

American University International Law Review

Volume 26

Issue 3 *Focus Issue: Intellectual Property Law
Enforcement and the Anti-Counterfeiting Trade
Agreement (ACTA)*

Article 2

2011

ACTA and the Specter of Graduated Response

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ACTA AND THE SPECTER OF GRADUATED RESPONSE

ANNEMARIE BRIDY*

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INTRODUCTION

Much of the controversy surrounding the secret negotiation of the Anti-Counterfeiting Trade Agreement (“ACTA”) centered on the possibility that the agreement would oblige parties to adopt an online copyright enforcement regime requiring Internet service providers (“ISPs”) to terminate Internet access for accused repeat copyright infringers.¹ This regime, called “graduated response” or “three strikes,” is at the forefront of an international lobbying campaign being waged by corporate copyright holders and the trade organizations that represent their interests to governments throughout

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1. *E.g.*, Peter Sayer, *Secret ACTA Draft Leaked After Washington Talks*, COMPUTERWORLD (Sep. 7, 2010), <http://computerworld.co.nz/news.nsf/news/secret-acta-draft-leaked-after-washington-talks> (identifying concerns that ACTA may require adopting a system of identifying, warning, and disconnecting subscribers accused of copyright infringement).

the world.² Groups like the International Federation for the Phonographic Industry (“IFPI”) and the International Intellectual Property Alliance (“IIPA”) have been especially aggressive in pressuring individual governments to require ISPs to take an active role in policing copyrights online by implementing graduated response protocols.³ Several countries, including the U.K., France, South Korea, and Taiwan, have already incorporated graduated response into their respective domestic copyright enforcement systems.⁴ Similar legislation is on its way to becoming the law in New Zealand,⁵ although European Union (“E.U.”) countries

2. See *For Students Doing Reports*, RECORDING INDUSTRY ASS'N AM., <http://www.riaa.com/faq.php> (last visited Mar. 1, 2011) (noting that the Recording Industry Association of America (“RIAA”) stopped its campaign to bring lawsuits against individual infringers in favor of seeking agreements with ISPs “on a graduated response program for repeat offenders”).

3. See *IFPI's Mission*, INT'L FED'N FOR PHONOGRAPHIC INDUSTRY [IFPI], http://www.ifpi.org/content/section_about/index.html (last visited Mar. 1, 2011) (indicating that IFPI's key areas of work include anti-piracy enforcement and government lobbying); *Description of the IIPA*, INT'L INTELL. PROP. ALLIANCE [IIPA], <http://www.iipa.com/aboutiipa.html> (last visited Mar. 1, 2011) (describing IIPA's international work as focused on improving protection and enforcement of copyrighted materials).

4. See Jeremy de Beer & Christopher D. Clemmer, *Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?*, 49 JURIMETRICS J. 375, 393-96 (2009) (noting that France's graduated response regime entailed the creation of HADOPI, a specialized governmental entity addressing Internet-based copyright infringement, and that South Korea imposed “active-preventative obligations on communications intermediaries”); Yu-Tzu Chiu, *Taiwan Adopts 'Three Strikes' Approach to Online Copyright Enforcement*, 77 PAT. TRADEMARK & COPYRIGHT J. 715 (2009) (reporting on the adoption of graduated response by Taiwan's parliament). The mandate in the U.K. is set forth in the Digital Economy Act of 2010, which became law in April 2010. See Digital Economy Act, 2010, c.24 §§ 3-18 (U.K.) (codifying notification and reporting obligations and responsibilities regarding online copyright infringement); see also *id.* c. 24, ¶ 33, Explanatory Notes (explaining that under the new U.K. law, the Secretary of State may phase in additional technical measures, including protocols for temporary Internet disconnection and bandwidth capping or shaping, if the notice regime set forth in the legislation proves inadequate to reduce the level of online infringement).

5. See Copyright (Infringing File Sharing) Amendment Bill 2010 §§ 122B-122R (N.Z.) (proposing to amend the Copyright Act of 1994 to provide new enforcement measures against the unauthorized sharing of copyrighted material over the Internet). As it was in France, the path to mandatory graduated response in New Zealand is proving to be a rocky one. See, e.g., Pat Pilcher, *So Long Section 92A - New Copyright Bill Revealed*, N.Z. HERALD, Feb. 24, 2010, http://www.nzherald.co.nz/technology/news/article.cfm?c_id=5&objectid=106281

including Germany and Spain have notably declined to enact such measures.⁶

In the countries that have enacted them, graduated response mandates do not derive from existing international treaty obligations, and it is now clear, based on the final text of ACTA, which was released following the eleventh and final round of negotiations in Tokyo, Japan, that such mandates will not be part of the agreement.⁷ This is, of course, good news for consumer advocates, who legitimately worry that three strikes protocols put too much power in the hands of corporate copyright holders and, among other shortcomings, fail to accommodate fair use/fair dealing exceptions that are built-in to most domestic copyright regimes. The omission of mandatory graduated response from the final text of ACTA should not, however, be taken as a definitive sign that the entertainment industries have failed in their concerted effort to globalize graduated response. On the contrary, ACTA in its final form both accommodates existing graduated response mandates and requires parties to promote the development of voluntary graduated response regimes in countries where mandates do not exist.⁸

93 (noting the controversy surrounding the implementation of graduated response in New Zealand, including the repeal of Section 92A of the Copyright Act, and the introduction of more user-friendly legislation in the form of the Copyright (Infringing File Sharing) Amendment Bill).

6. See Jacqui Cheng, *Germany Says "Nein" To Three-Strikes Infringement Plan*, ARS TECHNICA (Feb. 6, 2009), <http://arstechnica.com/tech-policy/news/2009/02/germany-walks-away-from-three-strikes-internet-policy.ars> (explaining the German government's decision that graduated response would be too invasive and would potentially conflict with domestic privacy laws); Howell Llewellyn, *'Three-Strikes' Off Anti-Piracy Agenda In Spain*, BILLBOARD.BIZ (June 22, 2009), http://www.billboard.biz/bbbiz/content_display/industry/e3i8071e0d9c25cb6b876d3771fb7e3d102 (reporting on the Spanish government's refusal to implement a graduated response scheme).

7. See generally Anti-Counterfeiting Trade Agreement, Dec. 3, 2010 [hereinafter ACTA Text—Dec. 3, 2010], available at <http://www.dfat.gov.au/trade/acta/Final-ACTA-text-following-legal-verification.pdf> (lacking any provision that would mandate adoption of graduated response).

8. See *id.* art. 27, ¶ 1 (ensuring the availability of “expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringements”); *id.* art. 27, ¶ 3 (requiring parties to “endeavor to promote cooperative efforts within the business community” to curb copyright infringement in the digital environment).

I. THE (APPARENT) RETREAT FROM GRADUATED RESPONSE

On April 16, 2010, at the conclusion of the eighth round of ACTA negotiations in Wellington, New Zealand, the Office of the United States Trade Representative (“USTR”) announced publicly in a press release that “no participant is proposing to require governments to mandate a ‘graduated response’ or ‘three strikes’ approach to copyright infringement on the Internet.”⁹ The official draft text of ACTA, released on April 21, 2010 (“the April draft”), confirmed that mandatory graduated response was no longer on the table for the negotiating parties by the end of the eighth round.¹⁰ What remained, however, was a more general provision that conditioned ISP eligibility for safe harbor from claims of third party infringement on “an online service provider adopting and reasonably implementing a policy . . . to address unauthorized storage or transmission of materials protected by copyright.”¹¹ Such a policy presumably might, though it needn’t necessarily, entail graduated response.

Readers of the April draft who are familiar with U.S. copyright law immediately recognized that the language of the proposed safe harbor provision, which U.S. negotiators drafted, was strongly evocative of section 512(i) of the Digital Millennium Copyright Act (“DMCA”)—the so-called repeat infringer provision.¹² Section 512(i) requires ISPs seeking safe harbor to “adopt[] and reasonably implement[] . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.”¹³

The verbal affinities between the developing Internet provisions of

9. Press Release, Office of the U.S. Trade Representative, The Office of the U.S. Trade Representative Releases Statement of ACTA Negotiating Partners on Recent ACTA Negotiations (Apr. 16, 2010), <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/office-us-trade-representative-releases-statement-ac>.

10. Anti-Counterfeiting Trade Agreement: PUBLIC Predecisional/Deliberative Draft, Apr. 21, 2010 [hereinafter ACTA Draft—Apr. 21, 2010], *available at* http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf.

11. *Id.* art. 2.18, ¶ 3 (Option 1, (b)).

12. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C. and 28 U.S.C.).

13. 17 U.S.C. § 512(i).

ACTA and the DMCA's repeat infringer provision were even more evident in an earlier, leaked draft of the agreement, which contained an explanatory footnote concerning the specific type of policy that would satisfy the requirement: "An example of such a policy is providing for the termination in appropriate circumstances of subscriptions [and/or] accounts on the service provider's system or network of repeat infringers."¹⁴ This footnote was conspicuously absent from the April draft, as was any other reference to termination of subscribers or account holders who are repeat infringers.

Unlike the previously leaked version of ACTA, the April draft retreated entirely from the DMCA's rhetoric of termination of subscribers and account holders—a response, perhaps, to criticism that ACTA's Internet provisions were being crafted by industry-captured U.S. negotiators to export the DMCA to the rest of the world. Other elements strongly reminiscent of the DMCA remained, however.¹⁵ For example, the April draft extended safe harbor to the same types of providers covered by the DMCA and proposed a notice-and-takedown regime similar in broad outline to the one in the DMCA.¹⁶

There were competing proposals in the April draft concerning the appropriate source of a takedown notice. One option required

14. Anti-Counterfeiting Trade Agreement: Informal Predecisional/Deliberative Draft, 28 n.29, Jan. 18, 2010, available at <https://sites.google.com/site/iip/enforcement/acta> (follow "Full Leaked Text Dated January 18, 2010").

15. The similarities do not stop at section 512. In addition to the safe harbor provisions for ISPs, the April draft contains, for example, provisions that prohibit the circumvention of technological protection measures (e.g., digital rights management or "DRM") that control access to and copying of copyrighted works. These provisions bear an unmistakable resemblance to section 1201 of the DMCA. Compare 17 U.S.C. § 1201 (prohibiting circumvention of "a technological measure that effectively controls access to a [copyrighted] work"), with ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 2.18, ¶ 4 (requiring parties to establish adequate protection and remedies to prevent the "unauthorized circumvention of effective technological measures").

16. Compare ACTA April Draft—Apr. 21, 2010, *supra* note 10, art. 2.18, ¶ 3 (Option 1) (providing limitations on the scope of an online service provider's liability for infringing activity that might otherwise arise from "automatic technical processes, and . . . referring or linking users to an online location"), with 17 U.S.C. § 512(a) (offering safe harbor for providers that route, transmit, and transiently store infringing material, as long as those activities are carried out through "an automated technical process"), and § 512(d) (establishing safe harbor for providers that "refer[] or link[] users to an online location containing infringing material").

“legally sufficient notice of alleged infringement,” which presumably could come from a rights holder, similar to notice deemed effective under section 512(c) of the DMCA.¹⁷ Another option required “receipt of an order from a competent authority,” which implies a governmental source.¹⁸ The latter proposal suggests the necessity for a disinterested official adjudication of some kind prior to any enforcement action. No such safeguard is required by the DMCA before content is taken down or, for that matter, before a user’s account access is terminated by a provider pursuant to section 512(i).¹⁹ By contrast, a form of due process is required prior to the imposition of access sanctions under the Internet Freedom Provision of the 2009 E.U. Telecoms Reform.²⁰ Due process is also a component of *Création et Internet*, France’s graduated response law, which (as amended) provides for judicial review of disconnection decisions that are issued initially by HADOPI, the special administrative entity created to implement the graduated response system.²¹

17. ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 2.18, ¶ 3 (Option 2); 17 U.S.C. § 512(c)(3)(A) (setting forth the elements of an effective notification of alleged infringement, including the signature of the owner of the copyright in the work or an authorized agent, identification of the copyrighted work, information reasonably sufficient to permit the service provider to locate the infringing work on its system, and a statement of good faith).

18. ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 2.18, ¶ 3 (Option 2).

19. *See* 17 U.S.C. § 512(i)(1)(A) (indicating that policies and procedures for terminating access for repeat infringers are established and implemented by service providers without any governmental involvement).

20. The Internet Freedom Provision, Article 1(3)a of the new Framework Directive, provides that sanctions involving Internet access must be “appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards . . . including effective judicial protection and due process.” Press Release, Europa, EU Telecoms Reform: 12 Reforms to Pave Way for Stronger Consumer Rights, an Open Internet, a Single European Telecoms Market and High-Speed Internet Connections for All Citizens Annex 1 (Nov. 20, 2009), *available at* <http://europa.eu/rapid/pressReleasesAction.do?aged=0&format=HTML&guiLanguage=en&language=EN&reference=MEMO/09/513>. Under Article 1(3)a, Internet users are entitled to a presumption of innocence and respect for their privacy rights in proceedings involving accusations of copyright infringement. *Id.*

21. *See* CODE DE LA PROPRIÉTÉ INTELLECTUELLE arts. L. 331-27, 331-31 (Fr.) (providing for judicial review of HADOPI decisions and sanctions); *see also* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-590DC, Oct. 22, 2009, Rec. 2-3 (Fr.) (holding that Article L. 331-21 is not unconstitutional, as judicial authorities are required to make case by case determinations of alleged

To ensure that statutory enforcement regimes like France's would not be disrupted or preempted by ACTA, there was a proposed provision in the April draft—presented as an alternative to the U.S.-drafted, DMCA-like notice-and-takedown provision—stipulating that ACTA's safe harbor provisions “shall not affect the possibility for a judicial or administrative authority, in accordance with the Parties [sic] legal system, requiring the service provider to terminate or prevent an infringement.”²² The proposed language avoided any reference to disconnection or termination of *infringers*, although the phrase “terminate or prevent an infringement” could be read to encompass termination of Internet access, pursuant to a governmentally defined protocol, for repeat infringers.²³

The commonalities between the April draft of ACTA and the DMCA did not end at the definition of safe harbors for ISPs. The April draft, like the DMCA, provided for the identification of alleged infringers outside the litigation context.²⁴ Like the DMCA, the April draft attempted to respond to the concerns of ISPs and privacy advocates by expressly excluding a general network monitoring or policing requirement.²⁵ In addition, the April draft contained anti-

offenses). The original version of the law, which did not provide for judicial review, was struck down by France's Constitutional Council. *See* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580, June 10, 2009 (Fr.) (holding provisions of the HADOPI statute unconstitutional for vesting judicial powers in an administrative authority).

22. ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 2.18, ¶ 3 (Option 2).

23. *Id.* This alternate provision is very similar to the provision in the E.U. Directive on Electronic Commerce concerning the availability of injunctive relief against ISPs in cases involving online copyright infringement: “The limitations of the liability of intermediary service providers . . . do not affect the possibility of . . . orders by courts or administrative authorities requiring the termination or prevention of any infringement.” European Parliament and Council Directive 2000/31, 2000 O.J. (L 178) 1, 6 (EC).

24. *Compare* ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 2.18, ¶ 3 (allowing a copyright holder to obtain information from the service provider on the identity of an allegedly infringing subscriber), *with* 17 U.S.C. § 512(h) (allowing a copyright holder to obtain a pre-litigation subpoena requiring a service provider to release information identifying an alleged infringer).

25. *Compare* ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 2.18, ¶ 3 (Option 1) (providing that “no party may condition the limitations in subparagraph (a) on the online service provider's monitoring its services or affirmatively seeking facts indicating that infringing activity is occurring”), *with* 17 U.S.C. § 512(m) (providing that “[n]othing in this section shall be construed to condition the applicability of subsections (a) through (d) on . . . a service provider monitoring its

circumvention provisions similar to those found in section 1201 of the DMCA, including section 1201's controversial anti-trafficking provisions, which ban the dissemination of technologies for circumventing technological protection measures employed by rights holders.²⁶ With respect to the proposed anti-circumvention provisions, however, there was a footnote in the April draft indicating a lack of consensus on the issue among negotiators.²⁷

The official release of the April draft, coming at the close of the eighth round of negotiations in Wellington, confirmed for the public at large what was being reported by commentators close to the process: As the parties entered the ninth round of negotiations in Lucerne, Switzerland, the provisions of the Internet chapter, even stripped of references to account termination for repeat infringers, remained divisive, and consensus on the DMCA-like secondary liability and anti-circumvention provisions was proving elusive.²⁸ This was true in no small part because the imposition of secondary liability required by provisions in the April draft would have represented a change in substantive intellectual property law for some parties.²⁹ The April draft thus demonstrated ACTA's potential to function as a back door for policymaking through which more

service or affirmatively seeking facts indicating infringing activity”).

26. Compare ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 2.18, ¶ 4 (requiring “adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors”), with 17 U.S.C. § 1201 (providing that “[n]o person shall circumvent a technological measure that effectively controls access to” a protected work).

27. ACTA Draft—Apr. 21, 2010, *supra* note 10, at 22 n.59 (stating that “[a]t least one delegation has reservations about several elements” of the proposed terms).

28. See, e.g., Nate Anderson, *ACTA Arrives (Still Bad, but a Tiny Bit Better)*, ARS TECHNICA (Apr. 21, 2010), <http://arstechnica.com/tech-policy/news/2010/04/acta-is-here.ars/3> (discussing the international climate for ACTA on the eve of the Luzerne round).

29. See Lynda J. Oswald, *International Issues in Secondary Liability for Intellectual Property Rights Infringement*, 45 AM. BUS. L.J. 247, 251-52 (2008) (noting that “[t]he considerable diversity in global thought on the issue of secondary liability for intellectual property rights infringement highlights the important fact that not all participants in discussion of this topic start from the same place in terms of legal theory and practice”); *Has the US Caved on Secondary Liability in ACTA?*, MICHAEL GEIST BLOG (Aug. 26, 2010), <http://www.michaelgeist.ca/content/view/5273/125/> (indicating that secondary liability was a sticking point in the negotiations because countries have different domestic approaches to the issue).

expansive substantive rights were sneaking in under the guise of better-coordinated enforcement.³⁰

Given the persistence of the parties' disagreement over the scope and substance of the Internet provisions, and considering the United States' publicly stated goal of concluding the agreement expeditiously, the most controversial elements of the Internet chapter were excised by the end of the tenth round of negotiations in Washington, D.C.³¹ The August 2010 draft of ACTA, leaked at the close of the round, dispensed with the consensus-thwarting secondary liability provisions from earlier drafts, along with the safe harbor framework designed to mitigate their impact on ISPs.³² A contemporaneous USTR press release, asserting that ACTA "is not intended to include new intellectual property rights or to

30. *But cf.* ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 1.3, ¶ 1 ("This Agreement shall be without prejudice to provisions governing the availability, acquisition, scope, and maintenance of intellectual property rights contained in a Party's law."). Commentators have pointed out, however, that many of the provisions proposed in the April draft *do* affect substantive rights. *E.g.*, Press Release, Am. Univ. Wash. Coll. of Law Program on Info. Justice & Intellectual Prop. (PIJIP), Text of Urgent ACTA Communiqué: International Experts Find that Pending Anti-Counterfeiting Trade Agreement Threatens Public Interests (June 23, 2010), *available at* <http://www.wcl.american.edu/pijip/go/acta-communication> ("What started as a relatively simple proposal to coordinate customs enforcement has transformed into a sweeping and complex new international intellectual property and internet regulation with grave consequences for the global economy and governments' ability to promote and protect the public interest.").

31. *See* Doug Palmer, *U.S. — EU Food Fight Dogs Anti-Counterfeiting Talks*, REUTERS, (Aug. 18, 2010), <http://www.reuters.com/article/2010/08/18/us-trade-counterfeiting-idUSTRE67H5M420100818> (reporting that the United States hopes that the differences between the negotiating countries regarding ACTA's scope can be resolved quickly so that the agreement can move closer to implementation).

32. What remained was a general provision requiring that "[e]ach party's enforcement procedures shall provide the means to address the infringement of {US: copyright or related rights} {EU/J: intellectual property rights[]} in the digital environment, including infringement that occurs via technologies [US: or services] that can be used to facilitate widespread infringement." ACTA Consolidated Text: Informal Predecisional/Deliberative Draft, art. 2.18, ¶ 2, Aug. 25, 2010 [hereinafter ACTA Draft—Aug. 25, 2010], *available at* <https://sites.google.com/site/iipenforcement/acta> (follow "Full Leaked Text Dated August 25, 2010"). A footnote singled out unlawful file sharing and unlawful streaming as examples of such technologies or services that can be used in widespread infringement. *Id.* at 19 n.29. Also included in the new provision was a mandate to implement the procedures "in a manner that avoids the creation of barriers to legitimate activity." *Id.* art. 2.18, ¶ 2.

enlarge...existing intellectual property rights,”³³ hinted at the impetus for the changes.

However, not all of the controversial DMCA-like provisions were eliminated by the end of the tenth round. Still in the mix going into the eleventh (and final) round of negotiations in Tokyo were controversial provisions concerning anti-circumvention³⁴ and ISP identification of alleged online infringers.³⁵ The proposed anti-circumvention provisions continued to include a requirement, backed by the United States but opposed by the E.U., that violations be actionable even without any nexus to copyright infringement.³⁶

By the time negotiations entered the final round, in September 2010, it was apparent to those following the process and comparing successive drafts of ACTA that U.S. aspirations for very aggressive Internet and intermediary liability provisions had been incrementally disappointed.³⁷ The language of the agreement with respect to the digital environment had evolved, as a result of pressure from both within and outside the formal process, to be more protective of the parties' sovereign prerogatives in areas relating to substantive rights,

33. Press Release, Office of the U.S. Trade Representative, Statement of ACTA Negotiating Partners on Recent ACTA Negotiations (Aug. 20, 2010), <http://www.ustr.gov/about-us/press-office/press-releases/2010/august>.

34. Compare ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 2.18, ¶ 4 (“Each Party shall provide for adequate legal protection and effective legal remedies . . . against the circumvention of effective technological measures that are used by authors.”), with ACTA Draft—Aug. 25, 2010, *supra* note 32, art. 2.18, ¶¶ 5-6 (“Each party shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by . . . authors.”).

35. In the August 2010 leaked text, however, the provision was no longer mandatory. Compare ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 2.18, ¶ 3 *ter* (providing that “[e]ach party shall enable right holders . . . to expeditiously obtain from [an online service provider] information on the identity of [an allegedly infringing] subscriber”), with ACTA Draft—Aug. 25, 2010, *supra* note 32, art. 2.18, ¶ 4 (stating that “each Party may provide. . . that its competent authorities have the authority to order an online service provider to disclose” information about alleged infringers).

36. ACTA Draft—Aug. 25, 2010, *supra* note 32, art. 2.18, ¶ 7.

37. See Sarah Lai Stirland, *ACTA: International Trade Negotiators Drop ISP Liability, Anti-Circumvention Provisions Still In*, BROADBAND BREAKFAST (Sept. 7, 2010), <http://broadbandbreakfast.com/2010/09/acta-international-trade-negotiators-drop-isp-liability-anti-circumvention-provisions-still-in/> (noting that the August Draft of ACTA included watered-down, broad language on intermediary liability).

liabilities, and exceptions.³⁸ The final text of the agreement, released officially after the Tokyo round, provides further evidence of this trend insofar as it altogether omits the U.S.-backed provision requiring parties to make circumventions actionable per se.³⁹

II. THE (ACTUAL) PERSISTENCE OF GRADUATED RESPONSE

Although the absence of any reference to repeat infringers in both the April draft and the final version of ACTA may give the impression that graduated response is not part of the enforcement framework contemplated by the agreement, this is only superficially true. The April draft contained an allusive provision requiring signatories to pressure ISPs to cooperate with rights holders:

Each party shall promote the development of mutually supportive relationships between online service providers and rights holders to deal effectively with . . . copyright and related rights infringement which takes place by means of the Internet, including the encouragement of establishing guidelines for the actions which should be taken.⁴⁰

This mandatory provision remains—albeit in qualified form—in the final version:

Each party shall endeavor to promote cooperative efforts within the business community to effectively address trademark and copyright or related rights infringement while preserving legitimate competition and, consistent with each Party's law, preserving fundamental principles such as freedom of expression, fair process, and privacy.⁴¹

Moreover, in the final version, a statement concerning ISP cooperation with rights holders appears in the agreement's preamble:

The Parties to this Agreement . . . [d]esiring to promote cooperation

38. *See id.* (indicating that technology companies and digital rights groups were concerned about ACTA's digital environment provisions and that the August draft seemed to address such concerns by including language allowing for the adoption of exceptions and limitations to anti-circumvention).

39. *Compare* ACTA Draft—Aug. 25, 2010, *supra* note 32, art. 2.18, ¶ 7 (mandating anti-circumvention measures independent of copyright infringement), *with* ACTA Text—Dec. 3, 2010, *supra* note 7, art. 27, ¶ 6 (lacking this August 2010 draft provision).

40. ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 2.18, ¶ 3 *quater*.

41. ACTA Text—Dec. 3, 2010, *supra* note 7, art. 27, ¶ 3.

between service providers and right holders to address relevant infringements in the digital environment... [h]ereby agree as follows...⁴²

Positioned as it is at the beginning of the agreement, this statement foregrounds the principle on which graduated response is founded: ISPs and rights holders should be collaborating more closely in the project of online copyright enforcement.

The notion that ISPs should be encouraged by governments to work with rights holders is reminiscent of the DMCA, which was drafted, according to the statute's legislative history, to "preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment."⁴³ The formalization of such cooperative relationships appears on the IIPA's 2010 global copyright policy wish list: "The copyright industries look to governments to... [e]ncourage cooperation by Internet service providers with all content owners, including workable and fair notice and takedown systems and graduated response mechanisms to deal with repeat infringers."⁴⁴

Even though ACTA does not mandate graduated response or require disconnection for repeat infringers, and even though the final version of the agreement does not contain a notice and takedown provision, the language requiring governments to take affirmative action to "promote cooperation" between rights holders and ISPs resonates strongly with the copyright industries' demand that ISPs become more active in fighting piracy. The industries' international strategy with respect to graduated response is to seek government mandates where such mandates seem politically achievable, and to accept government pressure where mandates prove too politically controversial. This strategy of compelled "voluntary" collaboration comes directly from the playbook of the IFPI, which advocates "government-backed systems of ISP cooperation" and asserts that "government pressure is crucial to producing collective action by all

42. *Id.* pmb1.

43. H.R. Rep. No. 105-796, at 72 (1998) (Conf. Rep.).

44. IIPA, *Copyright Industries' Global Challenges and Solutions for 2010: Reduce Copyright Piracy, Remove Market Access Barriers, Strengthen Laws* (2010), available at <http://www.iipa.com/pdf/2010Special301Challenges.pdf>.

ISPs.”⁴⁵

Consistent with the IIPA’s and the IFPI’s rhetoric, rights holders increasingly are defining “mutually supportive relationships” and “cooperation” between themselves and ISPs in terms of ISPs’ willingness to embrace graduated response.⁴⁶ This is so much the case that “cooperation” for the copyright industries now functions as a sort of code word for graduated response.⁴⁷ By requiring parties to “endeavor to promote cooperative efforts within the business community,” ACTA in its final form retains an implicit, sub-textual appeal for global graduated response.⁴⁸

These cooperative relationships are now developing in many places through market forces and, in fact, *without* government pressure—thereby casting doubt on the need for a provision in ACTA requiring official pressure.⁴⁹ A propos of this development, opponents of graduated response should be mindful that public law—whether international or domestic—is not the only vehicle through which graduated response regimes can be implemented. As described below, the United States and Ireland provide instructive examples of how graduated response can effectively become the law

45. IFPI, *Digital Music Report 2009: New Business Models for a Changing Environment*, 24 (2009), available at www.ifpi.org/content/library/DMR2009-real.pdf.

46. See, e.g., Nate Anderson, *RIAA Graduated Response Plan: Q&A With Cary Sherman*, ARS TECHNICA (Dec. 21, 2008), <http://arstechnica.com/old/content/2008/12/riaa-graduated-response-plan-qa-with-cary-sherman.ars> (reporting that the RIAA was essentially abandoning a lawsuit campaign against individual copyright infringers “in favor of a ‘graduated response’ partnership with ISPs”); Press Release, Austl. Copyright Council, *ISPs and Copyright Owners: Friends or Foes?* (Oct. 29, 2010), <http://www.copyright.org.au/news-and-policy/details/id/1853/> (asserting that “cooperation between copyright owner groups and ISPs is integral to any graduated response scheme”).

47. See IFPI, *Governments Address ISP Cooperation in Tackling Online Piracy Around the World* (Mar. 10, 2009), available at <http://www.ifpi.org/content/library/ISP-progress-March-2009.pdf> (enumerating various international “ISP cooperation” efforts across several countries, most of which involve a graduated response mechanism or disconnection of service).

48. ACTA Text—Dec. 3, 2010, *supra* note 7, art. 27, ¶ 3.

49. See discussion *infra* Parts II.A-B (explaining cooperative activities between rights holders and broadband providers in the United States, as illustrated by the Comcast-NBC Universal merger, and in Ireland, as illustrated by Eircom’s settlement with EMI, Sony BMG, Universal, and Warner).

for Internet users without ever becoming the law of the land.⁵⁰

A. PRIVATELY ORDERED GRADUATED RESPONSE IN THE U.S.

Whereas the entertainment industry's campaign in Europe and countries abroad has focused on government-mandated graduated response, the campaign in the United States has focused on inter-industry negotiations and technology-based solutions capable of private implementation.⁵¹ Rights holders in the U.S. market, believing that the DMCA has failed them as a weapon in the domestic war on piracy, have set their sights on "an enforcement regime that operates on Internet users through a combination of technology and private law mechanisms, such as standardized terms of service and acceptable use policies."⁵²

There are a number of reasons why U.S.-based ISPs are now more receptive to overtures from rights holders than they were in the past. One such reason is a growing sense among ISPs that they stand to benefit by agreeing to work more cooperatively with rights holders. For example, in 2005, Verizon agreed with Disney to forward notices of infringement to its customers; in return, Verizon gained the right to transmit Disney programming over its network.⁵³ These types of business arrangements are likely to become more common as distribution of non-amateur content over the Internet increases. Music, movies, and television shows that were once transmitted only over the air or via cable are now also streamed over the Internet, meaning that ISPs now mediate the consumption of corporate-produced entertainment in ways they never did before.⁵⁴ As a result

50. See discussion *infra* Parts II.A-B.

51. See Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81, 82 (2010) (referencing the Motion Picture Association of America's request to the Federal Communications Commission to "step aside and 'not interpose any legal or regulatory obstacles' . . . that would prevent rights owners and broadband providers from working together to implement graduated response").

52. *Id.* at 83-84.

53. Nate Anderson, *Verizon to Forward RIAA Warning Letters (But That's All)*, ARS TECHNICA (Nov. 13, 2009, 3:28 PM), <http://arstechnica.com/tech-policy/news/2009/11/verizon-to-forward-riaa-warning-letters-but-thats-all.ars>.

54. See Marc Chacksfield, *Online Video Streaming Continues to Rise*, TECHRADAR.COM (Jan. 19, 2010), <http://www.techradar.com/news/internet/online-video-streaming-continues-to-rise-664719> (reporting on Nielsen research showing large year-over-year increases in online viewing of video streams).

of the rise of streaming media over broadband, traditional lines of demarcation between corporate content producers and corporate network operators are blurring. The January 2011 merger between Comcast and NBC Universal is a prime example of the transformation now underway in the relationship between the major corporations that control access to the Internet and the major corporations that control rights in popular entertainment programming.⁵⁵ When owners of the networks over which content is delivered become holders of the rights in that content, their stake in the copyright enforcement game radically changes.

ISPs are also increasingly conscious of the extent to which peer-to-peer (“P2P”) file-sharing traffic, most of which is attributable to copyright infringement, causes congestion on their networks. A key element of the negotiation strategy for rights holders seeking to partner with U.S. broadband providers in the implementation of a network-level solution to online piracy is the assertion that management of P2P traffic should be regarded as a matter of mutual concern.⁵⁶ The message has not fallen on deaf ears; Comcast’s highly controversial use of deep packet inspection technology to effectively block BitTorrent traffic in 2007 is but one manifestation of the growing community of interest between rights holders and network operators.⁵⁷

55. See Kristen Hamill, *U.S. Approves Comcast-NBC Merger*, CNN MONEY (Jan. 18, 2011, 6:06 PM), http://money.cnn.com/2011/01/18/technology/fcc_comcast_nbc/index.htm (reporting that the FCC and Department of Justice approved the merger, but also imposed upon the parties a number of conditions to ensure that the merger served the public interest); see also Cecilia Kang, *Comcast-NBC Universal Merger Gains Support in FCC*, WASH. POST, Dec. 23, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/23/AR2010122304876.html?sid=ST2010122305522> (indicating concerns over the creation of a “content empire” owned by a service provider, and suggesting that the FCC should adopt strict, enforceable conditions in order to protect public interests).

56. See Saul Hansell, *Hollywood Wants Internet Providers to Block Copyrighted Files*, NY TIMES (Sept. 25, 2008), <http://bits.blogs.nytimes.com/2008/09/25/hollywood-tries-to-get-support-for-having-isps-block-copyrighted-files/> (reporting on the formation of an inter-industry consortium through which copyright owners seeking to limit illegal file-sharing and broadband providers seeking to reduce congestion on their networks will explore and advance their mutual interest in managing P2P traffic).

57. See Grant Gross, *Court Rules Against FCC’s Comcast Net Neutrality Decision*, REUTERS (Apr. 6, 2010), <http://www.reuters.com/article/idUS44396209420100406> (discussing the U.S. Court of Appeals for the District of

Given users' resistance to having their ISPs function as copyright enforcement agents for the entertainment industry, ISP executives are cagey when it comes to publicizing the nature of their cooperative relationships with corporate copyright holders. To comply with section 512(i) of the DMCA, every major broadband provider in the United States includes in its terms of use a provision reserving the right to terminate access for any user who repeatedly infringes copyrights.⁵⁸ Representatives of major broadband providers, including Comcast, Cox, and AT&T, publicly deny that they are participating in a "three strikes" program in cooperation

Columbia's decision to overturn a FCC ruling that had prevented Comcast from implementing network management processes that targeted P2P users); *see also* *What is BitTorrent?*, BITTORRENT.COM, <http://www.bittorrent.com/btusers/what-is-bittorrent> (last visited Mar. 1, 2011) (describing BitTorrent as an internet "protocol . . . allowing [users] to download files quickly by allowing people downloading the file to upload (distribute) parts of it at the same time").

58. *See, e.g., AT&T U-verse Terms of Service*, AT&T, Sched. 2, ¶ 5, <http://www.att.com/u-verse/att-terms-of-service.jsp> (last visited Mar. 1, 2011) ("AT&T . . . may, however, immediately terminate or suspend your Member Account and Sub Accounts, and all or a portion of your Service without notice if . . . you . . . engage in conduct that is a violation of any law, regulation or tariff (including, without limitation, copyright and intellectual property laws) . . ."). Comcast expressly reserves the right to terminate or suspend access unilaterally (i.e., in its "sole discretion"). *Comcast Acceptable Use Policy for High-Speed Internet Services*, COMCAST, sec. V, www.comcast.com/MediaLibrary/1/1/Customer/Support/Legal/Acceptable_Use_Policy_for_Internet.pdf (last visited Mar. 1, 2011).

It is Comcast's policy in accordance with the DMCA and other applicable laws to reserve the right to terminate the Service provided to any customer or user who is either found to infringe third party copyright or other intellectual property rights, including repeat infringers, or who Comcast, in its sole discretion, believes is infringing these rights. Comcast may terminate the Service at any time with or without notice for any affected customer or user.

Id. Verizon's terms are nearly identical to Comcast's. *Verizon Online Terms of Service*, VERIZON, Attachment A, ¶ 3 http://www.verizon.net/policies/popups/tos_popup.asp (last visited Mar. 1, 2011).

In accordance with the Digital Millennium Copyright Act (DMCA) and other applicable laws, it is the policy of Verizon to suspend or terminate, in appropriate circumstances, the Service provided to any subscriber or account holder who is deemed to infringe third party intellectual property rights, including repeat infringers of copyrights. In addition, Verizon expressly reserves the right to suspend, terminate or take other interim action regarding the Service of any Subscriber or account holder if Verizon, in its sole judgment, believes that circumstances relating to an infringement of third party intellectual property rights warrant such action.

Id.

with the RIAA.⁵⁹ At the same time, however, Comcast executive Joe Waz disclosed that the company issues between a million and two million infringement notices per year to subscribers on behalf of copyright holders.⁶⁰ A Cox spokesperson acknowledged that Cox has sent out hundreds of thousands of warnings and has suspended the accounts of a small number of users in connection with the company's DMCA compliance efforts.⁶¹

Although the impulse of broadband executives is to deny involvement when they are confronted with questions from the media about "three strikes" and graduated response,⁶² the fact of the matter is that U.S. broadband providers have engaged for a number of years in a form of graduated response in the name of DMCA compliance. They have entered into arrangements with rights holders requiring them to forward infringement notices to subscribers, and at least one major ISP—Cox—is on the record as having suspended access for subscribers who routinely receive and ignore such notices.⁶³ Such suspensions, which occur without a court order or a judgment of infringement, are permitted under the terms of use to which all subscribers must agree before obtaining broadband service.⁶⁴ Although it is impossible to gauge with any accuracy the extent to which U.S. ISPs are currently cooperating with rights holders in online copyright enforcement, they could be doing so quite extensively without any required disclosure and without

59. See Chloe Albanesius, *Comcast, Others Deny 'Three Strikes' Piracy Plan*, PCMAG.COM (Mar. 27, 2009), <http://www.pcmag.com/article2/0,2817,2343977,00.asp>.

60. *Id.*

61. See *id.* (claiming that less than 0.1% of Cox accounts that received notices were suspended); Sarah McBride, *Relationship Status of RIAA and ISPs: It's Complicated*, WALL ST. J. BLOG (Mar. 26, 2009, 3:07 PM), <http://blogs.wsj.com/digits/2009/03/26/relationship-status-of-riaa-and-isps-its-complicated/> (reporting that Cox suspends an account only when the user ignores "numerous communications" about infringing material).

62. See David Kravets, *Top Internet Providers Cool to RIAA 3-Strikes Plan*, WIRED (Jan. 5, 2009), <http://www.wired.com/threatlevel/2009/01/draft-verizon-o/> ("Two weeks after the [RIAA] announced it had struck deals with top internet service providers to cut off unrepentant music sharers, not a single major ISP will cop to agreeing to the ambitious scheme, and one top broadband company says it's not on board.").

63. Albanesius, *supra* note 59; McBride, *supra* note 61.

64. See *supra* note 58 and accompanying text (indicating that AT&T, Comcast, and Cox all have these provisions in their user agreements).

running afoul of their existing contractual agreements with customers.

B. PRIVATELY ORDERED GRADUATED RESPONSE IN IRELAND

Ireland provides another example of privately ordered online copyright enforcement. Graduated response became the de facto law for over forty percent of that country's broadband subscribers after a major ISP—Eircom—settled claims of copyright infringement brought against it by major music and movie distributors (EMI, Sony BMG, Universal, and Warner).⁶⁵ After an eight day trial, the parties agreed to a settlement that required Eircom to implement a “three strikes” graduated response protocol.⁶⁶ The case never went to judgment on the merits, so there is no law “on the books” as a result of it, yet the settlement has demonstrable public law effects.

The “three strikes” protocol adopted in the Eircom case is described in detail in an Irish High Court decision issued in the context of an unsuccessful legal challenge to the settlement.⁶⁷ Upon receiving a first notice of infringement from a computer security firm hired by the plaintiffs, Eircom informs its allegedly infringing customer that s/he has been caught in the act of illegal uploading or downloading.⁶⁸ This first warning is included with the customer's monthly bill.⁶⁹ Upon receipt of a second notice of infringement by the same customer, Eircom sends a separate letter to the customer that contains a strongly worded warning.⁷⁰ The response escalates from the first level to the second level only if fourteen days or more have passed since the first infringement was detected.⁷¹ Upon receipt of a third notice concerning the same customer, Eircom must review all of the evidence against the customer. As with the escalation from the first level of response to the second, fourteen days or more must pass before the response can graduate to the third level.⁷² The first two notices are generated automatically; the third notice, however,

65. *EMI Records v. Eircom Ltd.*, [2010] IEHC 108 (H. Ct.) (Ir.).

66. *See EMI Records*, [2010] IEHC 108, ¶¶ 2, 9.

67. *See generally EMI Records*, [2010] IEHC 108, ¶¶ 9-13.

68. *Id.* ¶ 9.

69. *Id.* ¶ 13.

70. *Id.* ¶¶ 9, 13.

71. *Id.* ¶ 13.

72. *Id.*

triggers a human review. Following human review, a notice of termination is sent to the customer, who is given fourteen days to respond.⁷³ Eircom considers the response, if any is received, in light of any extenuating circumstances the customer raises. If the customer claims in his or her response that there was a mistake of fact concerning the alleged infringements, Eircom considers that claim as well.⁷⁴ If Eircom does not find in favor of the customer, the customer's Internet service is cut off. No court order is required; the ISP is the sole arbiter of the customer's innocence or guilt.⁷⁵

The EMI-Eircom settlement has effectively made graduated response the law for over half a million Irish citizens entirely outside the parliamentary process. And unlike in France, where opposition to the HADOPI legislation in its initial form resulted in amendments designed to ensure judicial review of disconnection decisions, Eircom's subscribers have no such guarantee. In this respect, privately designed and implemented graduated response regimes are even more problematic, from the point of view of consumer protection, than publicly implemented ones.

CONCLUSION

At the close of the official negotiations, looking back on the round-by-round evolution of ACTA's terms, it seems safe to say that the Internet provisions were among the agreement's most contested and heavily negotiated. References to repeat infringers and account termination were edited out of the agreement well before the final round of negotiations, and with them went the prospect of mandatory graduated response. Related provisions requiring secondary liability for ISPs and a DMCA-like safe harbor framework also fell away, albeit later in the game.

Before breathing a sigh of relief, however, opponents of graduated response should think twice about the possible implications of the provision in the final version of ACTA that requires governments to "endeavor to promote cooperative efforts" between rights holders

73. *Id.*

74. *Id.*

75. *See id.* ¶¶ 14-15 (characterizing the settlement protocol as consistent with Eircom's terms of service regarding the suspension or termination of accounts).

and ISPs.⁷⁶ Through this amorphous provision, ISPs might be subject to various forms of government pressure encouraging them to capitulate to copyright holders' demands for privately implemented graduated response regimes. For lawmakers who would rather not place themselves at the center of the controversy over graduated response, private ordering with a government push may prove more palatable than outright government mandates, which prompted very vocal public resistance in places like France and the U.K.⁷⁷ Like the negotiation of ACTA itself, state-promoted private ordering represents a species of policymaking that is insulated from public scrutiny and that can be tailored, by virtue of that insulation, to serve corporate interests at the public's expense.

76. ACTA Text—Dec. 3, 2010, *supra* note 7, art. 27, ¶ 3.

77. See, e.g., Nate Anderson, *France Reintroduces Three-Strikes Law, Clashes With EU Likely*, ARS TECHNICA (Apr. 29, 2009, 1:31 PM), <http://arstechnica.com/tech-policy/news/2009/04/france-reintroduces-three-strikes-law-as-protests-mount.ars> (discussing the response to the *Création et Internet* bill in France, where citizens formed groups to protest the bill); Nate Anderson, *Three-Strikes Petition Gets Attention of 10 Downing Street*, ARS TECHNICA (Feb. 26, 2010, 12:52), <http://arstechnica.com/tech-policy/news/2010/02/uk-govt-agrees-with-3-strikes-proportionality-concernsthree-strikes-petition-gets-attention-of-10-downing-street.ars> (referencing a public petition opposing graduated response provisions in the Digital Economy bill).