

Graduated Response American Style: 'Six Strikes' Measured Against Five Norms

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From the early days of the commercial Internet, corporate copyright owners have been trying to get Internet service providers (ISPs) to play a more active role in the seemingly Sisyphean task of online copyright enforcement. Indeed, Congress recognized in 1998, when it passed the Digital Millennium Copyright Act (DMCA), that active cooperation between the two sets of stakeholders would be necessary to ensure effective enforcement of copyrights in the digital environment. The DMCA, accordingly, sought to balance the burdens and interests of copyright owners and ISPs by establishing a fairly clear division of labor: copyright owners are charged with monitoring networks and services for infringing content, and ISPs are charged with promptly removing that content when they become aware of it and are situated to remove or disable access to it. While the DMCA's statutory division of labor has worked relatively well over the years to manage large scale infringement on services that store content for users, it has not worked well to manage infringement over peer-to-peer (P2P) file sharing networks. This is due in large part to a basic mismatch between the decentralized network architecture of P2P systems and the DMCA's assumption of a more centralized architecture in which ISPs host content uploaded by users.

In 2007, in recognition of the DMCA's inadequacy in the face of P2P file sharing, and with the high-profile case of *Arista Records v. Lime Group* pending in federal district court in New York, then New York Attorney General Andrew Cuomo began pressuring broadband providers to agree voluntarily to play a greater role in fighting online piracy. Subsequently, at the federal and international levels, the Obama administration backed the idea of privately negotiated anti-piracy collaborations between broadband providers and corporate rights owners.

In July of 2011, broadband providers finally bowed to the mounting political pressure and to changing economic realities in the business of corporate content ownership and delivery. The five largest telecommunications companies in the United States entered into a memorandum of understanding (MOU) with trade groups representing major corporate copyright owners. The MOU creates "a common framework of 'best practices' to effectively alert subscribers, protect copyrighted content and promote access to legal online content." At the core of the common framework is the Copyright Alert Program (CAP), a domestic graduated response system that differs in significant respects from the controversial "three strikes" model currently operating in several countries abroad, most notably in France.

This Article is an assessment of the CAP with respect to five norms that are central to consumer protection in the enterprise of online copyright enforcement: freedom of expression, privacy, fairness, proportionality, and transparency. Part I provides an

introduction to graduated response, which is the genus of online copyright enforcement to which the CAP belongs. Part II takes a comparative look at two pre-existing graduated response systems: France's HADOPI system, a government-run program affecting all broadband subscribers in France, and a privately administered system operating in Ireland and run by the broadband provider Eircom. Part III provides a detailed explanation of the CAP including its governance structure, the division of labor it prescribes between copyright owners and broadband providers, and the graduated system of "copyright alerts" and "mitigation measures" it employs. Part III also considers the ways in which the CAP resembles and differs from the French and Irish examples. Finally, Part IV is an evaluation of the CAP's strengths and weaknesses with respect to each of the five norms listed above.