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## THE COPYRIGHT ALERT SYSTEM: A POTENTIAL UNFAIR BURDEN ON SMALL BUSINESS OWNERS

Rachel A. Schneidman\*

*The Copyright Alert System (CAS) confers on Internet Service Provider's (ISPs) the power to use "mitigating measures" against alleged copyright infringers in order to discourage piracy. This power is a result of a voluntary agreement between the ISPs, the Motion Picture Association of America, and the Recording Industry Association of America. Although the effectiveness of the CAS and the privacy concerns it raises have been analyzed in academic literature, the possible encumbrance of the CAS on small business owners has not been sufficiently considered.*

*This Note argues that while the CAS may be a valuable tool in impeding online piracy, it has the potential to unfairly burden small business owners. Specifically, this Note asserts that the CAS's scope should be expanded to include all broadband users, including residential and business users of every size.*

*In addition, this Note considers several countries' graduated response systems and examines their successes and failures. Indeed, the Note argues that in order to be successful and fair, the CAS must look to these other schemes and adopt their strengths, such as (1) considering the amount of control that the IP address owner has over the Internet account, and (2) distinguishing between types of infringement. The CAS must also avoid other graduated response systems' weaknesses, which include using only an IP address—without considering evidence of non-subscriber use—to identify an infringer. However, the most important revision to the CAS must be to ensure that it is evenly applied to all Internet users.*

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\* J.D. Candidate, Brooklyn Law School, 2015; B.S. Union College, 2010. I would like to thank my family and friends, especially Hillary Schneidman, Gary Schneidman and David Schneidman for their continuous love, encouragement, support and patience. I could not be where I am without you. Thank you to the editors and staff of the *Journal of Law and Policy* for their assistance and dedication.

## INTRODUCTION

With the development of new Internet technology, copyright infringement resulting from “online file sharing has become a serious problem” for the entertainment industry.<sup>1</sup> Peer-to-peer (P2P) networks, which allow individuals to share and copy files stored on other people’s computers, have created an easy platform for users to conduct the unauthorized exchange of copyrighted work.<sup>2</sup> The files are accessible and available to everyone who uses the same P2P network.<sup>3</sup> The widespread use of these networks and other information-sharing technology is challenging our beliefs about intellectual property, the interests of the industries that produce and sell copyrighted content, and what the public perceives as acceptable use of the copyrighted content.<sup>4</sup> Furthermore, the use of information-sharing technologies as tools for copyright piracy has incited new attempts by the entertainment industry to inhibit the “exchange of copyright protected content.”<sup>5</sup>

Throughout the world, government officials and judges are listening to the entertainment industry’s complaints that online piracy and file sharing are the source of decreasing sales of film and music.<sup>6</sup> According to at least one member of Congress, using P2P networks to pirate movies and music is “no different than lifting a CD or a DVD off the shelves of a Best Buy.”<sup>7</sup> However,

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<sup>1</sup> *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 908 (8th Cir. 2012).

<sup>2</sup> *Types of Content Theft*, FACT, <http://www.fact-uk.org.uk/types-of-content-theft/> (last visited Sept. 13, 2014).

<sup>3</sup> *Id.* Usually, default settings on P2P networks guarantee that while an individual downloads files, he or she is concurrently uploading content to the same P2P site. *Id.*

<sup>4</sup> See Robin Mansell & Edward Steinmueller, *Copyright Infringement Online: The Case of the Digital Economy Act Judicial Review in the United Kingdom*, LSE RESEARCH ONLINE 1, 7 (June 1, 2011), <http://eprints.lse.ac.uk/36433/>.

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., *id.* (providing examples of how France and the UK are dealing with the problem).

<sup>7</sup> *Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing on S. 103 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 16 (2002) (statement of Rep.

there are consumers who disagree with this statement and argue that the two actions are clearly distinguishable; while they acknowledge that shoplifting is criminal, they do not view their use on P2P networks as unlawful.<sup>8</sup>

Consumers and copyright owners hold sharply divergent views regarding the use of P2P networks. Some consumers believe that file sharing is similar to speeding on a highway: it is “a widely tolerated, technical violation of a rule that invokes virtually no moral outrage when done in moderation.”<sup>9</sup> In fact, there are P2P users who consider the networks to be “like the radio, a great tool to promote new music.”<sup>10</sup> Nonetheless, some users concede that they would not have otherwise purchased the content that they illegally downloaded<sup>11</sup> and “neither understand the copyright law nor believe in the system.”<sup>12</sup> Thus, there has been a painstaking struggle between enforcing copyright law and adapting to new social norms, such as the regular illegal downloading of content that develop with the advancement of information-sharing technology.<sup>13</sup>

United States Government officials, the Recording Industry Association of America (RIAA), and the Motion Picture Association of America (MPAA), have taken many steps to curb piracy—some more successful than others.<sup>14</sup> The newest venture,

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Martin T. Meehan, Member, H. Comm. on the Judiciary), *available at* <http://babel.hathitrust.org/cgi/pt?id=pur1.32754074674262;view=1up;seq=1>.

<sup>8</sup> *Id.* at 22 (statement of Ms. Hilary Rosen, Chairman & Chief Exec. Officer, Recording Industry Association of America).

<sup>9</sup> Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 544 (2003).

<sup>10</sup> Sean Silverthorne, *Music Downloads: Pirates – or Customers?*, Interview in the *Working Knowledge: The Thinking That Leads*, HARV. BUS. SCH. (June 21, 2004), <http://hbswk.hbs.edu/item/4206.html>.

<sup>11</sup> Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 331 (2003)

<sup>12</sup> Silverthorne, *supra* note 10.

<sup>13</sup> See Mansell & Steinmueller, *supra* note 4, at 1 (examining the challenges and various strategies of enforcing copyright laws within contemporary social norms).

<sup>14</sup> Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907,

the Copyright Alert System (CAS), follows in the footsteps of similar programs adopted in Europe and Asia. The CAS enforces a “graduated response scheme”—a system in which penalties increase for repeated infractions—to educate consumers and mitigate copyright infringement.<sup>15</sup>

In February 2013, the Center for Copyright Information (CCI) implemented the CAS, also known as the “Six Strikes” program, to combat online piracy.<sup>16</sup> The tiered system and the CCI were both originally developed through a voluntary agreement between Internet Service Providers (ISPs), the MPAA, and the RIAA.<sup>17</sup> The agreement, as described in its Memorandum of Understanding, permits the entertainment industry and copyright owners to monitor and notify the ISPs of possible copyright infringement.<sup>18</sup> Once an ISP receives a notification of such infringement, the ISP tracks the potential infringer’s IP address and alerts the IP address owner that his or her account was allegedly used for piracy.<sup>19</sup> If the

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910–24 (2004); Jonathan Weisman, *In Fight Over Piracy Bills, New Economy Rises Against Old*, N.Y. TIMES (Jan. 18, 2012), [http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html?pagewanted=all&_r=0).

<sup>15</sup> *Copyright Alert System FAQs*, CTR. FOR COPYRIGHT INFO., <http://www.copyrightinformation.org/resources-faq/copyright-alert-system-faqs/> (last visited Sept. 13, 2014) [hereinafter CTR. FOR COPYRIGHT, *FAQs*].

<sup>16</sup> Glenn Peoples, *Staying Alert: RIAA & Hollywood Partner with U.S. ISPs to Combat Web Piracy*, BILLBOARD (Feb. 28, 2013 1:15 PM), <http://www.billboard.com/biz/articles/news/1550490/staying-alert-riaa-hollywood-partner-with-us-isps-to-combat-web-piracy>. The Center for Copyright Information is a private entity that was created through the “content community and [ISPs].” *About CCI*, CTR. FOR COPYRIGHT INFO., <http://www.copyrightinformation.org> (last visited Sept. 13, 2014).

<sup>17</sup> Peoples, *supra* note 16.

<sup>18</sup> See *Memorandum of Understanding*, CTR. FOR COPYRIGHT INFO. 4–6 (July 6, 2011) [hereinafter CTR. FOR COPYRIGHT, *Memo of Understanding*], available at <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf>.

<sup>19</sup> *Id.*; IP addresses are unique number identifiers assigned to devices such as computers and printers. In order to receive and send data, a device must have an IP address by which it is connected to a network. When an individual visits a website or sends an email, these addresses are also sent. IP addresses can be tracked through websites or computer data. The addresses are then associated with the specific device that it is assigned to and thus, the owner of the device is

infringement continues, the CAS demands stricter penalties, which the ISPs enforce.<sup>20</sup> These penalties include “throttling bandwidth speeds”<sup>21</sup> and automatically readdressing the user’s Internet landing website.<sup>22</sup> Although this is not the United States’ first attempt to quell online file sharing piracy, it is the country’s first attempt at a “graduated response” scheme.

The CAS was designed with an educational purpose: to help consumers realize that P2P sharing may be illegal.<sup>23</sup> The CCI claims that the CAS’s objective is to create awareness of illegal file sharing by motivating individuals to legally exchange copyrighted works. However, many critics have lashed out at the CAS by publicly criticizing the system. One such critic is the Electronic Frontier Foundation (EFF), the preeminent international non-profit digital rights organization. The EFF points out that,

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identified. *What Is An IP Address? What Is My IP*, <http://www.whatismyip.com/what-is-an-ip-address/> (last visited Sept. 13, 2014); Andrew Kantor, *Cyberspeak: It’s a Big Internet, But You Can Still Be Tracked Down*, USA TODAY (June 17, 2004 7:02 PM) [http://usatoday30.usatoday.com/tech/columnist/andrewkantor/2004-06-17-kantor\\_x.htm](http://usatoday30.usatoday.com/tech/columnist/andrewkantor/2004-06-17-kantor_x.htm).

<sup>20</sup> Glenn Peoples, *ISPs Roll Out Copyright Alert Systems This Year*, CCI’s *New Executive Director Says*, BILLBOARD.COM (Apr. 2, 2012 5:25 PM), <http://www.billboard.com/biz/articles/news/1098129/isps-to-roll-out-copyright-alert-systems-this-year-ccis-new-executive>

<sup>21</sup> *Id.* Bandwidth is the rate at which an ISP’s customer can send and receive data over the Internet. *The Guide to Internet Speed*, PLUG THINGS IN, <http://www.plugthingsin.com/internet/speed/> (last modified Sept. 4, 2014). For example, an account with a bandwidth of 5 Mbps can receive a maximum of five megabits of data per second. *Id.* The ISP controls each user’s bandwidth. *Id.* When a user’s bandwidth is decreased, the rate at which they can send and receive data over the Internet is limited. *Id.*

<sup>22</sup> *What is a Copyright Alert?*, CTR. FOR COPYRIGHT INFO., <http://www.copyrightinformation.org/the-copyright-alert-system/what-is-a-copyright-alert/> (last visited Sept. 13, 2014) [hereinafter CTR. FOR COPYRIGHT, *Copyright Alert*]; see also Rachel Storch, *Copyright Vigilantism*, 16 STAN. TECH. L. REV. 453, 454 (2013). A “landing page” is an individual web page that is separated from a principal website that is used exclusively for a particular objective. *What Is A Landing Page?*, UNBOUNCE, <http://unbounce.com/landing-page-articles/what-is-a-landing-page/> (last visited Sept. 13, 2014). The landing page restricts the options presented to its visitors and usually does not provide navigation to the main webpage. See CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, at 10.

<sup>23</sup> CTR. FOR COPYRIGHT, *Copyright Alert*, *supra* note 22.

contrary to the CCI's general assumption, the distribution of copyrighted digital content is not always illegal.<sup>24</sup> The EFF has also asserted that ISPs are acting as private investigators to Hollywood executives without the checks and balances that are obligatory in public enforcement.<sup>25</sup> Thus, there is a risk that copyright owners may be too eager to enforce the law in ways that are unfair to the alleged pirates.<sup>26</sup>

This Note, however, focuses on a different concern: that the CAS may unfairly burden small business owners. The CAS targets residential Internet access, the type of service that small businesses generally use, and not the more extensive systems that large businesses regularly employ.<sup>27</sup> Therefore, the CAS may disproportionately affect small businesses relative to larger ones.<sup>28</sup> Small business owners can be subjected to the CAS's penalties, which include but are not limited to the Six Strikes warnings, monetary loss in the form of filing appeals from any notifications they receive, sluggish Internet speeds, and Internet redirection to particular landing pages.<sup>29</sup> Furthermore, critics warn that the CAS may discourage many small businesses and public places from offering free Wi-Fi to their customers.<sup>30</sup> This would negatively

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<sup>24</sup> Corynne McSherry, *The Copyright Propaganda Machine Gets a New Agent: Your ISP*, ELECTRONIC FRONTIER FOUND. (Feb. 25, 2013), <https://www.eff.org/deeplinks/2013/02/copyright-propaganda-machine-gets-new-agent-your-isp>; *About EFF*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/about> (last visited Sept. 13, 2014).

<sup>25</sup> Mitch Stolz, *U.S. Copyright Surveillance Machine About to be Switched On, Promises of Transparency Already Broken*, ELECTRONIC FRONTIER FOUND., (Nov. 15, 2012), <https://www.eff.org/deeplinks/2012/11/us-copyright-surveillance-machine-about-be-switched-on>.

<sup>26</sup> Storch, *supra* note 22, at 470–71.

<sup>27</sup> Jill Lesser, *CAS Will Not Harm Public Wi-Fi*, CTR. FOR COPYRIGHT INFO., <http://www.copyrightinformation.org/uncategorized/cas-will-not-harm-public-wi-fi/> (last visited Sept. 13, 2014); *see also* CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, at 2.

<sup>28</sup> CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, § 4(G)(i).

<sup>29</sup> Greg Wood, *Copyright Alert System Launches, ISPs to Send Notice of Illegal Downloads*, CBS NEWS (Feb. 26, 2013, 10:45 AM), <http://www.cbsnews.com/news/copyright-alert-system-launches-isps-to-send-notice-of-illegal-downloads/>.

<sup>30</sup> *Id.*; *see also* Peter Weber, *The Anti-Piracy Copyright Alert System: Is the*

impact the open wireless network, which is important to businesses in the United States.<sup>31</sup> In addition, the CAS may cause small businesses to inadvertently become centers for copyright infringement.<sup>32</sup> Since all CAS warnings go directly to the IP address owner—in this case the business owner—and not the individuals using their Internet services, the actual copyright infringer can hide under the umbrella of the business.

For these reasons, the CAS could have an enormous impact on small businesses. The CAS has not yet been challenged in court and its precise effects remain uncertain. Nevertheless, its potential ramifications deserve careful analysis because of the important role that small businesses and the Internet play in the U.S. economy. First, countless small business owners are already competing with large multinational companies.<sup>33</sup> According to the United States government, since 1970, small businesses have “provide[d] 55% of all jobs” and there are currently “23 million small businesses in

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*Napster Era Finally Dead?*, THE WEEK (Feb. 28, 2013), <http://theweek.com/article/index/240718/the-anti-piracy-copyright-alert-system-is-the-napster-era-finally-dead>.

<sup>31</sup> Zach Walton, *Will the “Six Strikes” Copyright Alert System Hurt Consumers and Small Businesses?*, WEBPRO NEWS (MAR. 4, 2013), <http://www.webpronews.com/will-the-six-strikes-copyright-alert-system-actually-stop-piracy-2013-03> (“[T]he CCI Web site tells people to lock down their Wi-Fi connections so others don’t pirate on your connection. The EFF sees this as an attack on the open Wi-Fi movement and it would be especially troublesome for those who do share their Internet connections with others, like small businesses.”); *Small Businesses*, OPEN WIRELESS MOVEMENT, <https://openwireless.org/#/businesses> (last visited Sept. 13, 2014). The open wireless network is a sharing of Internet connections without the implements of passwords to prohibit users from accessing the Internet source. See *Myths And Facts: Running Open Wireless And Liability For What Others Do*, OPEN WIRELESS MOVEMENT, <https://openwireless.org/myths-legal> (last visited Sept. 13, 2014).

<sup>32</sup> Kevin Collier, *3 Unintended Effects of the Copyright Alert System*, THE DAILY DOT (Jan. 28, 2013), <http://www.dailydot.com/politics/3-effects-copyright-alerts-system-six-strikes/>.

<sup>33</sup> For example, compare Gregory’s Coffee, which has 10 locations in New York City with Starbucks, which has 21,000 stores in more than 65 countries. GREGORY’S COFFEE, <http://www.gregoryscoffee.com/> (last visited Sept. 13, 2014); *Starbucks Coffee International*, STARBUCKS, <http://www.starbucks.com/business/international-stores> (last visited Sept. 13, 2014).



America.”<sup>34</sup> Even minor CAS-imposed inconveniences, such as slowed Internet connections or redirected landing pages, could drive customers away. Such ramifications may jeopardize the existence of these twenty-three million small businesses and the jobs of those who they employ.

These small businesses are incredibly important to the public because, among other things, they supply free Wi-Fi. Small businesses that offer Wi-Fi help “bridge the divide”<sup>35</sup> with those who are unable to afford Internet. These customers would be afforded one fewer opportunity of Internet access if small businesses were no longer a possible destination.<sup>36</sup> In addition, travelers, businesspeople, and those simply seeking to use the Internet would no longer have this convenient and efficient means to do so.<sup>37</sup> The Internet that small businesses provide to these customers is a reliable and continuous source of knowledge and a means of communication.<sup>38</sup> Thus, if the CAS disturbs this Internet accessibility, it will have repercussions that affect both business owners and the public.

Part I of this Note considers the music industry’s use of litigation to fight copyright infringement through online file sharing. Part II examines other “graduated response” systems that have been implemented in France, South Korea, New Zealand, and the United Kingdom. Part III considers the problems that the CAS may create for small business owners and the open wireless network, the difficulty of identifying individuals through their IP addresses, and the ease with which individuals can circumvent the

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<sup>34</sup> *Small Business Trends*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/small-business-trends> (last visited Sept. 13, 2014).

<sup>35</sup> *ISPs*, OPEN WIRELESS MOVEMENT, <https://openwireless.org/#/isps> (last visited Sept. 13, 2014).

<sup>36</sup> OPEN WIRELESS MOVEMENT, *Small Businesses*, *supra* note 31.

<sup>37</sup> *See id.*

<sup>38</sup> *See Reasons for Open Wireless*, OPEN WIRELESS MOVEMENT, <https://openwireless.org/> (last visited Sept. 13, 2014). Internet supplied by small businesses may entice patrons who are seeking to read their email or social media profiles. In addition, for the portion of the population that has minimal access to the Internet, the open wireless network and small businesses that provide free wi-fi offer an opportunity for others to enjoy this benefit to innovate, share and communicate. *Id.*

CAS. Part V suggests modifications to the current CAS.

I. THE ENTERTAINMENT INDUSTRY'S ANTI-PIRACY MASS LITIGATION AND LEGISLATIVE EFFORTS

This section discusses the actions that the RIAA and Congress have taken to deter users from unlawfully sharing copyrighted content and from visiting sites that host such files. The successes, failures, and ramifications of each attempt are also explored.

A. *The Music Industry's Mass Litigation Against Alleged Infringers Begins*

In 2003, the music industry commenced thousands of lawsuits against alleged individual copyright infringers who used P2P networks such as KaZaa, Morpheus, and Grokster.<sup>39</sup> By mid-2003, the recording industry—relying on the power granted under the Digital Millennium Copyright Act<sup>40</sup>—successfully subpoenaed the identity of 871 individuals, in a mass legal action that was the first of its kind.<sup>41</sup> Six months later the music industry filed lawsuits against an additional 532 alleged copyright infringers.<sup>42</sup> RIAA President Cary Sherman justified this mass litigation by pointing to the significance of the problem, which “require[d] us to act quickly

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<sup>39</sup> P2P services such as KaZaa, Morpheus and Grokster are Internet networks designed specifically for the sharing of media files such as feature films and sound recordings. *What is Peer-to-Peer file Transfer*, NAT'L. SCI. FOUND., <https://www.nsf.gov/oi/g/peer.pdf> (last visited Oct. 24, 2014).

<sup>40</sup> 17 U.S.C. § 512(h) (2000) (allowing copyright owners to have a United States district court issue a subpoena to an ISP that requested the identification of an alleged infringer). Obtaining the identity of alleged infringers thus enables the copyright owners to sue the subscribers. *Legal Information Institute*, CORNELL U. L. SCH., <http://www.law.cornell.edu/uscode/text/17/512> (last visited Sept. 13, 2014).

<sup>41</sup> Jefferson Graham, *Swap Songs? You May Be On Record Industry's Hit List*, USA TODAY (July 21, 2003, 11:28 PM), [http://usatoday.com/tech/news/2003-07-21-swappers\\_x.htm](http://usatoday.com/tech/news/2003-07-21-swappers_x.htm).

<sup>42</sup> John Schwartz, *Music Industry Returns to Court, Altering Tactics on File Sharing*, N.Y. TIMES (Jan. 22, 2004), <http://www.nytimes.com/2004/01/22/business/technology-music-industry-returns-to-court-altering-tactics-on-file-sharing.html?src=pm>.

and send a loud and clear message that this kind of activity is illegal and has consequences.”<sup>43</sup> While the music industry was maintaining its promise “not to let up” and continued to sue alleged infringers, it also offered each individual an early opportunity to settle. However, numerous members of the public refused to do so and instead took the matter to court.

Among the industry’s litigation targets were four college students who used the P2P networks to help others “copy and redistribute copyrighted songs.”<sup>44</sup> The RIAA sought the 1976 Copyright Act’s maximum damages—\$150,000 for each act of willful copyright infringement.<sup>45</sup> The most egregious offender possessed 650,000 illegally shared songs.<sup>46</sup> This provided the RIAA a potential \$97.5 billion in statutory damages, a sum that some critics argued was disproportionate to the actual worth of the intellectual property.<sup>47</sup> Perhaps due to such criticism, many students eventually settled their cases for a modest \$12,000–\$17,500 and agreed never to infringe or assist in the violation of the RIAA’s copyrighted works.<sup>48</sup> However, the recording industry’s success in these proceedings spurred its subsequent

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<sup>43</sup> Jon Healey, *Students Hit With Song Piracy Lawsuits*, L.A. TIMES (Apr. 4, 2003), <http://articles.latimes.com/2003/apr/04/business/fi-riaa4>.

<sup>44</sup> *Id.* One of the college students attended Princeton, two were enrolled at Rensselaer Polytechnic Institute, and the last one was a student at Michigan Technological University. Ken Hamner, *Entertainment Industry Goes After Little Guy*, COLLEGIAN ARCHIVES (Apr. 8, 2003), [http://archives.collegian.com/2003/04/08/hamner\\_entertainment\\_industry\\_goes\\_after\\_little\\_guy/](http://archives.collegian.com/2003/04/08/hamner_entertainment_industry_goes_after_little_guy/).

<sup>45</sup> 17 U.S.C. § 504(c)(2) (2010); Healey, *supra* note 43.

<sup>46</sup> Justine Blau, *Music Biz Sues Student File-Swappers*, CBS NEWS (Apr. 4, 2003, 8:44 AM), <http://www.cbsnews.com/news/music-biz-sues-student-file-swappers-04-04-2003/>.

<sup>47</sup> *See* Hamner, *supra* note 44. Compare the RIAA’s request of \$97.5 billion for 650,000 pirated songs with other statistics: “the cost of the space shuttle Endeavour was \$2.1 billion, the projected sales of Kellogg’s cereal in the year 2000 was \$2.5 billion and the gross domestic product (GDP) of China was estimated to be \$1.2 trillion in 2002.” *Id.*

<sup>48</sup> *See* Hamner, *supra* note 44 (stating the RIAA asked courts to make infringers pay a maximum fine of \$150,000 a song); Jon Healey & P.J. Huffstutter, *4 Pay Steep Price For Free Music*, L.A. TIMES (May 2, 2003), <http://articles.latimes.com/2003/may/02/business/fi-settle2>.

lawsuits and intimidation of other Internet users.<sup>49</sup>

The major record labels were successful in their first suit against an alleged infringer. In the 2012 case *Capitol Records Inc. v. Thomas-Rasset*, the defendant argued that her children or boyfriend might have illegally downloaded and shared songs under her username, and that she was not liable.<sup>50</sup> However, the Eighth Circuit upheld Thomas-Rasset's conviction for willfully infringing the recording companies' rights under the Copyright Act and held that the record companies were entitled to "damages of \$222,000 and a broadened injunction."<sup>51</sup> The court originally ordered her to pay a \$1.5 million fine, which it later reduced to \$220,000, the equivalent of \$9,250 per song.<sup>52</sup> Subsequently, in *Sony BMG Music Entertainment v. Tenenbaum*, the First Circuit affirmed the decision that damages of \$675,000, or \$22,500 for each of the thirty pirated songs, was appropriate.<sup>53</sup> Tenenbaum appealed the award of damages and argued that the sum was disproportionate to the actual injury—which he estimated at a maximum of \$450—and thus violated his due process rights. However, the court opined that the damage award was appropriate because Tenenbaum had unlawfully shared copyrighted music.<sup>54</sup> Similarly, in *Atlantic v. Howell*, seven major record labels sued Jeffrey Howell for using the P2P website KaZaa to share 4,000 songs.<sup>55</sup> The United States District Court for the District of Arizona found Howell liable for

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<sup>49</sup> See Healey & Huffstutter, *supra* note 48; see also David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, WIRED (May 18, 2010 1:24 PM), <http://www.wired.com/threatlevel/2010/05/riaa-bump/>.

<sup>50</sup> *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 904 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 1584 (2013).

<sup>51</sup> *Id.* at 902.

<sup>52</sup> *Id.* at 900.

<sup>53</sup> *Sony BMG Music Entm't v. Tenenbaum*, 719 F.3d 67, 68 (1st Cir. 2013).

<sup>54</sup> *Id.* at 68; Christina Sterbenz, *Appeals Court OK's \$675,000 Fine For Guy Who Illegally Downloaded 30 Songs*, BUS. INSIDER (June 26, 2013, 5:26 PM), <http://www.businessinsider.com/joel-tenenbaum-fine-upheld-2013-6>; *Joel Tenenbaum's \$675,000 Music Downloading Fine Upheld*, THE HUFFINGTON POST (June 25, 2013, 5:02 PM), [http://www.huffingtonpost.com/2013/06/25/joel-tenenbaum-music-fine-downloading\\_n\\_3500076.html](http://www.huffingtonpost.com/2013/06/25/joel-tenenbaum-music-fine-downloading_n_3500076.html).

<sup>55</sup> *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008).

distributing fifty-four copyrighted songs and awarded the plaintiffs \$40,500, or \$750 per song.<sup>56</sup>

*B. Reasons Why the Mass Litigation Failed*

Despite the entertainment industry's legal successes in these numerous cases, it also suffered public backlash through its harsh pursuit of alleged infringers. This is partially because the industry did not specifically target those who uploaded high volumes of content, nor did it hesitate to go target the elderly, poor, minors, or other sympathetic groups.<sup>57</sup> For example, the RIAA accused a seventy-one-year-old man of illegally downloading music despite his adamant denial and explanation that his grandchildren used his Internet when they visited his home.<sup>58</sup> Similarly, the RIAA sued an eighty-three-year-old deceased woman even after her daughter submitted a copy of her death certificate to the association.<sup>59</sup> Additionally, the RIAA brought a lawsuit against Brianna LaHara, a twelve-year-old honor student who lived in public housing and downloaded 1,000 songs from KaZaa.<sup>60</sup>

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<sup>56</sup> Atlantic Recording Corp. v. Howell, No. CV-06-02076-PHX-NVW, 2008 WL 4080008, at \*4 (D. Ariz. Aug. 29, 2008). However, Howell's case is distinguishable from *Thomas-Rasset* because Howell was also found guilty of erasing his hard drive, making it nearly impossible for the plaintiffs to present proper evidence. Compare *id.* at \*3-4, with *Thomas-Rasset*, 692 F.3d 899 (finding defendant guilty based on the evidence present; defendant did not erase hard drive). As a result, default judgment was also entered against Howell. *Howell*, 2008 WL 4080008 at \*4. See generally *Another File-Sharer Faces Costly Day of Reckoning*, L.A. TIMES, (Sept. 2, 2008, 1:21 PM), <http://latimesblogs.latimes.com/technology/2008/09/riaa-file-shari.html>.

<sup>57</sup> Matthew Sag, *Piracy: Twelve Year-Old, Grandmothers, and Other Good Targets for the Recording Industry's File Sharing Litigation*, 4 NW. J. TECH. & INTELL. PROP. 133, 182 (2006).

<sup>58</sup> Chris Gaither, *Group Sues 261 Over Music-Sharing*, BOSTON.COM (Sept. 9, 2003), [http://www.boston.com/news/nation/articles/2003/09/09/group\\_sues\\_261\\_over\\_music\\_sharing/](http://www.boston.com/news/nation/articles/2003/09/09/group_sues_261_over_music_sharing/).

<sup>59</sup> Andrew Orlovski, *RIAA Sues the Dead*, THE REGISTER (Feb. 5, 2005), [http://www.theregister.co.uk/2005/02/05/riaa\\_sues\\_the\\_dead/](http://www.theregister.co.uk/2005/02/05/riaa_sues_the_dead/).

<sup>60</sup> Lorena Mongelli, *Music Pirate: N.Y. Girl, 12, Sued for Web Songs Theft*, NEW YORK POST (Sept. 9, 2003, 4:00 AM), <http://nypost.com/2003/09/09/music-pirate-n-y-girl-12-sued-for-web-songs-theft/>; Alex Veigaap, *Music*

Adding to this host of problems, the music industry at times incorrectly identified its targets. In some instances, it failed to distinguish the music of ordinary people from that of famous recording artists. In one case, the RIAA accused a Penn State professor named Usher of illegally distributing a copyrighted song by the musician Usher Raymond.<sup>61</sup> However, the professor had actually shared a song about astronomy that other astronomers had performed.<sup>62</sup> As a result of its efforts against these types of individuals the entertainment industry suffered public backlash.<sup>63</sup>

Rather than move forward with the most active infringers, the RIAA undermined itself by targeting all types of individuals – “legal scholars, college researchers, universities, students, cryptographers, technology developers, civil libertarians, hackers and ultimately consumers.”<sup>64</sup> Commentators warned that panicked lawsuits could alienate consumers and political supporters.<sup>65</sup> The office of New York State Attorney General Andrew Cuomo—a proponent of tough anti-piracy measures—stated that the litigation needed to end because it was simply not helpful,<sup>66</sup> and several commentators warned that the lawsuits would lead to “commercial suicide.”<sup>67</sup> As one critic announced, “it is highly doubtful that Americans would tolerate for very long, if at all, the police raiding

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*Industry Lawsuits May Download Ire*, CORVALIS GAZETTE-TIMES (Sept. 15, 2003, 12:00 AM), [http://www.gazettetimes.com/business/music-industry-lawsuits-may-download-ire/article\\_896ddda8-b247-5d9b-98e4-21cf2a1be431.html](http://www.gazettetimes.com/business/music-industry-lawsuits-may-download-ire/article_896ddda8-b247-5d9b-98e4-21cf2a1be431.html).

<sup>61</sup> Declan McCullagh, *RIAA Apologizes for Threatening Letter*, CNET NEWS (May 12, 2003, 3:16 PM), [http://news.cnet.com/RIAA-apologizes-for-threatening-letter/2100-1025\\_3-1001095.html](http://news.cnet.com/RIAA-apologizes-for-threatening-letter/2100-1025_3-1001095.html).

<sup>62</sup> *Id.*

<sup>63</sup> Daniel Reynolds, *The RIAA Litigation War on File Sharing and Alternatives More Compatible with Public Morality*, 9 MINN. J.L. SCI. & TECH. 977, 983–86 (2008).

<sup>64</sup> *See, e.g.*, Yu, *supra* note 11, at 342–43.

<sup>65</sup> *Id.*

<sup>66</sup> Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, THE WALL STREET JOURNAL (Dec. 19, 2008, 12:01 AM), <http://online.wsj.com/news/articles/SB122966038836021137>.

<sup>67</sup> John Tehranian, *All Rights Reserved? Reassessing Copyright and Patent Enforcement in the Digital Age*, 72 U. CIN. L. REV. 45, 58–59 (2003).

homes and arresting teenagers for copying music or movies.’<sup>68</sup> History has proven this critic correct.<sup>69</sup>

In December 2008, after the music industry had sued approximately 35,000 individual file sharers, it declared that it was concluding its mass litigation scheme and turning its focus toward a voluntary agreement with the ISPs.<sup>70</sup> After years of delay, the groundbreaking arrangement was transformed into the CAS.<sup>71</sup>

### C. Legislative Efforts to Restrict Access to P2P Sites

In 2011, Congress also sought to limit foreign-based P2P sites through the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA). Through these laws, Congress intended to restrict access to “rogue” websites located outside of the United States that hosted or facilitated links to copyright infringing content.<sup>72</sup> The purpose was to strengthen copyright holders’ rights and expand their options to attack foreign websites that allegedly infringed on their copyrighted work.<sup>73</sup> Under SOPA and PIPA, the United States Department of Justice would have had the ability to request court orders requiring United States-based companies—online

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<sup>68</sup> Robert E. Litan, *Law and Policy in the Age of the Internet*, 50 DUKE L.J. 1045, 1070 (2001).

<sup>69</sup> See McBride & Smith, *supra* note 66.

<sup>70</sup> *Id.*

<sup>71</sup> Jeff Stone, *Six Strike Policy Launch Schedule For Monday, Feb. 25; Copyright Alert System Could Hurt Open Wi-Fi*, INTERNATIONAL BUSINESS TIMES (FEB. 23, 2013), <http://www.ibtimes.com/six-strike-policy-launch-scheduled-monday-feb-25-copyright-alert-system-could-hurt-open-wi-fi>; Ernesto, *Six Strikes Anti-Piracy Plan Delayed Till 2013*, TORRENTFREAK (Nov. 28 2012), <https://torrentfreak.com/six-strikes-anti-piracy-plan-delayed-till-121128/>; *Dotting Our “I’s”*, CTR. FOR COPYRIGHT INFO., <http://www.copyrightinformation.org/uncategorized/dotting-our-is/> (last visited Sept. 13, 2014).

<sup>72</sup> GEORGE B. DELTA & JEFFREY H. MATSUURA, *LAW OF THE INTERNET* § 5.05 (3d ed. 2009); Mike Belleville, *IP Wars: SOPA, PIPA, and the Fight Over Online Piracy*, 26 TEMP. INT’L & COMP. L.J. 303, 304 (2012); Larry Magid, *What Are SOPA And PIPA And Why All The Fuss?*, FORBES (Jan. 18, 2012 10:14 AM), <http://www.forbes.com/sites/larrymagid/2012/01/18/what-are-sopa-and-pipa-and-why-all-the-fuss/>.

<sup>73</sup> Belleville, *supra* note 72, at 304.

advertisers, credit card companies, and ISPs—to block access to the foreign “rogue” sites.<sup>74</sup>

Supporters of the bills argued that this broad power was necessary to avert pervasive copyright piracy.<sup>75</sup> The MPAA, RIAA, and the United States Chamber of Commerce, all advocates of SOPA and PIPA, claimed that creative advancements and jobs in “content-creating industries” were vulnerable to prevalent piracy.<sup>76</sup> They contended that these overseas websites acted as asylums for Internet pirates.<sup>77</sup> However, these proponents and the bills faced fierce hostility from individuals and P2P websites.

In opposition to the bills, more than one hundred thousand websites joined forces in an Internet strike.<sup>78</sup> Some sites temporarily shut down while others posted information about SOPA and PIPA, and provided directions on how users could contact Congress about their concerns with the bills.<sup>79</sup> Taking this cue, Internet subscribers fervently protested the bills through phone calls to Congress, social media postings, online petitions, and emails.<sup>80</sup> These objections were effective “as the stated positions by members of Congress on SOPA and PIPA shifted overnight from 80 for and 31 against to 55 for and 205 against.”<sup>81</sup> Subsequently, the House of Representatives deferred its consideration of SOPA until consensus for a solution could be reached.<sup>82</sup> Similarly, the Senate postponed its vote on PIPA based on the successful demonstrations.<sup>83</sup> Due to this legislative failure, the copyright owners, the RIAA, and the MPAA were forced once

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<sup>74</sup> DELTA & MATSUURA, *supra* note 72, at 5–34 (3d ed. 2009); Stephanie Condon, *SOPA, PIPA: What You Need To Know*, CBS NEWS (Jan. 18, 2012, 3:07 PM), <http://www.cbsnews.com/news/sopa-pipa-what-you-need-to-know/>.

<sup>75</sup> DELTA & MATSUURA, *supra* note 72, at 5–34.

<sup>76</sup> Condon, *supra* note 74.

<sup>77</sup> *Id.*

<sup>78</sup> Yafit Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 HARV. J.L. & TECH. 203–04 (2013).

<sup>79</sup> *Id.* at 204.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 204–205.



again to create a new solution to curb Internet piracy. Recognizing the breakdown of their approach, legislators looked to foreign models in an attempt to find an alternative tactic.

## II. GLOBAL GRADUATED RESPONSE SYSTEMS

The International Federation of the Phonographic Industry (IFPI), in its 2007 Annual Digital Music Report, asserted that the entertainment industry “need[s] government help to make it clear that ISPs must face up to their responsibilities and cut off copyright infringing users.”<sup>84</sup> Numerous countries throughout the world have placed this responsibility on the ISPs in the form of graduated response systems. France, South Korea, New Zealand, and the United Kingdom were the first countries to implement graduated response schemes. Although the laws vary among countries, each graduated response system strives to devise not only a basic level of uniformity of copyright protection, but also a means of enforcement.<sup>85</sup>

### A. France

The French government created its graduated response system, Haute Autorité pour la diffusion des oeuvres et la protection des droits sur Internet (HADOPI),<sup>86</sup> also known as the “Three Strikes” program, in 2009. Its purpose was to ensure that Internet users monitor and password-protect their Internet services in order to prevent others from using their networks to trade copyrighted material.<sup>87</sup> The original program allowed an administrative organization to suspend a user’s Internet access for illegal file

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<sup>84</sup> *Digital Music Report*, INT’L FED’N OF THE PHONOGRAPHIC INDUS. 1, 3 (2007), <http://www.ifpi.org/content/library/digital-music-report-2007.pdf>.

<sup>85</sup> See DELTA & MATSUURA, *supra* note 72, §5.04.

<sup>86</sup> In English, this translates to “High Authority for the Dissemination of Works and the Protection of Rights on the Internet.” Rebecca Giblin, *Evaluating Graduated Response*, 37 COLUM. J.L. & ARTS 147, 153 (2013).

<sup>87</sup> *The European Response to Online Piracy: the French Solution and the German and Italian Efforts*, GLOBAL CYBER SEC. CTR. BLOG, <http://www.gcsec.org/blog/european-response-online-piracy> (last visited Sept. 13, 2014).

sharing if there were continued offenses.<sup>88</sup> However, the Constitutional Council held that only a judge had the power to do so and thus declared the program unconstitutional.<sup>89</sup> Accordingly, HADOPI was quickly revised to acknowledge that judicial authority was the only means of disconnecting an accused's Internet access.<sup>90</sup>

The content owners initially focused on P2P file-sharing services even though the second version of HADOPI did not expressly limit itself to piracy conducted through P2P platforms.<sup>91</sup> These owners monitored their content for online piracy on P2P sites and then informed HADOPI of their allegations of copyright infringement.<sup>92</sup> The Rights Protection Committee (CPD), a group of individuals selected by a government decree to oversee the implementation of the warnings, reviewed these allegations and when it determined that an act constituted a violation of the copyright law, it used the ISP to send the user a warning email in the form of a "recommendation."<sup>93</sup> This "recommendation" informed the user of the offense, the user's responsibility to oversee his or her Internet access, the possible consequences of continued infringement, and the existing Internet security programs.<sup>94</sup> If any repeated offenses occurred within six months of

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<sup>88</sup> Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1374–1376 (2010).

<sup>89</sup> *See id.*; Guillaume Champeau, *Hadopi: The Suspension of Access Abolished by Decree in June*, NUMERAMA (May 20, 2013), <http://www.numerama.com/magazine/25994-hadopi-la-suspension-de-l-acces-supprimee-en-juin-par-decret.html>; Jacob Katrenakes, *France Reverses 'Three Strikes' Piracy Law, Will No Longer Suspend Violators' Internet Access*, THE VERGE (July 9, 2013, 2:53 PM), <http://www.theverge.com/2013/7/9/4507620/france-ends-hadopi-three-strikes-internet-suspensions>.

<sup>90</sup> *See id.*

<sup>91</sup> Giblin, *supra* note 86, at 154.

<sup>92</sup> *Id.*

<sup>93</sup> *Graduated Response*, HADOPI, <http://www.hadopi.fr/en/new-freedoms-new-responsibilities/graduated-response> (last visited Sept. 13, 2014); *Rights Protection Committee: Overview and Missions*, HADOPI, <http://www.hadopi.fr/en/high-authority/rights-protection-committee-overview-and-missions> (last visited Sept. 13, 2014).

<sup>94</sup> Giblin, *supra* note 86, at 155; Yu, *supra* note 88, at 1374.

the first warning, a certified letter was sent to the user.<sup>95</sup> This second “recommendation” reiterated the information contained in the first “recommendation.”<sup>96</sup> If a subsequent allegation was made within one year of the certified letter, the ISP could suspend the user’s Internet access for two months to one year, and impose a fine of €1500.<sup>97</sup>

As of December 2012, HADOPI issued broadband users “1.15 million first warnings, 100,000 second warnings and 340 third warnings.”<sup>98</sup> Those warnings resulted in only one fine and two guilty convictions.<sup>99</sup> Although HADOPI reduced P2P infringement, the “traffic had been diverted” to other piracy sources such as stream-ripping services that locally save streaming files,<sup>100</sup> and pirates used VPN services, secure networks that allow the sharing of information,<sup>101</sup> to avoid HADOPI detection.<sup>102</sup> Seventeen months after its implementation, the French film

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<sup>95</sup> GLOBAL CYBER SEC. CTR., *supra* note 87; Giblin, *supra* note 86, at 155.

<sup>96</sup> GLOBAL CYBER SEC. CTR., *supra* note 87; Giblin, *supra* note 86 at 155.

<sup>97</sup> Giblin, *supra* note 86, at 155. €1500 is the equivalent of approximately \$1990. See *Currency Convertor*, BLOOMBERG MARKETS, <http://www.bloomberg.com/markets/currencies/currency-converter> (last visited Sept. 13, 2014).

<sup>98</sup> Glenn Peoples, *France’s Hadopi: 2 Convictions, 1 Fine, 1.25 Million Warnings Since 2009*, BILLBOARD (Dec. 31, 2012, 1:52 PM), <http://www.billboard.com/biz/articles/news/1483616/frances-hadopi-2-convictions-1-fine-125-million-warnings-since-2009>.

<sup>99</sup> *Id.*

<sup>100</sup> Margaret Rouse, *Stream Recorder (Stream Ripper)*, WHATIS (Mar. 2011), <http://whatis.techtarget.com/definition/stream-recorder-stream-ripper>.

<sup>101</sup> Eric Geier, *How (and Why) To Set Up a VPN Today*, PCWORLD (Mar. 19, 2013, 3:10 AM), <http://www.pcmag.com/article/2030763/how-and-why-to-set-up-a-vpn-today.html>. Most of these networks are encrypted. *Id.*

<sup>102</sup> Giblin, *supra* note 86, at 156 (citing Pierre Lescure, *Mission « Acte II de l’exception culturel Contribution aux politiques culturelles à l’ère numérique*, MINISTERE DE LA CULTURE ET DE LA COMMUNICATION at 371 (May 2013), [www.culturecommunication.gouv.fr/var/culture/storage/culture\\_mag/rapport\\_le\\_scurer/index.htm#/1](http://www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_le_scurer/index.htm#/1)); see Ernesto, *Do “Strikes” Programs Help to Reduce Piracy?*, TORRENTFREAK (Apr. 26, 2013), <http://torrentfreak.com/do-strikes-programs-help-to-reduce-piracy-130426/> (explaining that there has been “a drastic rise in the use of VPN services through which P2P sharers can avoid being tracked”).

industry saw profits fall 2.7 percent.<sup>103</sup> Thus, it was no surprise that in May 2013, the Lescure report stated that HADOPI had failed to achieve its objectives. Indeed, some critics called the system “unwieldy, uneconomic, and ultimately ineffective”<sup>104</sup> and noted that the €10.4 million (\$13.7 million) 2012 HADOPI budget had resulted in one fine of €150.<sup>105</sup>

The French Ministry of Culture and Communications, which creates the cultural policy regarding art,<sup>106</sup> reviewed HADOPI’s ineffectiveness and revised it in multiple respects.<sup>107</sup> First, a 2013 decree eliminated Internet suspension as a possible punishment under HADOPI.<sup>108</sup> In addition, the second “recommendation” included notice of possible criminal proceedings and a maximum

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<sup>103</sup> Mike Masnick, *Is There Any Value In Cracking Down On ‘Piracy’ If It Doesn’t Increase Sales?*, TECHDIRT (Apr. 2, 2012), <http://www.techdirt.com/articles/20120330/18222718314/is-there-any-value-cracking-down-piracy-if-it-doesnt-increase-sales.shtml>.

<sup>104</sup> Giblin, *supra* note 86, at 156 (explaining that the Lescure Report was a study and report conducted by Pierre Lescure, the former head of the famous foreign television network Canal Plus, by request of the then-French President, Francois Hollande); Richard Chirgwin, *France Backs Away from Hadopi*, THE REGISTER (Aug. 6, 2012), [http://www.theregister.co.uk/2012/08/06/hadopi\\_under\\_fire/](http://www.theregister.co.uk/2012/08/06/hadopi_under_fire/); Mike Masnick, *French Report Says: Kill Hadopi, But Let Its Legacy Live On*, TECHDIRT, (May 13, 2013, 3:02 PM), <https://www.techdirt.com/articles/20130513/13523923064/french-report-says-kill-hadopi-let-its-legacy-live.shtml>.

<sup>105</sup> Peoples, *supra* note 98.

<sup>106</sup> *Ministry of Culture and Communication (France)*, CULTURE360, <http://culture360.asef.org/organisation/ministry-of-culture-and-communication-france/> (last visited Sept. 13, 2014) (describing the mission of the Ministry of Culture).

<sup>107</sup> *France Set to Scrap Hadopi*, World Intellectual Property Review (May 5, 2013), <http://www.worldipreview.com/news/france-set-to-scrap-hadopi>.

<sup>108</sup> Décret n° 2013-596 du 8 juillet 2013 supprimant la peine contraventionnelle complémentaire de suspension de l’accès à un service de communication au public en ligne et relatif aux modalités de transmission des informations prévue à l’article L. 331-21 du code de la propriété intellectuelle [Decree No. 2013-596 of July 8, 2013, Removing The Complementary Penalty Of Suspending Access To An On-Line Public Communication Service And Relating To The Information Transmission Methods Provided For In Article L. 331-21 Of The Intellectual Property Code], Journal Officiel De Le Republique Fraçaise [J.O.][Official Gazette of France], July 9, 2013, p. 60.

fine of €1500.<sup>109</sup> However, the Minister of Culture, who oversees the French cultural policy regarding the protection of the arts and practices, immediately revoked the HADOPI system and replaced it with a procedure of automatic fines.<sup>110</sup> In a press release, the Minister of Culture announced that suspending Internet was no longer compatible with stimulating growth in the “digital economy.”<sup>111</sup>

In retrospect, there are differing views on HADOPI’s success. A recent study indicated that although many users diverted their activities to other illegal sites, the threat of Internet suspension guided some French Internet subscribers to Apple’s iTunes store, a legal marketplace.<sup>112</sup> Despite these results, the Syndicat National de l’Edition Phonographique (SNEP), the organization that oversees the French recording industry, announced that the number of visitors to illegal file-sharing websites increased by seven percent between January 2010 and 2013, and that revenue solely from digital sources dropped by 5.2 percent.<sup>113</sup> Thus, while HADOPI revolutionized the notion of penalizing subscribers accused of illegally sharing copyrighted work and blocking an individual’s Internet access, the system was ultimately replaced with a graduated fine system.<sup>114</sup> The French government spent more than twelve million euros annually to oversee HADOPI,

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<sup>109</sup> Yu, *supra* note 88 at 1374.

<sup>110</sup> Giblin, *supra* note 86 at 156; Lars Brandle, *France’s ‘Three-Strikes’ Hadopi Law Gets the Guillotine*, BILLBOARD (July 10, 2013, 5:53 AM), <http://www.billboard.com/biz/articles/news/global/1569397/frances-three-strikes-hadopi-law-gets-the-guillotine>; *Ministry of Culture and Communication (France)*, *supra* note 106.

<sup>111</sup> Eric Pfanner, *French Appear Ready to Soften Law on Media Piracy*, N.Y. TIMES (June 2, 2013), <http://www.nytimes.com/2013/06/03/technology/03iht-piracy03.html>.

<sup>112</sup> *Id.*; see also Brandle, *supra* note 110.

<sup>113</sup> Pfanner, *supra* note 111.

<sup>114</sup> Josh Taylor, *France Drops Hadopi Three-Strikes Copyright Law*, ZDNET (July 10, 2013, 2:37 GMT), <http://www.zdnet.com/france-drops-hadopi-three-strikes-copyright-law-7000017857>; Glyn Moody, *French Hadopi Scheme Guttled; Other Bad Ideas To Be Introduced Instead*, TECHDIRT (Dec. 10, 2012 9:16 AM), <https://www.techdirt.com/articles/20121209/07085621316/french-hadopi-scheme-guttled-other-bad-ideas-to-be-introduced-instead.shtml>.

which in the end, many critics described as a very “expensive way to send a million e-mails.”<sup>115</sup>

### B. South Korea

South Korea uses a graduated response system similar to the original HADOPI. In 2009, the government revised the Korean Copyright Act to permit two processes that terminate the Internet service of alleged infringers.<sup>116</sup> In the first process, the Minister of Culture, Sports and Tourism issues orders that permit ISPs to take multiple actions against those who exchange illegal copies of copyrighted works.<sup>117</sup> These measures include warning the content infringers of their actions, erasing illegal copies, and prohibiting the transmission of the illegal copies. The Minister of Culture, Sports and Tourism also permits the suspension of the Internet provided by the user’s ISP.<sup>118</sup> The first suspension is only allowed to last one month, the second for a minimum of one month and a maximum of three months, and the third suspension may last between three and six months.<sup>119</sup>

The South Korean scheme, compared to HADOPI, has less power to disconnect service. South Korea’s program only

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<sup>115</sup> Mike Masnick, *New French Government Not Impressed By Hadopi; Wants To Cut Its Funding*, TECHDIRT (Aug. 7, 2012, 9:05 AM), <http://www.techdirt.com/articles/20120806/02240019940/new-french-government-not-impressed-hadopi-wants-to-cut-its-funding.shtml>.

<sup>116</sup> Bill Rosenblatt, *UK ISPs to Implement “Educational” Graduated Response System*, COPYRIGHT AND TECHNOLOGY (May 14, 2014), <http://copyrightandtechnology.com/2014/05/14/uk-isps-to-implement-educational-graduated-response-system/>.

<sup>117</sup> Sun-Young Moon & Daeup Kim, *The “Three Strikes” Policy in Korean Copyright Act 2009: Safe or Out?*, 6 WASH. J. L. TECH & ARTS 171, 171 (2011); Giblin, *supra* note 86, at 163.

<sup>118</sup> DOUG JAY LEE ET AL., MAJOR AMENDMENTS TO KOREAN COPYRIGHT ACT (2009), available at [http://www.apaaonline.org/pdf/APAA\\_56th\\_&\\_57th\\_council\\_meeting/copyright/2-Korea%20Copyright%20Ctee%20Country%20Report%202009.pdf](http://www.apaaonline.org/pdf/APAA_56th_&_57th_council_meeting/copyright/2-Korea%20Copyright%20Ctee%20Country%20Report%202009.pdf) (last visited Sept. 13, 2014).

<sup>119</sup> Enforcement Decree of the Copyright Act, Presidential Decree No. 22003, January 27, 2010, art. 72-3(2) (S. Kor.), available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=200937](http://www.wipo.int/wipolex/en/text.jsp?file_id=200937) (last visited Oct. 24, 2014).

disconnects the infringer's Internet access on the specific ISP with which the subscriber has an agreement and on which the piracy transpired.<sup>120</sup> Therefore, it does not prohibit infringers from creating new Internet accounts with different ISPs.<sup>121</sup> Also, the Korea Copyright Commission (KCC) must review the situation prior to any suspension, and the Minister of Culture, Sports and Tourism is obligated to hold a hearing involving the ISP and the account holder.<sup>122</sup> The Enforcement Decree of the Copyright Act requires that prior to interrupting an Internet service account, the KCC must consider elements such as the recidivism of the alleged pirate, the number of illegal copies exchanged, the category of illegal content, and the impact that the pirated works have on the dissemination of content.<sup>123</sup> However, this is only part of the graduated response scheme.

The other method of Internet suspension is by the KCC's recommendation.<sup>124</sup> The KCC has the power to order ISPs to warn infringers of their illegal actions, remove or forbid the sharing of copyrighted content, and freeze Internet connections of repeated infringers.<sup>125</sup> However, the ISPs are not required to abide by the KCC's recommendations.<sup>126</sup> Nonetheless, the Minister of Culture, Sports and Tourism may mandate that the ISPs take certain actions.<sup>127</sup>

Since the inception of the graduated response system in 2009, there have been reports of its success despite the fact that a limited portion of the South Korean population is affected by it.<sup>128</sup> At least four hundred Internet accounts in South Korea have been

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<sup>120</sup> See LEE ET AL., *supra* note 118.

<sup>121</sup> *Id.* at 6.

<sup>122</sup> *Id.* at 7; Copyright Act of 1957, Act. No. 432, Jan. 28, 1957, *amended* by Act. No. 9625, Apr. 22, 2009 (S. Kor.), *available at* [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=190145](http://www.wipo.int/wipolex/en/text.jsp?file_id=190145) (last visited Sept. 13, 2014).

<sup>123</sup> Enforcement Decree of the Copyright Act § 72-3(1).

<sup>124</sup> Copyright Act, March 15, 2012, art. 133-3, *amended* by Law No. 11110, December 2, 2011 (S. Kor.), *translated* by the Korea Copyright Commission.

<sup>125</sup> Moon & Kim, *supra* note 117, at 171.

<sup>126</sup> LEE ET AL., *supra* note 118, at 8.

<sup>127</sup> *Id.*

<sup>128</sup> Pfanner, *supra* note 111.

suspended.<sup>129</sup> During the period of July 2009 to December 2012, 468,446 warnings were issued and by March 2013, 408 South Korean websites had been terminated.<sup>130</sup> The South Korean government announced that 70% of infringers stopped after their first warning.<sup>131</sup> Another 70% of those who were still infringing discontinued after a second warning.<sup>132</sup> However, to give a broader perspective, in 2011, South Korea had more than forty million Internet users.<sup>133</sup> Thus, only 1.17 percent of the Korean Internet population was affected by the graduated response system, although this may have been a large percentage of alleged infringers.<sup>134</sup> Notwithstanding this percentage, the entertainment industry's revenue in South Korea increased by 26% between 2008 and 2012, a period that saw international music sales fall 14%.<sup>135</sup> Despite these numbers, Eric Pfanner of *The New York Times* reasoned that this revenue increase may reflect the resurgence of South Korean popular music, exemplified by musical acts such as the recording artist Psy and the success of his song "Gangnam Style."<sup>136</sup>

Regardless of the South Korean system's success, it has faced opposition from at least one major organization. In March 2013, the Korean National Human Rights Commission requested an evaluation of the graduated response system, not to evaluate its

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<sup>129</sup> *Id.*

<sup>130</sup> Giblin, *supra* note 86, at 164; *Copyright Reform: Abolishing Three-Strikes-Out Rule from Copyright Law*, OPENNET, <http://opennet.or.kr/copyright-reform> (last visited Sept. 13, 2014); Danny O'Brien & Maira Sutton, *Korean Lawmakers and Human Rights Experts Challenge Three Strikes Law*, ELEC. FRONTIER FOUND. (Mar. 29, 2013), <https://www.eff.org/deeplinks/2013/03/korea-stands-against-three-strikes>.

<sup>131</sup> INT'L FED'N OF THE PHONOGRAPHIC INDUS., *supra* note 84, at 22.

<sup>132</sup> *Id.*

<sup>133</sup> Giblin, *supra* note 86, at 165; *Internet Users in Asia*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats3.htm> (last visited Sept. 13, 2014) (stating that as of December 31, 2013 there were more than forty one million South Korean Internet users).

<sup>134</sup> Giblin, *supra* note 86, at 164.

<sup>135</sup> Pfanner, *supra* note 111; *see also* INT'L FED'N OF THE PHONOGRAPHIC INDUS., *supra* note 84.

<sup>136</sup> Pfanner, *supra* note 111; *see also* INT'L FED'N OF THE PHONOGRAPHIC INDUS., *supra* note 84.



effectiveness but rather to determine whether it conflicts with constitutional protections regarding information privacy, freedom of expression, and the right to access online information.<sup>137</sup> Thus far there has been no follow up to the request. Yet, it is possible that the system may eventually be deemed unconstitutional.

As of now, one could argue that the South Korean graduated response system has had a small influence. While industry revenue has increased, the system has only affected a limited fraction of the population. At the same time, those impacted by the scheme may be the most prevalent copyright infringers. If this is proven true, the South Korean system could be deemed a great success.

### C. *New Zealand*

A less strict graduated response system is underway in New Zealand. Unlike HADOPI, New Zealand's Copyright Amendment Act (CAA) is a "Three-Strike" warning system that only regulates P2P file sharing.<sup>138</sup> As a result, streaming is not within the foray of the scheme.<sup>139</sup> Therefore, if an individual illegally uploads a copyrighted video to YouTube, the pirate will not be subjected to the punishments of the Three-Strike system.<sup>140</sup> This weakens the system as it does not cover alternate ways by which infringers use copyrighted material.<sup>141</sup>

The New Zealand Executive Council established this system in order to "provid[e] more effective means for copyright owners to enforce their rights against people involved in unauthorized peer-

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<sup>137</sup> Pfanner, *supra* note 111.

<sup>138</sup> *NZ Copyright Infringement Regime – Illegal File Sharing*, LAW DOWN UNDER (Jan. 30, 2013), <http://www.lawdownunder.com/nz-copyright-infringement-regime-illegal-file-sharing/> [hereinafter LAW DOWN UNDER].

<sup>139</sup> *Id.*; Streaming is the process by which an individual watches a movie in "real time" rather than a downloaded version. Web Wise Team, *What is Streaming?* BBC (Oct. 10, 2012), <http://www.bbc.co.uk/webwise/guides/about-streaming>.

<sup>140</sup> LAW DOWN UNDER, *supra* note 138.

<sup>141</sup> Ernesto, *Three Strikes Law Does Nothing to Curb Piracy, Research Finds*, TORRENTFREAK, (Jan. 22, 2014), <https://torrentfreak.com/three-strikes-law-does-nothing-to-curb-piracy-research-finds-140122/>.

to-peer file sharing of copyright material.”<sup>142</sup> As in the systems described above, under the CAA, the ISPs<sup>143</sup> act as intermediaries between the copyright owners and the alleged infringers.<sup>144</sup> In this system, the copyright owner need only deliver to the ISP the IP address on which the alleged infringement occurred;<sup>145</sup> no other set of evidence or supporting facts is necessary.<sup>146</sup> Subsequently, the ISP is allowed seven days to match the IP address with the account holder and distribute an infringement notice.<sup>147</sup>

If the account holder has received no other infringement notice within the preceding nine months, then an IPAP (an ISP) mails a Detection notice.<sup>148</sup> A Detection notice informs the account holder of the alleged infringement and the consequences of persistent infringement.<sup>149</sup> These notices expire after nine months.<sup>150</sup> If a notice that was issued in the previous nine months has not expired nor been cancelled, a Warning notice is sent by an IPAP to the suspected infringer.<sup>151</sup> The Warning notice recounts the previous alleged infringements, lists the consequences of continuous violations, and describes how the holder can challenge a notice.<sup>152</sup> Finally, if two infringement notices are issued within nine months and neither was expired or cancelled, then a final Enforcement notice is distributed by an IPAP to the IP address owner.<sup>153</sup> This final notice identifies all of the infringements and warnings sent to the account holder and describes the actions that a copyright owner

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<sup>142</sup> LAW DOWN UNDER, *supra* note 138.

<sup>143</sup> In New Zealand, the ISPs are known as Internet Protocol Address Providers (“IPAP”). *Id.*

<sup>144</sup> LAW DOWN UNDER, *supra* note 138.

<sup>145</sup> Giblin, *supra* note 86, at 161.

<sup>146</sup> *Id.*

<sup>147</sup> LAW DOWN UNDER, *supra* note 138.

<sup>148</sup> Copyright Act 1994, § 6-122D (N.Z.), available at <http://www.justice.govt.nz/tribunals/copyright-tribunal/documents/3%20infringement%20notice%20process%20diagram.pdf> (illustrating the three infringement notice process).

<sup>149</sup> Copyright Act 1994, amended by Copyright (Infringing File Sharing Amendment Act 2011 § 6-122D(3) (N.Z.), available at [www.legislation.govt.nz/act/public/2011/0011/latest/DLM2764327.html](http://www.legislation.govt.nz/act/public/2011/0011/latest/DLM2764327.html).

<sup>150</sup> *Id.* §§ 6-122D(3), 6-122F(4)–(5) (N.Z.).

<sup>151</sup> *Id.* § 6-122E(1).

<sup>152</sup> *Id.* § 6-122E(2).

<sup>153</sup> *Id.* § 6-122F(1).

can take against the Internet subscriber.<sup>154</sup> After the infringer receives an Enforcement notice, the New Zealand Legislature permits the copyright owner to apply to the Copyright Tribunal for damages up to \$15,000.<sup>155</sup> The copyright owner can also make a request to the District Court that the alleged infringer's Internet be suspended for a maximum of six months; however, individuals are not permitted to apply to a District Court until a date established by the Order in Council.<sup>156</sup>

After the CAA went into effect in September 2011, music revenues in New Zealand decreased by 2.1 percent.<sup>157</sup> The New Zealand Screen Association claimed that the regularity of illegally downloading movies remained unchanged.<sup>158</sup> A study of DSL, a New Zealand ISP, reported that the amount of traffic on P2P networks decreased more than fifty percent since the introduction of the CAA.<sup>159</sup> However, prior to the CAA in 2010, music revenues also declined 1.9%.<sup>160</sup> In addition, after the introduction of the CAA in 2011, many users redirected their focus to streaming, FTP, tunneling and remote access protocols, all of

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<sup>154</sup> *Id.* § 6-122F(2).

<sup>155</sup> *Id.* § 6-122O(4).

<sup>156</sup> *Id.* §§ 6-122P; 6-122R. The Order in Council is a legislative instrument created by the highest New Zealand government body, the Executive Council. *Glossary*, N.Z. LEGISLATION, <http://www.legislation.govt.nz/glossary.aspx> (last visited Sept. 13, 2014); *Executive Council*, THE GOVERNOR-GENERAL, <https://gg.govt.nz/content/executive-council> (last visited Sept. 13, 2014).

<sup>157</sup> Glenn Peoples, *Business Matters: Did Anti-Piracy Laws Improve Revenue in New Zealand or Japan?*, BILLBOARD (Apr. 8, 2013, 9:00 PM), <http://www.billboard.com/biz/articles/news/1556656/business-matters-did-anti-piracy-laws-improve-revenue-in-new-zealand-or>.

<sup>158</sup> SHANE ALCOCK & RICHARD NELSON, UNIV. OF WAIKATO, MEASURING THE IMPACT OF THE COPYRIGHT AMENDMENT ACT ON NEW ZEALAND RESIDENTIAL DSL USERS 3–6 (Nov. 14–16, 2012), available at <http://wand.net.nz/sites/default/files/caa.pdf>.

<sup>159</sup> *Id.* Although P2P file sharing has decreased in New Zealand, BitTorrent still remains in the “top 5 application protocols in terms of bytes downloaded and BitTorrent DHT traffic is actually growing rather than shrinking. BitTorrent is still significant, but not as much as it was.” *The Impact of the Copyright Amendment Act: Update for September 2012*, WAND NETWORK RESEARCH GROUP (Oct. 26, 2012), <http://wand.net.nz/content/impact-copyright-amendment-act-update-september-2012>.

<sup>160</sup> Peoples, *supra* note 157.

which have increased traffic since the CAA came into effect.<sup>161</sup> In fact, after implementation of the Three-Strike System, DSL subscribers witnessed “three hundred percent more tunneling traffic,” which is the transmitting of Internet traffic through certain secured channels.<sup>162</sup> Similarly, the use of HTTPS, which encrypts copyright transfers and protects the user from detection, increased fivefold between February 2011 and October 2012.<sup>163</sup>

These numbers could reflect a change in the methods by which New Zealand Internet users illegally download copyrighted content. Indeed, previous P2P subscribers now use seedboxes—remote servers utilized to both download and upload small files at high speeds—and other tactics to illegally download copyrighted work and transmit the files to their computers using tunnels to safeguard themselves from being identified.<sup>164</sup> Certainly these new methods demonstrate the willingness of subscribers to find novel methods that minimize the probability of being targeted by

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<sup>161</sup> ALCOCK & NELSON, *supra* note 158, at 4–6. FTP is an internet protocol that uses the Internet to transfer file storage between computers. *Files Transfer Protocol (FTP): Frequently Asked Questions*, WINDOWS <http://windows.microsoft.com/en-us/windows-vista/file-transfer-protocol-ftp-frequently-asked-questions> (last visited Sept. 13, 2014). FTP, also known as File Transfer Protocol, is a network protocol used to transfer files between hosts over the Internet. *Id.* It creates a direct path to a user’s website and is commonly used to make files accessible for others to download. *Id.*

<sup>162</sup> ALCOCK & NELSON, *supra* note 158, at 6. A Tunnel is used to send protocol between networks that would not normally be capable of supporting it. Charlie Schluting, *Networking 101: Understanding Tunneling*, ENTER. NETWORKING PLANET (Aug. 3, 2006), <http://www.enterprisenetworkingplanet.com/netsp/article.php/3624566/Networking-101-Understanding-Tunneling.htm>. The data sent through the tunnels is encrypted prior to transmission. *Id.*

<sup>163</sup> ALCOCK & NELSON, *supra* note 158, at 4–6. HTTPS is an acronym for Hyper Text Transfer Protocol Secure. *What is HTTPS?*, INSTANT SSL, <http://www.instantssl.com/ssl-certificate-products/https.html> (last visited Sept. 13, 2014). When web browsers link to a website through HTTPS, the site encodes the online session and thus creates a secure connection which cannot be accessed by others. *Id.* For example, HTTPS is used for online bank transactions. *Id.*

<sup>164</sup> See ALCOCK & NELSON, *supra* note 158, at 6; *What is a Seedbox?*, SEEDBOX GUIDE (Jan. 26, 2013), <http://seedboxgui.de/guides/what-is-a-seedbox/>.

copyright holders.<sup>165</sup> Nevertheless, the CAA has successfully reduced P2P file sharing. On the other hand, the CAA may have also backfired in curbing piracy because it has incentivized subscribers to creatively find other means by which to illegally download copyrighted material.

#### *D. United Kingdom*

The United Kingdom plans to similarly implement an alert system. However, it will not engage in any punitive measures.<sup>166</sup> Although the first version of a graduated response system was originally decreed in 2010, it was not until July 2014 that the U.K. Government announced that representatives of the country's creative industries and ISPs had agreed to a new scheme, the Creative Content UK.<sup>167</sup>

Creative Content UK has an educational purpose: to promote and notify the public of legal methods of obtaining digital entertainment.<sup>168</sup> Its goal is to generate awareness of lawful means of obtaining copyrighted content and of the prevalence of Internet copyright infringement.<sup>169</sup> Its notification system will focus on Internet users of all ages.<sup>170</sup> The government, which is contributing

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<sup>165</sup> See ALCOCK & NELSON, *supra* note 158, at 6 (“We believe that this may be due to users responding to the CAA by changing their approach to file sharing to limit the likelihood of being detected by copyright holders.”).

<sup>166</sup> *UK Anti-Piracy Campaign Set to Begin*, BBC (Jul. 18, 2014), <http://www.bbc.com/news/technology-28374457>.

<sup>167</sup> *New Education Programme Launched to Combat Online Piracy*, GOV.UK, <https://www.gov.uk/government/news/new-education-programme-launched-to-combat-online-piracy> (last visited Oct. 24, 2014) [hereinafter *New Education Programme*]; *UK Creative Industries and ISPs Partner in Major New Initiative to Promote Legal Online Entertainment*, BRIT. PHONOGRAPHIC INDUSTRY (July 19, 2014), <http://www.bpi.co.uk/home/uk-creative-industries-and-isps-partner-in-major-new-initiative-to-promote-legal-online-entertainment.aspx> [hereinafter *UK Creative Industries and ISPs Partner*]; Tim Heaps & Tom Ohta, *Industry-Led Response to Online Copyright Infringement: the Voluntary Copyright Alert Programme (VCAP)*, BRISTOWS (May 5, 2014), <http://www.bristows.com/articles/industry-led-response-to-online-copyright-infringement-the-voluntary-copyright-alert-programme-vcap>.

<sup>168</sup> *New Education Programme*, *supra* note 167.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

£3.5 million to the campaign,<sup>171</sup> hopes that by educating the public about legal ways of obtaining copyrighted works, Internet users will develop more “confidence” when they purchase online content.<sup>172</sup> Furthermore, according to Lyssa McGowan, the Director of Sky Broadband,<sup>173</sup> participants in the Creative Content UK have two expectations—raising awareness of unlawful file sharing and simultaneously lending support to the United Kingdom’s creative industries.<sup>174</sup>

The creative organizations and ISPs developed the notification system through a memorandum of understanding.<sup>175</sup> This memorandum outlines the program’s enforcement.<sup>176</sup> Thus far, the Motion Picture Association, British Phonographic Industry, Sky Broadband, BT, TalkTalk, and Virgin Media have signed the memorandum.<sup>177</sup> These participants have agreed to a two-part system.<sup>178</sup>

The first component will be unveiled prior to the spring of 2015.<sup>179</sup> It will encompass a “multi-media education awareness campaign” that is managed by the content owners.<sup>180</sup> The purpose of this is to establish a “wider appreciation of the value and benefits of entertainment content and copyright.”<sup>181</sup>

Soon after will come the second phase.<sup>182</sup> This segment will involve a subscriber alert program.<sup>183</sup> Content owners will browse public P2P sites for their own works to determine if they are being

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<sup>171</sup> *Id.*. The joint system will be funded by the following partners: the Department for Business, Innovation and Skills, the Department for Culture, Media and Sport, and the Intellectual Property Office. *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *UK Creative Industries and ISPs Partner, supra* note 167. Sky Broadband is a prominent ISP in the United Kingdom. *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

shared illegally.<sup>184</sup> If the copyright holders believe that this is occurring, they will gather evidence, authenticate that this is their copyrighted work, save the IP address of the user who shared the content, and record the date and time of the alleged occurrence.<sup>185</sup> Next, the copyright owners will supply this information to the ISPs, which will link the IP address to an account holder and then administer the alerts.<sup>186</sup> Every participating ISP will send alerts to subscribers stating that their accounts may have been used to illegally download or upload copyrighted content on P2P websites.<sup>187</sup> The alerts will also inform subscribers of online locations that legally offer copyrighted works.<sup>188</sup>

Potential infringers will be sent a maximum of four alerts within a one-year timespan.<sup>189</sup> The alert program will not involve a law enforcement feature nor will it implement any mitigating measures, such as the termination of Internet service.<sup>190</sup> Rather, Creative Content UK will focus on tactics such as blocking access to websites and collaborating with advertisers to limit revenue to sites that illegally host copyrighted works.<sup>191</sup> As a result, if account holders disregard the warnings, the ISPs will not take any additional action.<sup>192</sup> Numerous commentators consider the Creative Content UK to be a “watered-down” version of the first graduated response system, the Digital Economy Act.<sup>193</sup>

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<sup>184</sup> *Digital Economy Act Copyright Regime Shelved by UK Government*, OUT-LAW (July 24, 2014), <http://www.out-law.com/en/articles/2014/july/digital-economy-act-copyright-regime-shelved-by-uk-government/>.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *New Education Programme*, *supra* note 167.

<sup>188</sup> *Id.*

<sup>189</sup> Marc Schneider, *Copyright Alert System to Launch in U.K., Warning Potential Infringers*, BILLBOARD (July 21, 2014), <http://www.billboard.com/biz/articles/news/digital-and-mobile/6174209/copyright-alert-system-to-launch-in-uk-warning>; Olivia Solon, *ISPs Launch Toothless Four Strikes Anti-Piracy Initiative*, WIRED (July 21, 2014), <http://www.wired.co.uk/news/archive/2014-07/21/four-strikes-copyright>.

<sup>190</sup> Schneider, *supra* note 189; Solon, *supra* note 189.

<sup>191</sup> Solon, *supra* note 189.

<sup>192</sup> *UK Anti-Piracy Campaign Set To Begin*, BBC NEWS (Jul. 18, 2014), <http://www.bbc.com/news/technology-28374457>.

<sup>193</sup> Schneider, *supra* note 189; Solon, *supra* note 189. The 2010 Digital

It is unclear whether or not this alert program will have a significant impact on curbing copyright piracy. At least one member of the United Kingdom music industry believes that if Internet users continue to infringe copyrighted works they will “feel the sting” of alerts sent to their household.<sup>194</sup> However, it is uncertain how users would actually be affected without any technical measures. Yet another view is that the Creative Content UK is not intended to deny access to the Internet but instead to change the public attitude towards illegal file sharing and to persuade the community to lawfully purchase copyrighted content.<sup>195</sup>

### III. THE AMERICAN COPYRIGHT ALERT SYSTEM

In February 2013, after three years of deliberations, the CCI implemented the CAS in order to curtail copyright piracy, particularly that which occurred through P2P networks.<sup>196</sup> ISPs including AT&T, Cablevision, Comcast, Time Warner Cable, and Verizon teamed with the MPAA and RIAA in a voluntary agreement to create an educational organization that disciplines alleged copyright infringers. Similar to the UK’s impending graduated response scheme, the system helps users “make better choices about the way they enjoy digital creative content” and allows copyright owners such as recording artists and filmmakers to be rightfully compensated for their works.<sup>197</sup> However, the CAS

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Economy Act envisaged a three-stage enforcement aspect that included the use of “technical measures.” These included limiting Internet speed, suspending Internet access, and employing various methods to restrict the infringer’s Internet service. Digital Economy Act, 2010, c. 24 §§ 124A–124G(3) (Eng.); *see also New Measures to Protect Online Copyright and Inform Consumers*, OFCOM (June 26, 2012), <http://media.ofcom.org.uk/2012/06/26/new-measures-to-protect-online-copyright-and-inform-consumers/> [hereinafter OFCOM, *New Measures*].

<sup>194</sup> *UK Creative Industries and ISPs Partner*, *supra* note 167.

<sup>195</sup> *UK Anti-Piracy Campaign Set To Begin*, *supra* note 192.

<sup>196</sup> Jill Lesser, Exec. Dir., Ctr. for Copyright Info., Statement at the U.S. House of Representatives Committee on the Judiciary Subcommittee on Courts, Intellectual Property, and the Internet: The Role of Voluntary Agreements in the U.S. Intellectual Property System (Sept. 18, 2013).

<sup>197</sup> *Id.*



is distinct from its European and Asian predecessors because it is a private scheme rather than part of a legislative program.<sup>198</sup> Thus, Hollywood executives—and not the United States government—execute the plan. The CAS is a warning system that consists of “Six-Strikes”<sup>199</sup> and is overseen by a “private regulatory body,” the CCI. It is structured through its Memorandum of Understanding (MOU).<sup>200</sup>

According to the MOU, copyright owners, including the RIAA and MPAA, join P2P networks, similar to New Zealand’s system, in order to monitor their content and more easily discover any illegal sharing of their work.<sup>201</sup> Analogous to HADOPI, if a copyright owner’s work is being illegally used on the P2P platform, the owner, RIAA or MPAA will notify the ISPs, which track down the alleged infringers through their IP addresses.<sup>202</sup> Subsequently, the alert aspect of the CAS is initiated.<sup>203</sup>

The CAS, like New Zealand’s CAA, presents the suspected infringer with a series of increasingly serious warnings.<sup>204</sup> Each alert or “strike” sent by the ISPs to Internet subscribers must meet certain requirements outlined in the MOU.<sup>205</sup> The alert needs to include identification of the copyrighted work that was allegedly infringed, a statement saying that the copyright owner believes the use of the work was not authorized, and the IP address that was associated with the infringement.<sup>206</sup> However, similar to New Zealand’s CAA, the identity of the IP address owner is not

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<sup>198</sup> See Storch, *supra* note 22, at 465.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, § 1; see also CTR. FOR COPYRIGHT, *Copyright Alert*, *supra* note 22.

<sup>202</sup> CTR. FOR COPYRIGHT, *Copyright Alert*, *supra* note 22; Ernesto, *ISPs and Tracking Company Ready to Start Six-Strikes Anti-Piracy Scheme*, TORRENTFREAK (Sept. 28, 2012), <http://torrentfreak.com/isps-and-tracking-company-ready-to-start-six-strikes-anti-piracy-scheme-120928/>.

<sup>203</sup> CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, § 4(G)(i).

<sup>204</sup> *Id.* § 4(G).

<sup>205</sup> *Id.* § 4(G)(i–vii).

<sup>206</sup> *Id.* § 4(D).

revealed to the copyright owner.<sup>207</sup> A maximum of six escalating alerts, which ISPs independently generate, are sent to Internet subscribers, and each level carries harsher consequences.<sup>208</sup>

The CAS requires ISPs to have fairly uniform warning processes.<sup>209</sup> All of the ISPs' punitive measures are divided into four categories: the Initial Education Step, the Acknowledgment Step, the Mitigation Measures Step, and the Post Mitigation Measures Step.<sup>210</sup> The first stage, known as the Initial Education Step, takes place when an Internet subscriber receives his or her first and second warnings.<sup>211</sup> Here, the ISP notifies the alleged infringer of the suspected copyright infringement, and warns that continued infringement will lead to vindicating measures such as a slower bandwidth.<sup>212</sup> The alert also informs the alleged infringer of lawful ways to download and purchase copyrighted content.<sup>213</sup>

If the infringement continues, next is the Acknowledgement Step in which the subscriber receives two more warnings, both of which inform the user of ways to rectify the situation.<sup>214</sup> The ISPs' actions at this stage are similar to those taken in the Initial Education Step, with the exception that now the user must acknowledge that he or she received this warning.<sup>215</sup> To gain the subscriber's acknowledgement, when the individual logs onto the Internet at least two scenarios may occur: the ISP immediately directs the user to a landing page, or a "pop-up" notice is displayed on the computer screen.<sup>216</sup> In either situation, the subscriber must "click through" the page or a "pop-up" notice in order to

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<sup>207</sup> Copyright Act 1994, *supra* note 148, §§ 122L, 122(Q).

<sup>208</sup> CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, §§ 4.1.2, 4(G).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* §§ 4(G)(i), 4(G)(iii).

<sup>213</sup> *Id.* § 4(G)(i).

<sup>214</sup> *Id.* §§ 4(G)(i), 4(G)(ii); *see also* CTR. FOR COPYRIGHT, *FAQs*, *supra* note 15 (discussing that additional alerts increase in severity and inform the subscriber how to address the infringing activity).

<sup>215</sup> CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, §§ 4(G)(i), 4(G)(ii).

<sup>216</sup> *Id.* § 4(G)(i); *see also* Storch, *supra* note 22, at 466.

demonstrate acknowledgement and review educational information.<sup>217</sup> The subscriber's response constitutes an agreement with the ISP that the ISP is entitled to provide the subscriber's identifying information to the copyright owner or any law enforcement official.<sup>218</sup> In addition, the CCI has also reserved the right of the ISPs to create another format that reasonably "require[s] acknowledgement of receipt of the Acknowledgement Step Copyright Alert."<sup>219</sup>

If an individual continues to download and share copyrighted material, a fifth alert, known as the Mitigation Measures Step, will commence.<sup>220</sup> In this phase, ISPs are permitted to take punitive measures against the Internet user. These measures include: reducing uploading and downloading speeds, lowering the user's Internet service tier, reducing the bandwidth rate, redirecting the browser to a landing page until the alleged infringer communicates with the ISP, and temporarily limiting the user's Internet use.<sup>221</sup> Each ISP can determine which type of punishment to impose based on what it believes is reasonable to prevent future piracy.<sup>222</sup> Similar to the Acknowledgement Step, the fifth alert will also include information on how the alleged infringer can address the Internet activity that is causing the warnings.<sup>223</sup>

If there is yet another detected infringement, the system reaches its final stage.<sup>224</sup> This level, known as the Post Mitigation Measure Step, is indistinguishable from the Mitigation Measures Step except that it includes a warning to the subscriber that he or

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<sup>217</sup> CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, § 4(G)(ii).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* § 4(G)(ii).

<sup>220</sup> *Id.* § 4(G)(iii).

<sup>221</sup> *Id.* § 4(G)(i); *see also* Storch, *supra* note 22 at 466.

<sup>222</sup> *See What Do The Mitigation Measures Entail?*, COMCAST (Apr. 8, 2014, 9:17 PM), <http://customer.comcast.com/help-and-support/internet/mitigation-measures>; *FAQS On The Center For Copyright Information And Copyright Alert System*, WIRED, [http://www.wired.com/images\\_blogs/threatlevel/2011/07/ispplan.pdf](http://www.wired.com/images_blogs/threatlevel/2011/07/ispplan.pdf) (last visited Sept. 13, 2014).

<sup>223</sup> *See* CTR. FOR COPYRIGHT, *FAQs*, *supra* note 15.

<sup>224</sup> CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, § 4(G)(iv).

she may be subject to a copyright infringement lawsuit under Federal Copyright Laws.<sup>225</sup> This stage, like previous phases, will also include information explaining how the Internet subscriber can remedy the situation.<sup>226</sup>

Unlike France's HADOPI system, the CAS will not suspend a subscriber's account regardless of how many alerts the user receives. Moreover, the CAS's Six Strike Program is more lenient than other graduated response systems in that subscribers' accounts can be reset: if an ISP fails to receive a copyright infringement notice regarding an individual's account within a year from the most recent notice pertaining to that same account then the account is reset.<sup>227</sup> All prior notices sent to alleged copyright infringers may be erased by the participating ISP and any future alerts will be treated as the first.<sup>228</sup>

Any individual who believes that a CAS warning was incorrectly received is permitted to file an appeal through an Independent Review.<sup>229</sup> The American Arbitration Association (AAA), a not-for-profit alternative dispute resolution association, oversees any challenge to a Mitigation Alert.<sup>230</sup> Any AAA decision is final.<sup>231</sup> The subscriber must pay a \$35 filing fee and submit the appeal within ten business days of receiving the CAS warning.<sup>232</sup> The subscriber must then choose the defenses listed in the MOU that are applicable to the situation, explain the reasoning for the

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<sup>225</sup> See *id.* The framework of the Digital Millennium Copyright Act ("DMCA") demonstrates that Congress did not aim to include alleged copyright infringers nor graduated response systems within the Act. Yu, *supra* note 88, at 1409. Thus, an alleged infringer can be subjected to disciplinary action by both the CAS and the DMCA. *Id.*

<sup>226</sup> CTR. FOR COPYRIGHT, *FAQs*, *supra* note 15.

<sup>227</sup> CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, § 4(G)(v).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at Attachment C.

<sup>230</sup> *Independent Review FAQs*, CTR. FOR COPYRIGHT INFO., <http://www.copyrightinformation.org/resources-faq/independent-review-faqs/> (last visited Sept. 13, 2014).

<sup>231</sup> *Id.*

<sup>232</sup> CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, at Attachment C. § 4.1.6–4.1.7.

defense, and deliver appropriate evidence of such claims.<sup>233</sup> The MOU provides six “Grounds for Independent Review,”<sup>234</sup> which include Misidentification of Account, Unauthorized Use of Account, Authorization, Fair Use, Misidentification of File, and Work Published Before 1923.<sup>235</sup> Because the CCI acknowledges that an Independent Review may not be proper for certain situations, such as instances involving *de minimis* use of copyrighted material, Internet subscribers and copyright owners are still allowed to proceed with their disputes in Federal Court.<sup>236</sup>

The CCI recently released its first progress report of the CAS in which the organization emphasized the system’s effectiveness.<sup>237</sup> In its first ten months, more than one million alerts were issued by the ISPs to Internet subscribers.<sup>238</sup> At least 70% of these alerts were sent within the Initial Education Step while less than 3% were disseminated as part of the Post Mitigation Measures Step.<sup>239</sup> However, more than sixty thousand people reached the Mitigation Measures Step, “which is 8% of everyone who received at least one warning.”<sup>240</sup> Yet, of those account holders who received challengeable alerts from ISPs, only 265 elected to have an independent review of the warnings;<sup>241</sup> this

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<sup>233</sup> *Id.* § 4.1.3.

<sup>234</sup> *Id.* § 1.

<sup>235</sup> *Id.* § 1(i)–(vii).

<sup>236</sup> *Id.* § 1; see Annemarie Bridy, *Graduated Response American Style: “Six Strikes” Measured Against Five Norms*, 232 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1, 34 (2012).

<sup>237</sup> *CCI Provides First Copyright Alert System: Progress Report Highlighting Initial Accomplishments*, CENTER FOR COPYRIGHT INFORMATION (May 28, 2014), <http://www.copyrightinformation.org/press-release/cci-provides-first-copyright-alert-system-progress-report-highlighting-initial-accomplishments/> [hereinafter CTR. FOR COPYRIGHT, *First Copyright Alert System*].

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> Ernesto, “*Six Strikes*” *Results Show High Number of Persistent Pirates*, TORRENTFREAK (May 28, 2014), [http://www.torrentfreak.com/six-strikes-results-show-high-number-of-persistent-pirates-140528/?utm\\_source=dlvr.it&utm\\_medium=twitter](http://www.torrentfreak.com/six-strikes-results-show-high-number-of-persistent-pirates-140528/?utm_source=dlvr.it&utm_medium=twitter).

<sup>241</sup> *Id.*; see *The Copyright Alert System Phase One and Beyond*, CENTER FOR COPYRIGHT INFORMATION 11 (May 28, 2014), available at <http://www>.

represents less than 1% of all alerts administered to users.<sup>242</sup> While only forty-seven of these challenges were successful, the defense most often asserted by an Internet user was Unauthorized Use of Account.<sup>243</sup>

Although the CCI views the CAS' first year as a success, there are issues with the report and its results.<sup>244</sup> While the ISPs released a tremendous number of warnings, some of which persuaded users to stop infringing,<sup>245</sup> a small portion of overall Internet subscribers has actually been affected.<sup>246</sup> For instance, in the first twelve months of the CAS, only 3% of Comcast account holders received alerts.<sup>247</sup> Moreover, Comcast customers form the majority of BitTorrent users in the United States, which is troubling in light of the small number of subscribers affected by the CAS.<sup>248</sup> Yet, if this 3% represents the most incessant copyright infringers then the statistics asserted by the CAS can still be viewed as successful. In addition, under France's HADOPI, only 9% of Internet subscribers received a second warning over a two-year period, and less than 1% reached the third strike.<sup>249</sup> Thus, it remains unclear from the report whether the CAS can be effective to considerably deter piracy.<sup>250</sup>

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[copyrightinformation.org/wp-content/uploads/2014/05/Phase-One-And\\_Beyond.pdf](http://copyrightinformation.org/wp-content/uploads/2014/05/Phase-One-And_Beyond.pdf).

<sup>242</sup> Ernesto, *supra* note 240.

<sup>243</sup> *Id.*

<sup>244</sup> CTR. FOR COPYRIGHT, *First Copyright Alert System*, *supra* note 237.

<sup>245</sup> *Id.*

<sup>246</sup> Ernesto, *supra* note 240.

<sup>247</sup> *Id.*

<sup>248</sup> Ernesto, *supra* note 240. BitTorrent lets people host a file such as a movie or software, which are then made "available for download using a torrent download application which happens to be the same application that hosts the infringing files." Derek Broes, *Why Should You Fear SOPA and PIPA?*, FORBES (Jan. 20, 2012, 1:14 PM), <http://www.forbes.com/sites/derekbroses/2012/01/20/why-should-you-fear-sopa-and-pipa/>. When a person downloads a file using a BitTorrent, the individual receives the file from numerous machines that host the specific file using the same software. *Id.* On many occasions, these files are then made available for download by others, which begins the file sharing process. *Id.*

<sup>249</sup> Ernesto, *supra* note 240.

<sup>250</sup> *Id.*

Lastly, a major aspect missing from the report is information on whether or not the CAS affects small businesses.<sup>251</sup> Throughout the report, small businesses are only mentioned once in a footnote in which the CCI acknowledges that “it is possible that some small business accounts could receive [a]lerts as well if they are purchasing retail broadband services marketed to residential customers.”<sup>252</sup> Due to the fact that the CAS is projected to double in size in its second year,<sup>253</sup> more data could be collected that would enable the CCI to focus part of its next report on the possible burden that the system has on small businesses and their owners.

#### IV. THE CAS’ POSSIBLE IMPACT ON SMALL BUSINESS OWNERS AND THE OPEN WIRELESS NETWORK

The CAS raises concerns of fairness and prejudice to small business owners.<sup>254</sup> Its focus is solely on residential Internet access, rather than all types of Internet access, including business class.<sup>255</sup> Large businesses require more bandwidth than an average household does.<sup>256</sup> They employ high-speed networks that are used specifically for big establishments.<sup>257</sup> In contrast, small businesses only need DSL to have a satisfactory Internet connection and speed.<sup>258</sup> Moreover, small businesses usually lack the sophisticated Internet security measures that are common among large

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<sup>251</sup> *The Copyright Alert System Phase One and Beyond*, *supra* note 241.

<sup>252</sup> *Id.* at 15.

<sup>253</sup> CTR. FOR COPYRIGHT, *First Copyright Alert System*, *supra* note 237.

<sup>254</sup> Walton, *supra* note 31.

<sup>255</sup> CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, § 4(G)(i).

<sup>256</sup> BUSINESS INTERNET SERVICES, <http://largebusinessinternet.com/> (last visited Sept. 13, 2014).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* DSL enables people to access the Internet through phone lines at speeds ranging from 8Mbps for downloads to 1Mbps in regard to uploads. *Different Types of Internet Access Platforms*, EVERYTHING DSL, <http://www.everythingsdsl.com/education/types-of-internet-access/> (last visited Sept. 13, 2014).

businesses.<sup>259</sup> A possible effect of this is a greater burden placed upon small businesses and the open wireless network than on larger businesses on business class Internet networks.<sup>260</sup>

The CCI has defended the graduated response scheme against arguments that there could be a disproportionate impact on small businesses. Jill Lesser, Executive Director of the CCI, announced that “the accounts that will be included in the CAS are not the accounts that are used to provide public Wi-Fi and accusations that the CAS will end public Wi-Fi are false.”<sup>261</sup> However, in contrast to this public statement, she subsequently admitted:

[D]epending on the type of Internet service they subscribe to, very small businesses like a home-office or a local real estate office may have an Internet connection that is similar from a network perspective to a residential connection. In those cases, customers are assigned [IP] addresses from the same pool as residential customers. The practical result is that if an employee of the small business, or customer using an open Wi-Fi connection at the business, engages in infringing activity the primary account owner would receive [a]lerts.<sup>262</sup>

Thus, owners of small businesses will bear the burden of receiving CAS alerts and have to pay the \$35 filing fee each time they wish to exonerate themselves from the guilt assigned by the CAS, even though a customer may have pirated material without the owner’s knowledge.<sup>263</sup>

The impact that the CAS may have on small businesses should

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<sup>259</sup> *Check Point Introduces Big Security for Small Businesses*, CHECK POINT, (May 7, 2013), <http://www.checkpoint.com/press/2013/050713-checkpoint-introduces-big-security-for-smb.html>.

<sup>260</sup> See Daniel Nazer, *The Copyright Alert System FAQ*, ELEC. FRONTIER FOUND. (Feb. 28, 2013), <https://www.eff.org/deeplinks/2013/02/six-strikes-copyright-alert-system-faq>.

<sup>261</sup> Jill Lesser, *supra* note 27.

<sup>262</sup> *Id.*

<sup>263</sup> CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, § 4.1.6.



not be minimized. The program could harm numerous types of small businesses including cafes, coffee shops, restaurants, bars, hair salons, bookstores, and more.<sup>264</sup> These types of establishments often use residential Internet accounts. Thus, the fact that “the vast majority of businesses, including those like Starbucks that provide legitimate open Wi-Fi connections, will have an Internet connection that is tailored to a business operation and these business networks are not part of the CAS and will never be sent a Copyright Alert” does not justify the CAS, considering the possibility that small businesses will be disproportionately affected.<sup>265</sup> If even a single kind of business is within the scope of the CAS, every category of business should be as well.

As noted above, an ISP can implement several possible mitigating measures against an Internet subscriber and account. These measures include redirecting the user to a landing page, which forbids the consumer from visiting specific websites, and slowing the account’s bandwidth speeds.<sup>266</sup> While Lesser asserted that small businesses “would not be subject to disconnection under the CAS any more than a residential subscriber would,” she fails to see the issue at hand—this is not about small businesses compared to residential subscribers but instead it is about small businesses versus large businesses.<sup>267</sup> If a small business’s Internet speed is decelerated for forty-eight hours, that business suffers from forty-eight hours of reduced clientele, profits, and productivity.<sup>268</sup> Furthermore, these punitive measures are implemented after only a

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<sup>264</sup> Geoff Duncan, *The Copyright Alert System: What You Need to Know*, DIGITAL TRENDS (Sept. 14, 2012), <http://www.digitaltrends.com/computing/isps-preparing-to-embrace-copyright-alert-system/>.

<sup>265</sup> Lesser, *supra* note 196.

<sup>266</sup> CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, § 4(G)(iii).

<sup>267</sup> Lesser, *supra* note 196.

<sup>268</sup> See Adi Kamdar, *Don’t Be Fooled: “Six Strikes” Will Undoubtedly Harm Open Wireless*, ELECTRIC FRONTIER FOUNDATION (Feb. 14, 2013), <https://www.eff.org/deeplinks/2013/02/six-strikes-undoubtedly-harm-open-wireless>. An Internet speed of 256 kbps is slightly faster than an average dial-up Internet speed. Ernesto, *Verizon’s “Six Strikes” Anti-Piracy Measures Unveiled*, TORRENT FREAK (Jan. 11, 2013), <http://torrentfreak.com/verizons-six-strikes-anti-piracy-measures-unveiled-130111/>.

mere allegation of infringement<sup>269</sup> and before the alleged infringer has an opportunity to rebut the charge. Since many individuals patronize small businesses, it could take only a short period of time for someone to activate the CAS; indeed, contrary to Jill Lesser's statement, small businesses are likely to have more Internet users than households, which means there could be a greater number of potential infringers, and thus, the small businesses would experience slower Internet speeds than residential users.<sup>270</sup> Adding to the unfairness, deep-pocketed conglomerates such as Starbucks will not experience these consequences because they have specialized business class Internet connections, which are more expensive.<sup>271</sup> Certainly, businesses like Starbucks are able to enjoy the benefits of the open Wi-Fi network and may acquire new patrons who seek unimpeded Internet service.<sup>272</sup>

Furthermore, the CAS could create a situation in which local small businesses are seen as hotbeds of Internet pirates.<sup>273</sup> The lesson to copyright infringers is simple: if you do not want to get caught, go to a location where you will not be blamed.<sup>274</sup> Moreover, while consumers could also remain anonymous at large businesses, customers would likely flock to these larger establishments simply because they do not have speed or landing page issues as they are not subjected to the ISPs mitigating measures.

For many small business establishments, an Internet connection is vital to success. Public Wi-Fi allows patrons to read their email, find the news, access their social media accounts, and communicate with others.<sup>275</sup> Small businesses "have long served as

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<sup>269</sup> *Id.*

<sup>270</sup> Collier, *supra* note 32.

<sup>271</sup> Kamdar, *supra* note 268; see, e.g., *Business Internet*, COMCAST BUSINESS, <http://business.comcast.com/internet/business-internet/plans-pricing> (last visited Sept. 13, 2014); *Fios Internet*, VERIZON, <http://www.verizon.com/smallbusiness/products/business-FIOS-Internet/packages/> (last visited Sept. 13, 2014).

<sup>272</sup> Collier, *supra* note 32.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> See *Reasons for Open Wireless*, OPEN WIRELESS MOVEMENT, <https://openwireless.org/> (last visited Sept. 13, 2014).

gathering places for the community to work, study, read, and relax.”<sup>276</sup> Many critics of the CAS have even gone so far as to acknowledge that the Internet is so significant in today’s society that offering a usable network to customers is comparable to delivering utilities such as heat and electricity.<sup>277</sup> Moreover, society has come to see an open wireless network as a public benefit and valuable economic instrument.<sup>278</sup> An open wireless network boosts profits, tourism, supports innovation, makes cities more appealing and invites the population to sit at local coffee shops.<sup>279</sup>

Although the CAS allows an Internet account holder to present several defenses to an alleged infringement, small business owners generally only have one relevant defense at their disposal—that there was an unauthorized use of their account.<sup>280</sup> The business owner must claim that the illegal activity occurred due to an unapproved use of the subscriber’s account, of which the owner was uninformed and could not have averted.<sup>281</sup> Yet, small business owners are still disadvantaged because the subscriber is only permitted to present this argument on one occasion.<sup>282</sup> Thus, if the same user or even different customers access the business’s Internet for illegal purposes on multiple instances, the business cannot claim the defense again.<sup>283</sup> In effect, this stipulation strips away an essential form of protection for small business owners.

In addition, a small business owner cannot always prevent illegal Internet use. Unless the business has a sophisticated IT department, it is nearly impossible for it to supervise and regulate what its customers do on the Internet.<sup>284</sup> Even if an owner informs

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<sup>276</sup> *Id.*

<sup>277</sup> *See, e.g.,* Collier, *supra* note 32.

<sup>278</sup> OPEN WIRELESS MOVEMENT, *supra* note 275.

<sup>279</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> CTR. FOR COPYRIGHT, *Memo of Understanding, supra* note 18, Attachment C.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *See* Cyrus Farivar, “Six Strikes” Program Could Affect Businesses Too, *Even if Infringer is Unknown*, ARS TECHNICA (Jan. 14, 2013, 5:45 PM),

patrons that there are Internet restrictions, or provides a terms of service, it is not guaranteed that this could prevent would-be pirates from illegal activity—although the owner may subsequently succeed on an Unauthorized Use of Account defense.<sup>285</sup>

Another shortcoming of the CAS is that it identifies alleged infringers through IP addresses, which does not automatically imply guilt to the owner of the IP address. In 2012, in *SBO Pictures v. Doe*, the Massachusetts District Court acknowledged that in many piracy cases, discovery revealed that the named defendant was not the individual who used the computer to illegally download content.<sup>286</sup> Similarly, in the 2011 case *Third Degree Films v. Doe*, the Northern District of California conceded “Comcast subscriber John Doe 1 could be an innocent parent whose Internet access was abused by her minor child, while John Doe 2 might share a computer with a roommate who infringed Plaintiffs’ work.”<sup>287</sup> Likewise, in the 2012 *In re BitTorrent Adult Film Copyright Infringement Cases*, the Eastern District of New York stated, “the assumption that the person who pays for Internet access at a given location is the same individual who allegedly downloaded a single . . . film is tenuous.”<sup>288</sup> In addition, the court recognized the weakness of the argument that an ISP can identify the alleged infringer’s “true identity” based on a subscriber’s IP address because “while the ISPs will provide the name of its subscriber, the alleged infringer could be the subscriber, a member of his or her family, an employee, invitee, neighbor or interloper.”<sup>289</sup> Thus, these courts recognized the exact problem that

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<http://arstechnica.com/business/2013/01/six-strikes-program-could-affect-businesses-too-even-if-infringer-is-unknown/>.

<sup>285</sup> CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, Attachment C.

<sup>286</sup> *SBO Pictures v. Doe*, No. 12-10804-FDS, 2012 U.S. Dist. LEXIS 159536, at \*10 (D. Mass. Nov. 5, 2012).

<sup>287</sup> *Third Degree Films v. Doe*, No. C 11-02768, 2011 U.S. Dist. LEXIS 128030, at \*9 (N.D. Cal. Nov. 4, 2011) (citing *BMG Music v. Doe*, No. 04-650, 2004 U.S. Dist. LEXIS 8457 (E.D. Pa. Apr. 2, 2004)).

<sup>288</sup> *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 84 (E.D.N.Y. 2012).

<sup>289</sup> *Id.* at 85.

small business owners might face—that the owner might be wrongly identified as the perpetrator.

Presumed guilt based on an IP address is particularly problematic in the case of small business owners. Marc Joaquin, the Associate Director of the Business and Legal Affairs department of Atlantic Records, has stated that regardless of how many people live in a family home, if an IP address is traced to copyright infringement, the subscriber should be held liable because someone must be accountable for the actions in the household.<sup>290</sup> However, he disagreed with the CAS' ability to use IP addresses as proof of guilt in the small business context. He said, "there are dozens of customers a day, which means it is nearly impossible to monitor who does what on that Internet account. That is unfair to the subscriber."<sup>291</sup>

While the CAS may be a beneficial and successful program, the potential drawbacks should not be overlooked. Large businesses, which already have certain advantages due to their size, are not within the scope of the CAS. In contrast, small businesses may be subjected to CAS alerts and their ability to maintain fast and reliable Internet access could be disadvantaged. Furthermore, even if some regard the mandatory \$35 appeals fee as insubstantial, it is still \$35 that other businesses are not forced to pay.

## V. THE COPYRIGHT ALERT SYSTEM SHOULD BE MODIFIED

### A. *The Scope of the Copyright Alert System Should Be Expanded*

The CAS is unfair in its current form. If the graduated response system's true goal is to halt piracy, then it should not be limited to a certain subset of Internet connections. The requirement that the CAS only target the casual infringer on a residential Internet access must be altered by the CCI<sup>292</sup> to apply to all types of Internet

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<sup>290</sup> Interview with Marc Joaquin, Assoc. Dir. of Bus. & Legal Affairs, Atlantic Records (Nov. 13, 2013).

<sup>291</sup> *Id.*

<sup>292</sup> Lesser, *supra* note 196, at 10.

connections, including business class. If this occurs, more people would be subjected to the copyright alerts, and small businesses would no longer be at a disadvantage relative to larger ones.

The MOU contains a loophole that must be eliminated, as it would allow the ISPs to effortlessly remove one viable option for infringers to “beat the system.” According to the MOU, ISPs must keep records relating to the CAS and provide the CCI with this information throughout the year.<sup>293</sup> However, it does not clarify whether or not copyright alerts carry over between ISPs.<sup>294</sup> The MOU provides the impression that, similar to South Korea’s program, the Six Strikes rule does not ban infringers from establishing new Internet accounts with other ISPs—and thus resetting their strikes—when they receive alerts and are subject to punitive measures.<sup>295</sup>

Another problem with the CAS is that unlike New Zealand’s “Three Strike” system, when enforcing disciplinary measures, it does not distinguish between first-time and continuous offenders nor consider the egregiousness of the illegal file sharing.<sup>296</sup> The CAS should determine damages using similar mitigating factors to those used in New Zealand’s “Three Strike” system. These include: the atrociousness of the infringement; the reasonable price of the copyrighted work; and a punishment that would discourage future infringement.<sup>297</sup> Using a set of factors to determine the harshness of the disciplinary processes would make the CAS fairer because an individual who is caught illegally downloading a copyrighted work in one instance should not be faced with the same consequences as a habitual infringer.

Likewise, in their enforcement of mitigating measures, if possible, the ISPs could take into consideration whether the specific IP address was associated with a small business rather than an individual’s home and then determine what type of punishment should be administered accordingly. If the violation occurred at a small business address, the ISP’s should be more lenient in their

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<sup>293</sup> CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, § 9(A).

<sup>294</sup> *See id.* §§ 1(F) – 4(G)(iv).

<sup>295</sup> *See* LEE ET AL., *supra* note 118, at 6.

<sup>296</sup> *See* Giblin, *supra* note 86 at 162.

<sup>297</sup> *Id.*

application of the mitigating measures. This is because small businesses are more likely to have a greater number of Internet users, which makes it less likely that the account holder was the wrongdoer.

The CAS should also routinely use pop-up screens to remind infringers that transferring copyrighted content is illegal. The ISPs should display these pop-ups whenever an individual clicks “upload” or “download” on any P2P site. The pop-ups should also list the mitigating measures that will take place if the CAS identifies the individual, and the damages that the copyright owner can seek under the DMCA, which can amount to a maximum of \$150,000.<sup>298</sup> Hopefully, reminders such as these would at least cause an infringer to second-guess his actions.

In order to keep the CAS running in its first year, the CCI cost roughly \$2 million, which does not include the cost of identifying infringers and processing the notices.<sup>299</sup> If the cost of the CAS continues to rise without any probative evidence that it has been effective in deterring P2P piracy or with evidence that it is harmful to small businesses owners, the program could be an expensive failure with no effect on piracy and inadvertent consequences on small business owners, much like France’s costly HADOPI system.<sup>300</sup>

### *B. Why Arguments for Leaving the Copyright Alert System Unchanged Are Unavailing*

The first argument why the CAS should remain in its current

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<sup>298</sup> 17 U.S.C. § 504(c) (2010). As stated in footnote 214, an alleged infringer can be subject to punishment under both the CAS and the DMCA for copyright infringement. Yu, *supra* note 88, at 1374.

<sup>299</sup> See Ernesto, “Six Strikes” Copyright Alert System Costs Millions, TORRENTFREAK (Oct. 17, 2013), <https://torrentfreak.com/six-strikescopyright-alert-system-costs-millions-131017/> (“It’s worth noting that the costs above only apply to the CCI organization. The copyright holders and ISPs incur extra costs when they track down infringers and process the notices.”). Compare CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, § 2(E) (describing the cost-bearing scheme for initiation costs), with *id.* § 2(H)(ii) (describing the way parties will bear the costs of the Independent Review Program as that program enforces the CAS).

<sup>300</sup> *Id.*; Masnick, *supra* note 115.

form is that it is very easy for small business owners to avoid the CAS Alerts. Since only residential Internet networks are monitored within the CAS, small business owners should upgrade their Internet connections to a higher class, such as a business network.<sup>301</sup> If this were done, the owners would not face the possibility of receiving any warnings and the CAS could continue to monitor alleged piracy. However, forcing a small business to upgrade its Internet class is another unfair burden. Simply put, although some ISPs offer deals to small companies, business class Internet is generally more expensive than residential Internet.<sup>302</sup> Indeed, small business owners should not be forced to pay more money for a service that is unnecessary or undesired.

Another argument against modification of the CAS is that the tiered system will be effective in its current form regardless of its scope on businesses because of its watchful eye. “[T]he [CAS] ‘wants to insinuate a Big Brother type of [I]nternet environment to scare people away from illegal file-sharing platforms and steer them in the direction of legal downloading sites.’”<sup>303</sup> As a result, although the CAS is “unlikely to stop the biggest violators,” it may curtail piracy completed by the casual infringer who could be too scared of the possibility of being caught.<sup>304</sup>

Rather, the CAS could be even more effective if it expanded its scope to include business network Internet. This would allow the CAS to monitor the illegal file sharing of copyrighted content at many other types of establishments, including large businesses. If this were accomplished, then the number of Internet accounts being monitored by the CAS would exponentially grow. As a result, the possibility of identifying and prohibiting even more unlawful activity would increase. Yet, because the CAS in its current form limits itself to residential networks, all of the patrons of larger establishments and their Internet activity goes undetected.

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<sup>301</sup> Lesser, *supra* note 27; CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, § 2.

<sup>302</sup> Lee Hutchinson, *Why I Pay Extra For “Business-Class” Broadband at Home*, ARS TECHNICA (Oct. 15, 2012, 8:00 AM), <http://arstechnica.com/information-technology/2012/10/why-i-pay-extra-for-business-class-broadband-at-home/>.

<sup>303</sup> Weber, *supra* note 30.

<sup>304</sup> *Id.*



In effect, the CAS confines itself to a smaller population in which to search for alleged infringers.

A third reason against altering the CAS is that small businesses are powerful and capable of looking out for their own welfare. According to this argument, small businesses would surely resist a system that would significantly harm their interests. Small businesses are indeed a large part of the United States economy. There are “23 million small business in America [which] account for 54% of all U.S. sales.”<sup>305</sup> In addition, since the 1970’s small businesses have supplied “55% of all jobs and 66% of all net new jobs.”<sup>306</sup> Since 1990, eight million jobs have been created through small businesses.<sup>307</sup> These numbers indicate the important role that small businesses have in the United States economy. Therefore, it is unlikely that small businesses would tolerate the CAS if it were to have such devastating effects. In addition, if small businesses are already able to successfully compete with large businesses in areas such as innovation, communication between employees, customer service and quality control, there is no reason why they will not be able to overcome the CAS.<sup>308</sup>

On the other hand, large businesses already have numerous inherent advantages.<sup>309</sup> For starters, many of these businesses have established brands, apparently endless monetary resources, and locations not only throughout the United States but the world.<sup>310</sup> Moreover, large companies often receive price breaks, which allow them to obtain better deals when buying supplies or products and to establish lower prices when selling items.<sup>311</sup> Unlike small businesses in which the owner may encompass the role of the

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<sup>305</sup> U.S. SMALL BUS. ADMIN., *supra* note 34.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> Michael Mazzeo et al., *What Small Businesses Do Better Than Corporate America*, FORTUNE (June 10, 2014), <http://fortune.com/2014/06/10/what-small-businesses-do-better-than-corporate-america/>.

<sup>309</sup> Rick Suttle, *The Advantages of a Large Business*, CHRON, <http://smallbusiness.chron.com/advantages-large-business-21007.html> (last visited Sept. 13, 2014).

<sup>310</sup> Ilan Mochari, *Why It Pays to Have Large Competitors*, IDEA LAB (Aug. 22, 2014), <http://www.inc.com/ilan-mochari/large-competitors.html>.

<sup>311</sup> *Id.*

owner, waiter, cashier and secretary all at once, large companies usually have greater organizational structures to separate employee functions.<sup>312</sup> These include dividing employees among different departments such as marketing, information technology, legal, and finance.<sup>313</sup> Lastly, these companies generally have deeper brand recognition and advertising.<sup>314</sup> Thus, they often experience more recurring business, which yields greater profits.<sup>315</sup> Collectively, these advantages already create a difficult environment for small businesses to adequately compete with large businesses. The potential unfair burden that the CAS could place upon small business owners only exacerbates this difficulty.

## VI. CONCLUSION

Although the entertainment industry has been forced to adapt to rampant copyright infringement by lowering its work staff and profit margin expectations, the CAS in its current form cannot be maintained.<sup>316</sup> To date, the CCI has not implemented the CAS evenly among United States Internet subscribers. It thus may have a debilitating effect on small business owners. The burden that these owners could incur as a result of the graduated response system necessitates changes to the voluntary agreement.

While the CAS marks a new groundbreaking age of voluntary agreements, cooperation, and innovation for copyright holders and ISPs, there is also a potential for the open wireless network to be harmed by the graduated response system, which again would have repercussions on small business owners.<sup>317</sup> Although the Six Strikes program is well-intentioned, “if a [program] is so out of touch with the way the world works . . . perhaps we should begin to question whether having [it] is a good idea in the first place.”<sup>318</sup> Because there has been no viable option to deter copyright

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<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> Interview with Marc Joaquin, Associate Director of Business & Legal Affairs, Atlantic Records (Nov. 13, 2013).

<sup>317</sup> Lesser, *supra* note 196; *Small Businesses*, *supra* note 31.

<sup>318</sup> Yu, *supra* note 88, at 1407–08.

infringement thus far, the CAS should remain in place but it must be altered.

The CAS has shortcomings but there are realistic solutions, which can be easily enforced. Graduated response systems used in other countries—particularly South Korea—provide examples of viable modifications. Most importantly, however, the CAS should be altered to expand its monitoring to include a majority of the broadband users—including both residential and business.<sup>319</sup> The CAS must be amended to permit the Six Strikes program to apply to every type of Internet connection, not just residential networks.<sup>320</sup> This will allow businesses of all sizes to experience the inconveniences of the CAS and prevent the most extensive unfairness that may currently be inflicted upon small business owners.

Likewise, following the South Korean graduated response system, the CAS should distinguish between the type and instances of infringement, and the identity of the account holder.<sup>321</sup> This would require the CAS to consider the kind of copyrighted material that is shared, the number of copyrighted works that are unlawfully uploaded or downloaded, and the amount of control that the account holder has of the activity conducted on the Internet account<sup>322</sup> in order to reduce the imbalance between offenders. If this were established it could require ISPs to be more lenient when implementing mitigating measures against small business owners as opposed to residential account holders who have more control over their Internet activity or to even disregard any infringing activity associated with the small business owners IP address. Furthermore, the CCI should look towards the South Korean system as an example of better dialogue between the ISPs and account holders. Although in contrast to South Korea's system, the CAS does not permit the suspension of Internet accounts, like South Korea's graduated response system, it should permit a hearing between the ISP and the account holder prior to requiring

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<sup>319</sup> OFCOM, *New Measures*, *supra* note 194.

<sup>320</sup> Jill Lesser, *supra* note 27.

<sup>321</sup> Enforcement Decree of the Copyright Act, Presidential Decree No. 22003, January 27, 2010, art. 72-3(2) (S. Kor.), available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=200937](http://www.wipo.int/wipolex/en/text.jsp?file_id=200937) (last visited Oct. 24, 2014).

<sup>322</sup> *Id.* § 72-3(1).

the \$35 challenge fee.<sup>323</sup>

However, the South Korean scheme also teaches a valuable lesson in preventing an account holder from avoiding the mitigating measures. Under this scheme, account holders are able to switch ISPs in order to elude punishment administered by one.<sup>324</sup> The CAS should be improved by not allowing this to occur. Instead, the MOU should be updated to authorize the ISPs to interchange mitigating measures against particular account holders who attempt to switch ISPs with the intention of escaping punishment. The seemingly unending penalties could cause Internet subscribers to become so frustrated that they may cease to participate in illegal file sharing.

Copyright piracy has been and will continue to be a very serious problem. Pop-up ads can remind the subscriber of the CAS' most severe mitigating measures and the maximum \$150,000 damages that an alleged infringer can be liable for under the Copyright Act.<sup>325</sup> However, the most important adjustment that should be made is for the CAS to apply to every type of Internet network and businesses size as the current CAS could have the unintended effect of unfairly burdening small business owners, and therefore must be improved.

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<sup>323</sup> CTR. FOR COPYRIGHT, *Memo of Understanding*, *supra* note 18, Attachment C. § 4.1.6–4.1.7.

<sup>324</sup> *See* LEE ET AL., *supra* note 118.

<sup>325</sup> *See* text accompanying note 48.