Six Strikes Measured against Five Norms
Two parts

1. Descriptive
   - What’s the Copyright Alert System (CAS)?

2. Normative
   - How does it measure up against norms & values important to Internet users?
Parties to the Graduated Response MOU

BROADBAND PROVIDERS
- Verizon
- AT&T
- Cablevision
- Comcast
- Time Warner Cable

COPYRIGHT OWNERS
- RIAA
- Motion Picture Association of America
- AIM
- American Association of Independent Music
- Independent Film & Television Alliance
Copyright Alert System (CAS) Parameters

PRIMARILY A “NOTICE AND NOTICE” SYSTEM

Copyright Owner → ISP → Customer

NOTICE of Infringement

ALERT
Copyright Alert System (CAS) Parameters

- 4 Steps, 6 Alerts
  1. Initial Educational Step
     - 2 “Educational Step Copyright Alerts”
     - At least 7 days apart
  2. Acknowledgement Step
     - 2 “Acknowledgement Step Copyright Alerts”
     - At least 7 days apart
     - Subscriber must acknowledge receipt (landing page or pop-up)
  3. Mitigation Measures Step
     - 1 “Mitigation Measure Copyright Alert”
     - Imposition of MM (delayed to allow for Independent Review option)
     - A range of possibilities – ISP has discretion
     - May be waived in favor of a “Fifth Warning Copyright Alert”
  4. Post-Mitigation Measures Step
     - 1 “Post-Mitigation Measure Copyright Alert”
     - Initial MM reapplied or different MM applied (delayed to allow for Review option)
What happens after the 6th Alert?

- ISP does not have to keep sending alerts but must continue to track and report notices received for the subscriber in question.
- System resets for every subscriber after 12 months.
What are the possible Mitigation Measures?

- Temporary reduction in transmission speed
- Temporary step-down in service tier to a restricted throughput tier
- Temporary redirection to a landing page for copyright “instruction” or until subscriber contacts customer service
- Temporary suspension of access for a reasonable time (ISP decides what’s “reasonable”)
- Other
How does the Independent Review work?

- Center for Copyright Information (CCI) Executive Committee chooses a provider (now known to be AAA), which assembles a panel of neutrals
- Each neutral must be a lawyer trained to apply “prevailing legal principles as determined by U.S. federal courts” (TBD by an “accepted, independent expert” on copyright)
- Process must be automated to the maximum extent possible
- One reviewer per case; no live hearing; no discovery
- Subscriber’s identity not revealed to copyright owner
- Limited range of defenses available
- $35 filing fee – refundable if subscriber wins; may be waived
- Does not preclude civil action for either party
What defenses are available?

- Misidentification of account
- Unauthorized use of account (once only)
- Authorization
- Fair use
- Misidentification of file
- Work published before 1923
ON THE ONE HAND…
COPYRIGHT OWNERS

- protect legal rights granted by copyright
- stem the unlawful distribution of works

ON THE OTHER HAND…
CONSUMERS

- provide education
- protect privacy
- give fair warning
- provide an opportunity for review
What other values are in the balance for consumers?

- **Five norms**
  1. **Freedom of expression**
     - Access to lawful content is insured
  2. **Privacy**
     - Anonymity is protected
  3. **Fairness**
     - Innocence is presumed
     - Allegations are adjudicated neutrally
     - Sound legal principles are applied consistently
  4. **Proportionality**
     - Sanctions fit the infraction
  5. **Transparency**
     - Protocol terms are easy to find and easy to understand
     - People running the show are easy to identify
     - There is ongoing public disclosure of system performance
The major threat to freedom of expression in online enforcement is over-enforcement

- Misidentification of content
- Inability of automated systems to “process” fair use

Enforcement protocols that block or filter content are the most problematic
Five Norms: 1. Freedom of Expression

How does the MOU stack up?
• No in-network blocking or filtering of content by ISPs
• Agreement to focus on files containing complete or substantially complete copyrighted works
• Methods for identifying copyrighted content are subject to review by an “impartial technical expert”
  • A method is deemed inadequate only if “fundamentally unreliable”
  • Expert findings of inadequacy are confidential
  • Expert recommendations for improvement are non-binding
  • Notices will not be issued on the basis of inadequate methods (but the public has no way to know about findings of inadequacy)
The Six Strikes system is protective of consumer freedom of expression.
Room for improvement?

- Content ID methodology is OK unless “fundamentally unreliable”? *Yikes!*
- Expert recommendations for improvement should be binding
- Findings of inadequacy should be publicly disclosed if not remedied within a set period of time
The major threats to privacy in online copyright enforcement

- Loss of anonymity without legal process (i.e., no subpoena)
- Surveillance of subscriber traffic
How does the MOU stack up?

- ISPs forward notices but do not identify alleged infringers to copyright owners.
- Information is gathered by copyright owners from open P2P networks; ISPs are not monitoring traffic.
- Review/appeal process does not involve ID of subscribers.
- Methods for identifying infringements are subject to review by "recognized privacy experts".
  - (But) recommendations for improvement are confidential and non-binding.
The Six Strikes system is protective of consumer privacy.
Room for improvement?

- Expert findings of inadequacy with respect to privacy should be made public if they are not remedied within a reasonable time
- Expert recommendations for improvements in methodologies should be binding
Three Norms
3. Fairness

Threats to \textit{fairness} in online copyright enforcement

- Rush to judgment (presumption of guilt)
- Lack of an opportunity to be heard by a neutral adjudicator
- Unknown or inconsistent standards
- Limitations on defenses
How does the MOU stack up?

- Rights owners get the benefit of two presumptions:
  1. IP addresses are accurately captured
  2. Copyrighted files are accurately identified
- Subscribers have a right to independent review of alerts
- The organization conducting the reviews is charged with training reviewers in accepted principles of federal law developed by an “independent expert”—but what are they, and who is that?
- Subscribers may raise defenses, but they are limited to 6 enumerated defenses
The Six Strikes system is \textit{fair} to consumers.
Room for improvement?

• Presumptions should be earned, not given uncritically
  • Methods for identifying IP addresses and infringing files must be provably reliable as a technical matter
• Legal principles to be applied in the review process should be made public, as should the identity of the “independent expert” who developed them
• Subscribers should be entitled to any defense cognizable under US copyright law, not just the six enumerated in the MOU
The main threat to **proportionality** is a sanction or sanctions more severe or far-reaching than the offense warrants.
How does the MOU stack up?

- Five alerts before any mitigation measure (MM) is imposed
- 7-day grace periods between alerts
- Termination of access is **not** a required MM
- Speed/throughput sanctions are **not** a required MM
- ISPs have discretion to waive the MM once per account
- Critical services (e.g., VOIP, e-mail, security/medical monitoring) are exempt
- “Reset” after 12 months
The Six Strikes system is proportional in its approach to sanctions.
Threats to transparency are secrecy and lack of disclosure surrounding various aspects of the program:
- Design
- Implementation
- Oversight
- Outcomes

Lack of transparency undermines credibility and public confidence in program neutrality.
Five Norms
5. Transparency

- Parties are accountable on an ongoing basis to each other but not to the public
  - Internal CAS reports and audits are confidential
- All input from independent technical experts on methodological weaknesses is confidential
- Identities of technical experts are not disclosed
- Identity of copyright expert is not disclosed
- Process for choosing, training, and evaluating independent reviewers is confidential
- Substantive legal principles applied by independent reviewers are not disclosed
The Six Strikes system is transparent to the public in its governance and operations.
Room for improvement?

- Input from technical experts about methodological shortcomings should be made public if remedial action is not taken within a reasonable time.
- Annual reports containing detailed statistics on the program’s operation and the outcome of independent reviews should be published on the CCI web site.
- The legal standards applied by independent reviewers should be made public.
- The independent review process should be audited annually by someone other than the CCI.
- The identities of retained independent technical and legal experts should be disclosed.
The Executive Committee of the CCI has ultimate responsibility for operation and oversight of the program
- Appointments are evenly split between the parties (3+3)

Why not give consumers a voice on that Committee? Why relegate that voice to an Advisory Board?
- 2 members each from ISP and CO groups (2+2)
- 1 independent copyright expert (+1)
- 1 consumer/public interest advocate (+1)

Alternatively, give the Advisory Board power to make binding recommendations