthorized use of account" defense, likely to arise in cases involving unsecured Wi-Fi networks and hacked computers, can only be raised once. Moreover, the reviewer has the discretion to conclude that the "unauthorized use" occurred as a result of a subscriber's failure to secure its internet connection.[225] In making that determination, the reviewer will "consider the evidence in light of the educational messages previously provided by the Participating ISP."[226] After succeeding on this defense, a user will be required to show by clear and convincing evidence that any subsequent unauthorized use "occurred despite reasonable steps to secure the Internet account and that the breach of such security could not reasonably have been avoided."[227] Subscribers who successfully defend against the accused infringement will be refunded the $35 fee and the alert leading to the mitigation phase will be removed from the subscriber's account.[228] However, the previous alerts given to the user will remain on the user's account, such that any subsequent alert will trigger the mitigation process.[229] If a user receives no further alerts within a twelve month period, his account will be cleared of all previous alerts.[230]

3. Mechanisms for Identifying Infringing Works

The MOU provides little information about how content owners will go about identifying infringing works on the ISPs' networks.[231] The MOU, like the DMCA, places the burden on content owners to identify and notify ISPs about allegedly infringing works on their networks.[232] Content owners might

223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Cf. id.*
232. *Id.* § 4(a), at 4.

employ their own automated technologies to search sites for infringing works. Furthermore, some ISPs, such as Comcast, are also content owners and thus they may implement automated filtering in their own pipelines to identify infringing works.[233]

Many filtering technologies rely on digital tags and watermarks inserted into media files by content owners to identify content that is being distributed without authorization.[234] A number of content owners will likely rely on newer video and audio monitoring software that utilizes "perceptual characteristics" of the sounds and images encoded in a file of a copyrighted work to create a unique digital "fingerprint."[235] The efficacy of fingerprinting technology remains disputed, especially when files have been converted, compressed, or separated into multiple files.[236]

It is unclear whether any parties to the agreement will utilize controversial deep-packet inspection ("DPI") technology to identify infringing works.[237] DPI looks beyond the routing information contained within a data packet's header, and into the packet's payload that contains the underlying transmitted information.[238] DPI is appealing to ISPs for reasons beyond those related to copyright enforcement, because DPI can be used to detect viruses, malware, and spam, to manage network flow congestion, and to mine user's data for advertising and marketing purposes.[239] However, DPI is a controversial technology, especially among privacy and free speech advocacy groups, because it allows an organization to inspect—and thus control—all of the data flowing over its pipelines.[240] The use of DPI as a copyright enforcement device may be appealing to companies that operate as both an ISP and a content owner, such as Comcast, so long as the costs of filtering is lower than the economic loss created by unauthorized use of that companies' copyrighted works.

233. *Cf.* Bridy, *supra* note 2, at 112.
234. *See* Sawyer, *supra* note 80, at 383.
235. *See id.* at 384.
236. *See id.*
237. *Cf.* Bridy, *supra* note 2, at 105.
238. *See id.* at 112.
239. *Id.*
240. *See* Ralf Brendrath, *The End of the Net as We Know It? Deep Packet Inspection and Internet Governance*, SOCIAL SCIENCES RESEARCH NETWORK 24 (Aug. 4, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1653259#667993.

IV. BENEFITS AND DRAWBACKS OF PRIVATELY ORDERED ENFORCEMENT

Changes in the landscape of the Internet over the last decade have altered many of the premises on which the DMCA was based. Furthermore, legislation aimed at strengthening public enforcement of copyright has thus far been met with substantial opposition.[241] Thus, the time may be ripe for a shift towards private ordering. This Part identifies the benefits and drawbacks of private ordering. Privately ordered copyright enforcement regimes, such as that created by the 2011 MOU, present a number of advantages over publicly administered regimes, but critics are concerned that consumers' interests are neglected when content owners and ISPs collaboratively administer GRS.

A. HAS THE TIME COME FOR PRIVATE ORDERING?

1. A Changed Landscape

The way people use and conceive of the Internet has changed drastically since the time when the DMCA was first passed. At the turn of the century, ISPs were primarily concerned with increasing broadband penetration.[242] As broadband was being rolled out, the future shape of the Internet was still uncertain. Public policy favored expanding the physical infrastructure of the Internet and fostering the legitimacy and potential of online markets and communities.[243] During this period, it was perhaps wise to relax copyright enforcement in exchange for encouraging and solidifying the Internet's potential to promote commerce, productivity, and information exchange.[244] Internet commerce, in general, was still in its infancy.[245] In the days of Napster—prior to the advent of iTunes and other online retailers—users had no real alternative to legally acquire music and other copyrighted content online.[246] At that time, slower internet access speeds and smaller market penetration of broadband connectivity limited the scope of file-sharing.[247] Prior to the development of P2P networks, most content was delivered from a centralized host located at a URL.

Scholars, such as Tim Wu, have stated that the anarchic state of the Internet over the last two decades created a chaotic creative environment

241. *See* discussion in Section I.B.4., *supra*.
242. *See* Bomsel & Ranaivoson, *supra* note 30, at 13–29.
243. *See id.* at 20.
244. *See id.* at 13–29.
245. *See id.*
246. *See* Markoff, *supra* note 166.
247. *See* Bomsel & Ranaivoson, *supra* note 30, at 20.

that was conducive to a remarkable period of innovation and technical expansion.[248] The lack of copyright enforcement online probably helped many ISPs to grow and expand their physical and technical infrastructure without incurring the cost of paying for content access.[249] Thus, the digitization of content and the concurrent rise in infringing activities encouraged innovation and the growth of ISPs, while passing the burden on to content owners via copyright enforcement costs.[250]

However, the Internet is no longer in its infancy. Broadband access is widespread. Wi-Fi is ubiquitous, and smart phones and mobile networks allow users to access the Internet from virtually anywhere. Online commerce, banking, and communication are well-established and, in some fields, have largely displaced their brick-and-mortar counterparts.[251] Likewise, consumers can choose from a dizzying array of models to legally access music, e-books, movies, and television on line. A huge variety of websites, including wildly popular social media sites, allow for the free exchange of information and ideas. In economic terms, the positive externalities of the expansion of broadband access are diminishing, while the negative externalities of widespread infringement are increasingly threatening the creative industries without producing a corresponding benefit to the public.[252] ISPs are no longer vulnerable companies that must be fostered and subsidized to ensure their continued success.[253]

Other recent technological advances have created new challenges in copyright enforcement. Smart phones and tablet computers give consumers constant access to music, video, and other media, including unauthorized copies. Furthermore, Web 2.0 created a culture that embraces sharing and remixing of copyrighted works.[254] YouTube, Facebook, and other interactive sites allow users to easily share copyrighted materials including user-generated content. Similarly, with the growth of "cloud computing," users now can store data—acquired legally or illegally—on remote servers. As the

248. *See* WU, *supra* note 45 (suggesting that centralized control of information networks stifles innovation as companies become invested in maintaining the status quo of technology).

249. *See* Bomsel & Ranaivoson, *supra* note 30, at 24.

250. *See id.*

251. *See, e.g.*, Julie Bosman, *The Bookstore's Last Stand*, N.Y. TIMES (Jan. 28, 2012), http://www.nytimes.com/2012/01/29/business/barnes-noble-taking-on-amazon-in-the-fight-of-its-life.html?pagewanted=all; Katia Hetter, *Travel Agents Know Something You Don't*, CNN (Jan. 30, 2012, 11:47 AM), http://www.cnn.com/2012/01/30/travel/travel-agent-evolution/index.html (last visited Jan. 31, 2012).

252. *See* Bomsel & Ranaivoson, *supra* note 30, at 13–29.

253. *See id.*

254. *See* Edward Lee, *supra* note 56, at 1485.

cost of data storage becomes cheaper and the speed of transmission increases, users will likely turn increasingly to the cloud. The potential for liability for the operators of these remote servers remains an unsettled question, especially for those cloud-service providers, such as cyberlocker services, that create cloud-based copies without assuring that the original file was an authorized copy.[255] Furthermore, as more people in developing countries gain broadband Internet access, piracy threatens copyright owners' ability to capitalize on their works in international markets.[256]

The technologies available to ISPs for managing their networks have also advanced greatly since the passage of the DMCA. Filtering technologies have become much more sophisticated and now offer ISPs the ability to monitor and control the data sent over their networks.[257] Broadband providers are eager to employ "smart technologies" to improve the capacity and speed of their networks.[258] More controversially, ISPs have lobbied against efforts to codify net neutrality into U.S. law because they prefer to be able to prioritize data transfers based on differential pricing and preferred content.[259]

Despite the huge volume of file-sharing that now occurs on the Internet, ISPs are arguably in a much better position than ever before to police their networks for infringing use given the vast technological improvements of the last fifteen years.[260] Scholars such as Annemarie Bridy have pointed out that the improvement in ISPs' adoption of smart network technologies to monitor the data flowing over their networks has weakened the DMCA-era

255. *See* John Baumgarten, *First Looks at Copyright and the Cloud—Recent "Locker" Decisions Probe Infringement Liability and Safe Harbor Issues*, LEXIS NEXIS COMMUNITIES : LAW & TRADEMARK COMMUNITY (Sept. 21, 2011, 1:06 PM), http://www.lexisnexis.com/community/copyright-trademarklaw/blogs/copyrightandtrademarklawblog/archive/2011/09/21/first-looks-at-copyright-and-the-cloud-recent-quot-locker-quot-decisions-probe-infringement-liability-and-safe-harbor-issues.aspx; *see also* Murad Ahmed, *Megaupload Action Puts Cloud Services In Spotlight*, THE AUSTRALIAN (Jan. 23, 2012, 11:00 AM), http://www.theaustralian.com.au/news/world/megaupload-action-puts-cloud-services-in-spotlight/story-fnb64oi6-1226251071259 (reporting that Megaupload.com, a hugely popular cloud locker service, had been shutdown because of alleged rampant copyright infringement on its website).

256. *See* Michael Cieply, *Digital Piracy Spreads, and Defies a Fix*, N.Y. TIMES, Apr. 6, 2009, at B3.

257. *See* Paul Ohm, *The Rise and Fall of Invasive ISP Surveillance*, 2009 U. ILL. L. REV. 1417, 1432 (2009).

258. *Id.*

259. *See* Suganya Sukumar, *Is Network Neutrality Affecting the Internet?*, BUZZLE.COM (Sept. 23, 2011) http://www.buzzle.com/articles/is-network-neutrality-affecting-the-internet.html.

260. *See generally* Bridy, *supra* note 2 (discussing how technological developments have altered the assumptions underlying the costs and feasibility of enforcing copyrights since the original drafting of the DMCA).

arguments that ISPs should be shielded from liability for copyright infringement because they serve as mere conduits of information exchange.[261]

Further complicating the issue of allocating liability is the fact that many new smartphones and similar devices are tethered to specific software platforms. These devices are often subject to the centralized control of a single company, such as Apple's iPhone, which limits a user to installing only those applications that have been purchased through Apple's proprietary online application store.[262] The makers of these tethered devices have a greater ability than their PC making counterparts to control the content-accessing activities of their customers. Whether this increased control over the software available to a user might affect a company's copyright infringement liability under the DMCA's safe harbor provisions by increasing an ISP's actual knowledge of infringing activities remains untested.[263] Critics who fear that GRS jeopardize free speech, privacy, and due process protections are also concerned that single platform devices are vulnerable to censorship and centralized control.[264]

2. Consumer Options, Convenience, and Competition

Through its highly successful iTunes store, Apple has already shown that customers are willing to pay for content through purchasing individual songs, albums, TV shows, and movies. Through licensing deals negotiated with the all of the major record labels, Apple was able to establish a pricing scheme that attracted many newcomers to purchase authorized content online.[265] Part of iTunes's success likely stemmed from the popularity of Apple's iPod mp3 player, which provided a convenient single access point for a user's music collection. A number of newer businesses, such as Netflix and Spotify, have demonstrated that there may be a market for people who value convenience of access to content to the degree that they are willing to become paying

261. *See id.*

262. *See* Timothy B. Lee, *How I Learned To Stop Worrying And Love The App Store*, ARS TECHNICA (Oct. 16, 2011 8:00 PM), http://arstechnica.com/tech-policy/news/2011/10/the-iconstitution-how-to-protect-user-freedom-in-an-app-store-world.ars/4.

263. *See* Bridy, *supra* note 2, at 106.

264. *Cf.* Letter from Access to Rep. Lamar Smith, Chairman, Comm. on the Judiciary (Nov. 15, 2011), *available at* https://s3.amazonaws.com/access.3cdn.net/bea9ca8d08d08c45c7_rvm6bx96w.pdf (stating that aggressive copyright enforcement measures "sends an unequivocal message to other nations that it is acceptable to censor speech on the global Internet").

265. *See* WU, *supra* note 45, at 294 (speculating that Apple's ability to successfully negotiate with record labels may have been partially a result of the fact that then-CEO Steve Jobs had learned to operate in both Silicon Valley and Hollywood during his tenure as CEO of Pixar).

subscribers.[266] Many of these new models offer tiered plans, where users can access content through a paid subscription—generally offering the greatest number of features and fewest ads—or through an advertisement-supported format that limits certain features or restricts catalog access.[267]

Many companies, such as Apple, Amazon, Google, and Dropbox, are investing heavily in cloud-based services that allow consumers to sync content between all of their devices, such as iPods, smart phones, and laptops. These companies believe that consumers value the ease of accessing content over the cost-savings of acquiring free unauthorized content. If this is proven true, the companies that succeed will be those which offer the best balance of breadth of content catalog and convenience of access. However, it remains unclear whether a purchase, subscription, or advertisement-supported model will come to dominate the authorized market for media.[268]

A recent Swedish survey found that convenience of access and breadth of licensed content contributed to the growing popularity of Spotify, an online music provider that offers unlimited access to licensed content through a subscription and advertisement-based business model.[269] Looking at the motivations for why people switch to authorized music services, survey participants cited "the range of music that's released" as the main reason (40%).[270] Other reasons given were the increase in the volume of available music (30%).[271] The fact that legal services have become cheaper (24%) and simpler (24%) also significantly affected consumer's decisions.[272] Notably, the survey indicated a temporary lapse in the consumer trend towards legal models during the second quarter of 2011, when Spotify announced new limits in its free ad-based service.[273] This lapse suggests that the balance between the cost of convenience and the appeal of accessing free pirated content is still difficult to quantify.

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266. *See What is Spotify*, SPOTIFY, http://www.spotify.com/us/about/what (last visited Feb. 21, 2012).

267. *See* Boyd Myers, *supra* note 52.

268. *See* John Defore, *Spotify Music-Streaming Service's Honeymoon May Soon Be Ending*, WASHINGTON POST (Oct. 7, 2011), http://www.washingtonpost.com/entertainment/music/spotify-music-streaming-services-honeymoon-may-soon-be-ending/2011/09/27/gIQA5o39SL.

269. *See Musiksverige Svenskarnas Internet Van Or Q2 2011*, SCRIBD, http://www.scribd.com/doc/66658516/Musiksverige-Svenskarnas-Internet-Van-Or-Q2-2011 (last visited Mar. 27, 2012) (summarizing Swedish music consumers' listening trends since the introduction of the Spotify music service).

270. *See id.*

271. *See id.*

272. *See id.*

273. *See id.*

3. Equitable Cost Sharing in a Developed Market

GRS, and private ordering generally, are market-driven mechanisms that internalize copyright piracy externalities by spreading the cost across all parties in the chain of content distribution.[274] Economic principles state that without the ability to monetize a good, less of that good will be produced than would be optimal for the public good.[275] In copyright, much of the cost of capitalizing a given work lies in enforcement costs to discourage free riders through identification and litigation of infringing uses.[276] Enforcement costs "include the costs of setting up boundaries or erecting imaginary fences that separate protected and unprotected elements of a work" and "include the costs of excluding trespassers, proving infringement and sanctioning copyright violators."[277] By giving creators copyright protection, the law allows creators to build some of those costs of enforcement into the final price of their product.[278] Digitization of content reduces certain production and distribution costs for creators, but it also makes piracy far easier and more widespread.[279] Consumers who download unauthorized content without paying for it enjoy the benefit of a content creator's labor without paying any of the accompanying costs of creation and production.[280] Furthermore, those websites and companies that profit through advertisements while providing access to unauthorized access to content also enjoy the benefits of a creator's work at no cost.[281]

Scholars Olivier Bomsel and Heritiana Ranaivoson have argued that uncompensated content creators and distributors in effect end up subsidizing ISPs that are able to attract consumers by offering breadth of content (YouTube) at fast download speeds (broadband) without compensation to rightsholders.[282] Bomsel and Ranaivoson also argue that administering GRS will generate costs for ISPs to identify and notify infringing users[283] and that the cost of implementing these systems will push ISPs to develop efficient

274. *See* Bomsel & Ranaivoson, *supra* note 30, at 16–17.

275. *See generally* Harold Demsetz, *Toward A Theory of Property Rights*, 57 AM. ECON. REV. PAPERS & PROC. 347 (1967) (discussing the costs associated with assigning and enforcing property rights and the need to assign ownership to internalize externalities).

276. *See* LANDES, W.M., "COPYRIGHT", IN TOWSE, RUTH (ED.), HANDBOOK OF CULTURAL ECONOMICS, CHELTENHAM: EDWARD ELGAR 134 (2003).

277. *See id.*

278. *See* Bomsel & Ranaivoson, *supra* note 30, at 13–29.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *See id.*

filtering technologies.[284] However, without a concurrent cost assigned to content owners for falsely accusing or identifying a user for infringement, content owners may lack sufficient incentives to avoid overbroad enforcement.[285] An ideal agreement between each party would balance the benefits of widespread, technically efficient enforcement with a mechanism for introducing costs for misidentification.

Properly constructed, graduated response mechanisms can increase the value of enforcement by reducing the costs of monitoring and applying appropriate measures to discourage or prevent further acts of infringement. Furthermore, if designed correctly, GRS can equitably share the costs of copyright enforcement such that all parties are encouraged to cooperate. Such mechanisms can help to compensate rightsholders for the use of their copyrighted works.

Privately ordered copyright enforcement regimes such as GRS may help resolve some of the major issues in copyright enforcement by reducing the costs, risks, and inefficiencies of litigation while contributing to more widespread and evenly applied enforcement. By encouraging a marketplace based on competition between companies offering different models for accessing authorized content, privately ordered enforcement can help equitably divide the costs of enforcement and the profits of distribution of copyright content. In contrast, public ordering based on legislation, litigation, and administration by public bodies places a significant cost of enforcement on the public through taxation. Furthermore, litigation and legislation are both relatively slow and static processes for defining copyright infringement liability. But by structuring an enforcement regime through private mechanisms, companies are better situated to innovate and adapt to changes in technology and markets.

4. The Soft Hammer

Privately ordered enforcement mechanisms constitute an improvement upon the current system based on lawsuits and statutory damages if they lead to more even and widespread enforcement. Currently the cost of litigation motivates plaintiffs to limit the number of lawsuits they pursue, which decreases the chance that an individual will be sued. However, these plaintiffs are also motivated by enforcement cost concerns to seek higher damages so as to deter other infringers.[286] Litigation depends on an enforcement model that makes the consequences of infringement lawsuits severe enough for a

284. *See id.*
285. *Id.*
286. *See supra* Section I.B.3.

few individual infringers so that others are discouraged from future infringement. Over the last decade, this model of enforcement, based on low individual risk but very high cost if caught, has proven rather unsuccessful and unpalatable for all parties.[287] Much of the public views these damages as unfair and disproportionate to the actual harm caused, perhaps because unauthorized downloading and streaming is so commonplace.[288] Furthermore, because the risk to any one individual of being sued is exceedingly low, users may have not been deterred from using and distributing pirated content despite the high damages awards in individual cases.[289]

Filtering technologies and reduced barriers to adjudicating claims of infringement increases the probability of an infringer being caught, which in turn allows the enforcing party to decrease the penalty to each individual user. Furthermore, privately administered sanctions that are defined by private agreements in the form of end user license agreements and terms of service may not carry the same stigma associated with the exercise of the state's coercive power through public sanctions, and thus consumers may perceive those punishments to be less harsh or unfair. Many individuals feel that it is unfair to be punished for behavior, such as music downloading, that is perceived as commonplace.[290] In their proposal for a copyright enforcement administrative body, Lemley and Reese argued that people will accept limited enforcement of a rule only so far as the response is seen as commensurate.[291] If GRS issue copyright alerts in a consistent manner, and if mitigation measures are applied equally to all accused infringers, then people may come to see private copyright enforcement as fair and acceptable.

B. CONCERNS WITH THE GRADUATED RESPONSE SYSTEM AND PRIVATE ORDERING

A number of significant concerns must be addressed in order to ensure that privately ordered enforcement mechanisms strike the appropriate balance between online copyright protection for rights holders and

287. *See* Mark Lemley & Anthony Reese, *Reducing Digital Copyright Enforcement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1405 (2004) ("[I]t seems unfair and disproportionate to impose the burden of enforcing copyright so heavily on a few unlucky defendants. This is particularly true if the sanction is severe—we put up with random enforcement of traffic offenses because the sanction is so minor, but we might feel differently if speeders had to spend a year in jail.").

288. *See id.*

289. *See supra* Section I.B.3.

290. *See* Lemley & Reese, *supra* note 287, at 1405.

291. *See id.*

individuals' right to free speech, due process, privacy, and fair use. Many critics argue that it is dangerous to allow private entities to create a system wherein copyrights are presumed valid and accused infringers have the burden of proving their innocence[292] Furthermore, a privately ordered system, lacking the protections provided by public law, could more readily be used to censor media and suppress free speech.[293] Many now argue that internet access has become an important right necessary for full participation in democracy and the marketplace that should not be abridged solely to protect the right of content owners to monetize their intellectual property assets.[294] The failure of many of the post-Napster copyright enforcement efforts by the content owning industries, such as the lawsuit campaign against individual infringers, were at least in part a result of public perception that a given enforcement strategy was unfair.[295] To be successfully implemented, GRS must account for these concerns and perceptions.

1. Net Neutrality and Universal Access

Some critics contend that internet connectivity should be a basic right, and that principles of network neutrality should be protected by statute.[296] For these critics, internet disconnection is an inappropriate sanction for copyright infringement and undermines the neutrality of the Internet.[297] Moreover, new technologies allow ISPs to monitor—and potentially control—with ever-greater detail exactly what information is flowing over their networks. Industry-wide adoption of GRS may present a slippery slope problem where such technologies could be used for censorship and propaganda purposes. Considering the recent use of social media and user-generated content in the revolutions of the Arab Spring and in other democratic movements,[298] it may be dangerous to allow private entities to request that content be removed from websites without proof that the private party is the actual owner of the copyright and that the party is exercising a protected exclusive right. This is especially troublesome where filters could be used to prevent such material from ever being posted in the first place.

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292. *See* Bridy, *supra* note 2, at 127.
293. *See* Brendrath, *supra* note 240, at 24.
294. *See* Yu, *supra* note 42, at 1398.
295. *See supra* Section I.B.3.
296. *See* Bridy, *supra* note 2, at 127.
297. *Id.*
298. *See* Michael Blackman, *Bullets Stall Youthful Push for Arab Spring*, N.Y. TIMES (March 17, 2011), http://www.nytimes.com/2011/03/18/world/middleeast/18youth.html?pagewanted=all.

Moreover, threats of disconnection may turn out to be an ineffective deterrent in the first place, given the variety of internet access points available to consumers today, including home, work, and mobile networks via smart phones. Furthermore, because many internet connections are shared by families and coworkers, disconnections could affect non-infringing users. Likewise, businesses such as cafes might be discouraged from providing internet access to customers because of the potential loss of internet connectivity.

Denials of internet service as an alternative to civil liability does not solve all of the challenges of creating an effective copyright enforcement regime. Many people already argue that universal access to internet connectivity should be a public policy goal, given the central role of the Internet in commerce and the public sphere.[299] Thus any enforcement mechanisms that deny internet access could be criticized as a disproportionate response to a user's copyright-infringing activities.

2. Fair Use and Free Speech

The doctrine of fair use allows an individual to make use of copyrighted material without seeking right holders' permission when that use is made in the context of criticism, comment, news reporting, or educating.[300] The doctrine of fair use stems from a recognition that overbroad copyright protection could chill free speech rights guaranteed by the First Amendment.[301] The Internet created a variety of new tools for creating, transforming, and distributing works. User-generated content in particular proliferated because of Internet sites such as YouTube. Overbroad copyright enforcement that discourages remixing and transformation is thus contrary to copyright's purpose as a means for encouraging the development of new creative works.[302]

Automated filter technologies in some ways shift the burden from content owners to affirmatively identify infringing works to uploaders, who must present evidence of fair use for posting user-generated content. Aggressive filtering technology might prevent users from uploading materials that would constitute fair use in a court of law. A proper fair use analysis, which is arguably quite difficult even for trained lawyers, may be far too

299. *See* WU, *supra* note 45.

300. 17 U.S.C. § 107 (2006).

301. *See* Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) (stating that "the 'fair use' defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances").

302. *See* Sawyer, *supra* note 80, at 403.

complicated to be automated using current technology.[303] Many critics believe ISPs' users and subscribers must be given the right to dispute accusations of infringement based on automated filtering and that any appeal process should include a human reviewer given the complexities of fair use analysis.[304]

Some commentators propose the development of a public administrative body to facilitate fair use and other infringement defense disputes arising as a result of automated filters to ensure due process rights.[305] Furthermore, technologies that have contributed to piracy also helped create the conditions for a huge expansion of user-generated creativity and innovation. GRS may threaten this growth by blocking remixes, fan fiction, and the like.

3. Privacy and Procedural Due Process

Graduated response regimes also implicate serious privacy concerns where ISPs intend to automatically monitor users' activities to identify infringers. This will be especially true where ISPs employ filtering technologies rather than rely on notifications by content owners.[306] Furthermore, technological advances are increasing ISPs' ability to track the activities of their users.[307] Technologies such as deep packet inspection allow ISPs to monitor—and potentially control—with ever-greater detail exactly what information is flowing over their networks.[308] If GRS rely on stored information about a user's previous infringement allegations, then users may rightfully feel that ISPs have violated their privacy by tracking and recording their online activities.[309] Furthermore, many critics are concerned with the length of time that ISPs may store a user's online browsing information and with whom such information might be shared.[310]

Finally, many critics fear that users will not be afforded sufficient procedural safeguards in privately administered GRS, which are often largely automated.[311] These critics insist that any graduated response system must

303. *See id.*
304. *See id.*
305. *See* Lemley & Reese, *supra* note 287, at 1471.
306. *See* Swartout, *supra* note 85, at 532.
307. *See* Ohm, *supra* note 257, at 1432.
308. *See* Ralf Brendrath, *The End of the Net as We Know it? Deep Packet Inspection and Internet Governance*, SOCIAL SCIENCES RESEARCH NETWORK (Aug. 4, 2010), *available* at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1653259#667993.
309. *See* Yu, *supra* note 42, at 1401.
310. *See id.*
311. *Id.*

include independent review, sufficient notice, and an opportunity for a user to defend against allegations of infringement.[312]

V. AN ANALYSIS OF THE 2011 MOU

The 2011 MOU improves protections for the copyrighted works of content owners, may reduce litigation and associated costs for ISPs, and incorporates a number of protections for individual users' rights and interests. To respect users' interests, parties to the 2011 MOU should ensure that their GRS are transparent, predictable, and narrowly tailored to users infringing activities. As a privately ordered enforcement regime, the 2011 MOU has the potential to be modified throughout its implementation to further this balancing of interests more readily than a publicly ordered regime. To ensure that this balancing is done well, the GRS created by the 2011 MOU should be continually monitored and critiqued by all of the interested parties.

The 2011 MOU defines an efficient process to streamline and automate the process by which incidents of infringement are identified and adjudicated.[313] The GRS created by the 2011 MOU will provide for an enforcement process that may be cheaper than litigation for content owners and ISPs.[314] For content owners and ISPs, filtering technologies can reduce the costs of identifying and monitoring infringing works.[315]

One goal of any copyright enforcement regime should be to make infringing means for acquiring content significantly less appealing to consumers than legal means while preserving free speech and privacy rights.[316] Although some users will certainly continue to find ways to access pirated content, a copyright enforcement regime should not be designed to completely wipe out piracy but rather to incentivize consumers to choose legal markets in order to access creative works.[317] Accessing creative works through pirated channels online fails to reward content owners for their creativity, and instead compensates application ISPs and advertisers who derive their revenue from the sale of advertisements and related purchases.

312. *See* Bridy, *supra* note 2, at 126.

313. *See* Strowel, *supra* note 14, at 75.

314. *See* Yu, *supra* note 42, at 1384.

315. *See* Justin Hughes, *Copyright Enforcement on the Internet—In Three Acts*, Fordham Conference at Cambridge working paper, 2009, *available at* http://fordhamipconference.com/wp-content/uploads/2010/08/JustinHughes_Copyright_Enforcement_on_the_Internet_in_Three_Acts.pdf.

316. *See* Strowel, *supra* note 14, at 86.

317. *See id.*

Effective deterrence of piracy thus pulls users towards markets wherein the creator of a work is more directly compensated for a user's access to that work. By partnering with ISPs to enforce their copyright protections, content owners can avoid the costs and risk of litigation while creating more widespread enforcement. Improved filtering technologies and more widespread employment of automated monitoring via ISPs' willing participation can more readily and cheaply identify infringing uses of content owners' copyrighted works. For content owners, reducing enforcement costs and improving revenues from the sale and licensing of their works can improve the profitability of creating and distributing artistic works. This in turn further incentivizes future creativity and innovation, which benefits users by leading to the development of new artistic works.

Network ISPs will benefit from the 2011 MOU if GRS leads to a reduction in unauthorized file-sharing because infringing activities often use up massive amounts of the bandwidth on ISPs' networks, which in turn affects other non-infringing users. Some network ISPs have already demonstrated a strong desire to throttle users' bandwidth and download speeds in order to better manage their networks.[318] However, filtering technologies may increase an ISP's awareness of the infringing activities of its users, which in turn could open the ISP up to liability by running afoul of the safe-harbor requirements of the DMCA that condition immunity from liability on an ISP's lack of knowledge of infringing activities.[319]

Although the terms of the agreements between individual ISPs and content owners are unavailable, it may be that ISPs negotiated with content owners to contractually shield themselves from liability in exchange for participating in the 2011 MOU. Likewise, as many network ISPs, such as Comcast, have moved beyond the model of passive carrier into active arbiters of content,[320] the 2011 MOU embodies through private agreement an alignment of the economic interests of content owners and ISPs. By employing contractual means to limit liability, both network and application ISPs can reduce their costs associated with litigation and devote those saved resources towards greater creativity and innovation, which in turns benefits users. Application ISPs who are party to the MOU also improve their position to negotiate profitable licensing deals from content owners relative to their competitors, which can in turn produce licensing agreements that

318. *See* Yoo, *supra* note 47.
319. *See* Bridy, *supra* note 2, at 120.
320. *See id.* at 86.

maximize the development of content for users.[321] If content owners continue to develop legal models that are convenient and efficiently priced by the market and the graduated steps of the 2011 MOU serve to deter many users from engaging in infringing activities by making it sufficiently difficult to access unauthorized content, then the 2011 MOU will accomplish the goal of pulling consumers back into legal markets.

The 2011 MOU creates a system for enforcing copyright that can be tested and defined by the dynamic, experimental forces of the market. As copyright scholar Jonathan Zittrain has noted, "reasonable copyright holders could disagree on whether it would be a good thing to prevent certain unauthorized distributions of their works."[322] Companies are not homogenous entities: they have different ideas about tolerated uses of copyright content.[323] ISPs who are party to the 2011 MOU that relax their filtering mechanisms to allow for a broad understanding of fair use may attract the greatest number of consumers for their content. It is conceivable that tolerant companies will out-compete those with the tightest restrictions. However, if competing ISPs differ in the degree to which they police their networks, customers may jump to the least restrictive companies and thus undermine the purpose of an industry-wide agreement for establishing a copyright enforcement framework. Thus, the terms of the 2011 MOU, though admirable, risk backfiring because of their flexibility. Nonetheless, one of the strengths of the 2011 MOU as a privately ordered framework is that signatories may choose to alter or abandon the agreement as soon as they feel that the framework does not satisfy their needs. A legal framework defined by statutes, such as the DMCA, has no such flexibility for voluntary participation and experimentation.

The 2011 MOU also addresses a number of critics' concerns by establishing procedural mechanisms to protect users' rights and interests.[324] The 2011 MOU provides four alerts to users before any mitigation measure is implemented.[325] Rather than a litigation-based model wherein a user is first notified of infringing activity in the form of a legal complaint, the 2011 MOU

321. *See* PETER S. MENELL & SUZANNE SCOTCHMER, INTELLECTUAL PROPERTY, IN HANDBOOK OF LAW AND ECONOMICS (A. Mitchell Polinsky & Steven Shavell eds., 2008) (discussing how licensing promotes creativity by allowing creators the flexibility necessary to optimize the capitalization of their intellectual property assets).

322. *See* ZITTRAIN, *supra* note 264, at 120.

323. *Cf. id.* (discussing how the internal diversity of ideas within a single company allows for fruitful discussions of how aggressive or lax a stance that company should take regarding copyright enforcement to maximize profit).

324. *See* Bridy, *supra* note 2, at 126.

325. *See supra* Section III.A.1.

provides a system that gives users early warning of suspected infringement. These early warnings include educational measures that provide a means for creating informed notice of the basis for an infringement claim.[326] For users, these educational measures are implemented prior to administering any action to slow or disconnect a users' internet service.[327] The alerts should be designed to ensure users understand the specific activity that is allegedly infringing as well as the rationale behind copyright protections. Likewise, ISPs and content owners should make these educational warnings user-friendly rather than legalistic to increase their effectiveness. While 'copyright school' may appear more like propaganda than a primer of legal doctrines,[328] an enforcement system that is transparent about its policies and its rationale for those policies is more likely to be accepted by the public, which is critical for any successful enforcement regime.[329]

Under the 2011 MOU, ISPs are granted flexibility in choosing between the prescribed mitigation measures, all of which are arguably more narrowly tailored and less harsh than the remedies available at law.[330] Giving users repeated, "graduated" warnings more fairly allows an opportunity to adjust their conduct or to contest the allegation of their infringing activities. The MOU provides for at least four warnings before even the first "mitigation measure" is taken.[331] The current agreement between ISPs and content owners in the U.S. does not include the more Draconian three-strikes model adopted in some countries,[332] likely because ISPs fear that such strict termination of service provisions for accused infringers threatens to drive away paying internet service subscribers.

The measures provided for in the 2011 MOU do not carry the same social stigma as lawsuits and criminal or civil penalties. This "soft hammer" approach of redirecting users to landing sites or temporarily reducing download speeds is likely to increase consumers' acceptance of the GRS because these remedies are not likely to be seen as overly harsh or disproportional to users' infringing acts.[333] Likewise, because the GRS

326. *See supra* Section III.A.1.

327. *See id.*

328. *Cf.* Nate Anderson, *Back To School With RIAA-Funded Copyright Curriculum*, ARS TECHNICA (Sept. 17, 2009), http://arstechnica.com/tech-policy/news/2009/09/back-to-school-with-riaa-funded-curriculum.ars (discussing how various companies existing approaches to "copyright education" offer only the unilateral perspective of copyright owners).

329. *See* Yu, *supra* note 42, at 1421.

330. *See supra* Sections III.A.1 & IV.A.4.

331. *See id.*

332. *See* 2011 MOU Agreement, *supra* note 3.

333. *See* Yu, *supra* note 42, at 1421.

provided for in the 2011 MOU will rely partially on automation and filtering,[334] enforcement is likely to be more widespread and less arbitrary than individual lawsuits, which also should improve users' perceptions of GRS. However, some ISPs may remain reluctant to downgrade or terminate their customers' access if doing so drives users towards ISPs who are less aggressive in their enforcement.[335] But given the size and scope of the parties who signed on to the 2011 MOU, there should be a high degree of standardization between ISPs' GRS, which will help deter subscribers from simply moving to the ISP with the most lax enforcement.

Although the 2011 MOU does provide for termination of a user's internet access as a possible consequence for infringement, termination for repeated infringement is already required as part of the conditions for safe harbor under the DMCA.[336] Furthermore, ISPs that seek to maintain their subscriber base have an economic incentive to provide the most narrowly tailored measure that will effectively discourage future infringement. Finally, compared to the current litigation-based model for enforcement, reducing a user's internet speed or terminating his broadband access is arguably a far more equitable response for illegal file-sharing than awarding statutory damages that can reach into the hundreds of thousands of dollars.[337]

Although critics are rightly concerned that policy reasons may favor universal internet access as a basic right,[338] that goal should be addressed through legislation establishing such a right, rather than through policies that indirectly advocate for lax copyright enforcement in order to avoid internet service termination. Furthermore, given the ubiquity of internet access points, such as connections at work, libraries, and through mobile networks, few users are likely to be completely denied internet access. Inconvenience is not equivalent to complete denial of access. Nonetheless, ISPs should generally avoid termination as a consequence for infringement, especially in communities without multiple network ISPs, as a mitigation measure to avoid digitally ostracizing consumers.

The 2011 MOU also creates an independent review process to dispute infringement claims.[339] The $35 dollar fee for requesting a review of allegations of infringement is far less than what any user would have to spend

334. *See supra* Section III.A.3.

335. *See* Bridy, *supra* note 2, at 95.

336. *See* 17 U.S.C. § 512(i) (2006).

337. *See* Sony BMG Music Ent. v. Tenenbaum, 672 F. Supp. 2d 217 (D. Mass. 2009); Capitol Records, Inc. v. Thomas-Rasset, 799 F. Supp. 2d 999 (D. Minn. 2009) (awarding $1.5 million in damages).

338. *See* WU, *supra* note 45.

339. *See supra* Part III.A.2.

to fight such allegations in a lawsuit. Users can avail themselves of a number of defenses that would be available in a court of law, and reviewers are instructed to adhere to established legal procedures and precedent in adjudicating claims.[340] Improvements in filtering technologies over the last decade should allow parties to the 2011 MOU to more accurately identify actual cases of infringement and lower the number of false positives, which can unfairly burden users.[341] Furthermore, any allegation that is successfully defended against will be removed from a user's record. However, the 2011 MOU should be amended to require that users be informed of the right to appeal any finding of infringement at each phase, rather than only after a user is moved to the mitigation phase.

The Supreme Court, in *Eldred*, recognized that while the doctrine of fair use protects the free speech interests of individuals in the context of copyright law, that right is limited when an individual wholly appropriates another's speech.[342] Accordingly, the independent review program established by the 2011 MOU should allow for a robust and liberal understanding of fair use that maps on to the current legal understanding of the doctrine as established by relevant case law. In addition, ISPs that maintain records of their users' online activities should only maintain the minimum amount of information necessary to adjudicate infringement claims. User information should be kept confidential and not shared with content owners, other ISPs, or government agencies, except where required by law.

Because ISPs, as private entities, can limit the acceptable uses of their services through terms of service agreements, the 2011 MOU does not implicate critics' concerns about free speech as much as a publicly administered GRS, which would necessitate the coercive and unavoidable power of the state. Users who found an application ISP's enforcement policies to be overly strict can move to a different ISP, thus allowing the market to preserve their interests. Furthermore, there may be a danger in relying on private entities to maintain a publicly accessible Internet. If public policy favors treating ISPs as common carriers, then that goal should be accomplished through appropriate legislation establishing an official endorsement of net neutrality, rather than through a weakening of copyright enforcement.

340. *See supra* Part III.A.2.

341. *See* Hughes, *supra* note 315.

342. Eldred v. Ashcroft*,* 537 U.S. 186, 201 (2003) (stating that "[t]he First Amendment securely protects the freedom to make . . . one's own speech; it bears less heavily when speakers assert the right to make other people's speeches.").

The 2011 MOU embodies a market-based approach to balancing the interests of content owners, ISPs, and users. The 2011 MOU establishes a clearinghouse to study and recommend best practices for administering GRS effectively and cheaply. Content owners, ISPs, and public interest groups should continually engage this clearinghouse to advocate for their competing interests via the clearinghouse mechanism. This private means for balancing interests should serve as a complement, rather than a replacement, to public means such as lobbying, litigation, and legislation to develop guidelines for copyright enforcement. The success of the 2011 MOU should be measured by whether it reduces piracy, provides users convenient and reasonably priced access to creative works, fairly and accurately identifies and adjudicates infringement claims, and creates efficient means for allocating the costs of copyright enforcement among those who benefit from access to creative works.

VI. CONCLUSION

Striking the correct balance between enforcement costs, individual free speech and due process rights, and the benefits of providing incentives to create new works, lies at the center of copyright protection policy concerns. GRS allocate the costs and burdens of copyright enforcement equally among content owners and ISPs, who both benefit from the consumption of copyrighted materials. Privately ordered copyright enforcement regimes can create more even and widespread enforcement, which can in turn reduce the consequences for any single infringer and usher in a return of fairness to the enforcement regime. As enforcement becomes more commonplace, consumers will likely be drawn to legal mechanisms for acquiring content, which will in turn help restore the legal market for creative works. Furthermore, privately ordered systems can be adapted and refined much more quickly than public legal regimes. Likewise, economic competition encourages efficiencies in enforcement processes and filtering technologies.

For consumers to accept GRS as a legitimate and fair means of enforcing copyright, which is the only way they will work as an effective regime over the long term, parties to the 2011 MOU should ensure that their GRS are transparent, predictable, and narrowly tailored to users' infringing activities. The independent review program should be truly independent and respectful of users' privacy, free speech, and due process rights. Moreover, content owners must continue to push for convenient models for legally acquiring copyrighted content that are structured and priced in such a way as to attract users.

The success of the 2011 MOU as a means for copyright enforcement will turn largely on how ISPs and content owners implement and administer the

GRS. Furthermore, although many of the key industry players have signed on to the MOU, the notable absence of tech giants, such as Google and Apple, may detract from the 2011 MOU's effort to establish industry-wide standards. Ultimately, consumers will determine the success of the 2011 MOU by how they choose to access copyrighted content. Unless users perceive GRS as fair, the public may come to see GRS as yet another overzealous approach of content owners that isolates modern consumers—similar to the RIAA's post-Napster litigation strategies. But if consumers find that the price of convenient legal access outweighs the costs of acquiring content illegally on the Internet, then the 2011 MOU's GRS may lead to a thriving and efficient market for copyrighted works.