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Keywords

file sharing, Digital Millennium Copyright Act (DMCA), “Memorandum of Understanding (MOU)

THE GRADUATED RESPONSE: DIGITAL GUILLOTINE OR A REASONABLE PLAN FOR COMBATING ONLINE PIRACY?

by Danielle Serbin¹

"With a [peer-to-peer file sharing] system, you can share your favorite songs with your best friend – or your 20,000 best friends."²

Online file sharing is great for users. It gives them free and easy access to millions of songs and movies with the click of a button. But file sharing is arguably harmful to the recording and film industries ("the industry"), precisely because it allows users to receive copyrighted works for free. In fact, the industry blames peer-to-peer file sharing for billions of dollars in lost revenue.³ The industry has attempted to target online file-sharing with many different tactics, most prominently a mass-litigation campaign against end-users.⁴ That campaign, largely considered a failure, ended in 2008.⁵ In July 2011, the industry announced a new plan for targeting illegal file-sharing.⁶ The plan is similar to a "three strikes and you're out" model used in many countries,⁷ whereby users engaging in illegal file-sharing are given a warning for the first two instances of illegally sharing files, and on the third instance their Internet service is temporarily cut off.⁸ The July graduated response deal is more of a "six strikes and you're maybe out" system.⁹ The industry, in partnership

with the major Internet Service Providers (ISPs), developed a program of six warnings of increasing intensity. For the first few instances of infringement, users will receive educational pamphlets, informing them that file-sharing is illegal and that there are legal routes to obtain movies and music online.¹⁰ But for users who continue to file-share, the ISP will slow down or even cut off Internet access.¹¹ While some laud the program as an important step towards reducing online copyright infringement,¹² others refer to such a system as a "digital guillotine," because it "[kills] a critical way people connect with the world."¹³

This paper examines the July 2011 graduated response deal and concludes that it is not an optimal approach for addressing peer-to-peer file sharing—not for the industry, and not for the users. Part I briefly explains the technology of peer-to-peer file sharing technology and the reasons the industry wants to eliminate it (or more realistically, reduce it). Part II explains the industry's tactics for combating file sharing before the graduated response. It explains why the Digital Millennium Copyright Act (DMCA) – the provision of copyright law meant to address illegal Internet downloading – has not been a useful resource for preventing file sharing. Part III explains how because of DMCA's failure, the industry has had to use other means to target file sharing, most prominently a mass-litigation campaign against peer-to-peer file sharers, which proved to be both ineffective and hugely unpopular.

Part IV explains the July graduated response deal, and examines both the benefits and problems the program will create for users and the industry. It explains how it poses significant concerns for users because the graduated response allows ISPs to slow or cut off Internet access. Part IV argues that the problem with the graduated response is that the "punishment"

1. Third year law student, University of California Berkeley School of Law, Boalt Hall.

2. Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 54 (2004), http://www.jus.uio.no/sisu/free_culture.lawrence_lessig/portrait.letter.pdf.

3. See Part I, *infra*.

4. See Part III, *infra*.

5. Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL STREET J. (Dec. 19, 2008), http://online.wsj.com/article/SB122966038836021137.html?mod=rss_whats_news_technology.

6. Cornne McSherry & Eric Goldman, *The "Graduated Response" Deal: What if Users Had Been At the Table?*, ELECTRONIC FRONTIER FOUNDATION (July 18, 2011), <https://www.eff.org/deeplinks/2011/07/graduated-response-deal-what-if-users-had-been>.

7. Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 727 (2011) [hereinafter Bridy I] (e.g. the U.K., France, South Korea, and Taiwan).

8. See Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1374 (2010).

9. *Memorandum of Understanding*, CENTER FOR COPYRIGHT INFORMATION 24 (July 6, 2011), <http://www.copyrightinformation.org/sites/default/files/Memorandum%20of%20Understanding.pdf>.

10. *Id.* at 8-9.

11. *Id.* at 10-13.

12. Nate Anderson, *White House: We "Win the Future" by Making ISPs into Copyright Cops*, ARS TECHNICA (July 7, 2011), <http://arstechnica.com/tech-policy/news/2011/07/white-house-we-win-the-future-by-making-isps-into-copyright-enforcers.ars>.

13. WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 14 (2004).

doesn't match the "crime" – it slows or cuts off *all* of a user's Internet access *not* because the user fails to pay his or her bill, but because *some* of the user's activity allegedly infringes. And the graduated response system does all of this without providing the procedural safeguards an Internet user would otherwise receive in court. Further, Part IV explains the significant problems associated with slowed or terminated Internet access, chief among them impeding upon a user's freedom of expression and political assembly – two activities for which the Internet is a major forum.

Finally, Part V offers a potential alternative to the July graduated response deal. It advocates for a program that would have ISPs charge users a "file-sharing fee" for each instance of illegal file sharing, and then pass the proceeds onto the copyright holders. This approach is superior for the industry because it provides a quick and efficient mechanism for reducing losses incurred from peer-to-peer file sharing. And it is superior to the July graduated response deal for users because it does not cut slow or off Internet access.

I. PEER-TO-PEER SHARING: WHAT IT IS AND WHY THE INDUSTRY WANTS TO STOP IT

A. Peer-to-Peer File Sharing Defined

Peer-to-peer file sharing differs from music and movie downloading performed on a traditional client-server system. A client-server system is a "one way road," where users open a website and download a file directly from the website to their computers.¹⁴ Peer-to-peer sharing is a two-way street; while you're online downloading other people's files, others using the sharing software can download files you have stored on your hardware.¹⁵

Peer-to-peer file sharing utilizes a software program to locate other computers that have files a user wants. File sharing occurs when: (1) the user logs in to a peer-to-peer file sharing software (such as Gnutella, BitTorrent, or The Pirate Bay); (2) the user requests files for download; (3) the software queries other computers that are connected to the Internet and also running the file-sharing software; (4) the program finds a computer with the requested file and downloads it directly to

the user's hard drive.¹⁶ This way, users are able to share songs and movies over the Internet with each other free of charge, without ever storing the material online or downloading it from a website.

B. The Problem with Peer-to-Peer File Sharing

Peer-to-peer file sharing violates copyright law because it infringes upon the copyright holder's exclusive rights of distribution and reproduction.¹⁷ Many scholars argue that the current copyright framework is antiquated because it does not account for how easy modern technology makes reproduction and distribution (and hence infringement).¹⁸ However, the law is clear that peer-to-peer file sharing is illegal, and Congress doesn't appear ready to change this. But simply because peer-to-peer file sharing is illegal does not mean it is necessarily harmful to copyright holders.

This paper works on the assumption that peer-to-peer file sharing is problematic and requires a solution. Not everyone agrees with this proposition. Some studies conclude that illegal file sharing does not negatively impact industry sales; some even argue that file sharing allows for greater "sampling" of recordings, which ultimately leads to greater sales.¹⁹ However, there are many studies that conclude otherwise.²⁰ What is relevant for this Article is that both the movie and recording industries believe that peer-to-peer file sharing hurts sales and is worth combating. For example, in 2008, Michael Robinson of the MPAA

16. *Id.*

17. See 17 U.S.C. § 106(1)-(3) (2006); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001). Notably, some scholars argue that when users simply make copyrighted works available by placing them in a shared folder on their computer, this does not necessarily constitute an illegal "distribution" under the Copyright statute, and courts misinterpret the law when they conclude that it does. See, e.g., Andrew James McGarow, *The "Making Available" Theory and the Future of P2P Networks: Does Merely Making Files Available for Further Distribution Constitute Copyright Infringement, and is it Time for Congress to Act in Accordance with this Technology?*, 88 U. DET. MERCY L. REV. 155, 161 (2010).

18. See, e.g., Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV., 813, 851 (2001).

19. John Schwartz, *A Heretical View of File Sharing*, N.Y. TIMES, Apr. 5, 2004, at C1.

20. See, e.g., Alejandro Zentner, *Measuring the Impact of File Sharing on the Movie Industry: An Empirical Analysis Using a Panel of Countries*, 4 (Mar. 22, 2010), available at <http://ssrn.com/abstract=1792615> (arguing that statistical evidence supports the conclusion that BitTorrent technology negatively impacts movie video sales).

14. Carmen Carmack, *How BitTorrent Works*, HOWSTUFFWORKS (Mar. 25, 2006), <http://computer.howstuffworks.com/bittorrent.htm>; For a comprehensive the history of peer-to-peer file sharing, see Andrew W. Eichner, *File Sharing: A Tool for Innovation, or a Criminal Instrument?*, 2011 BCIPTF 1 (2011), available at http://bciptf.org/wp-content/uploads/2011/09/Andrew_Eichner_Note_File_Sharing_EICedits-final-edit.pdf.

15. *Id.*

(Motion Picture Association of America) stated that the movie industry loses “over \$18 billion annually worldwide to piracy and Internet piracy . . . [i]t is a growing problem and a growing threat.”²¹ And according to the Recording Industry Association of America (RIAA), as of August 2008, “global theft of sound recordings cost the U.S. economy \$12.5 billion in lost revenue and more than 71,000 jobs and \$2 billion in wages to U.S. workers.”²²

II. PRE-GRADUATED RESPONSE LEGAL FRAMEWORK: THE DMCA FAILS AS AN EFFICIENT MECHANISM FOR COMBATING PEER-TO-PEER FILE SHARING

Most online downloading of copyrighted movies and music occurs not on traditional client-server websites, but through peer-to-peer file-sharing.²³ However, the DMCA, which is the legal mechanism for combating Internet copyright infringement, did not anticipate peer-to-peer file sharing. This is primarily because such file sharing did not exist in 1998 when Congress drafted the DMCA.²⁴ As such, Congress structured the DMCA to prevent Internet piracy through client-server illegal downloading.²⁵

The DMCA provides safe harbor provisions to ISPs so long as they conform to certain statutory requirements.²⁶ These statutory requirements are meant to facilitate collaboration between ISPs and copyright holders so that infringing material can be removed from the Internet without a court order.²⁷ However, because Congress passed the DMCA before the advent of peer-to-peer file sharing, the DMCA is only effective at achieving this collaboration for illegal activity performed on client-server sites.²⁸

The DMCA distinguishes between “storage providers,” the traditional client-server sites (which served as host to most of the infringing activity when the DMCA was passed), and “conduit providers,”

which provide access to the peer-to-peer file sharers of today.²⁹ Storage providers are governed by DMCA § 512(c). They must comply with the DMCA’s notice-and-takedown provisions.³⁰ This system works relatively simply: a copyright holder notices infringing material on a server, the copyright holder notifies the manager of server about the infringing material, and then the manager removes the material.³¹ Further, under the “red flag” provision of the DMCA, even if a storage provider does not receive a notice of infringing material from a copyright holder, if it has knowledge of infringing material on its network, it must remove the material.³² Thus, the DMCA is structured so that storage providers must work with the industry in order to maintain their safe harbor status.³³

Unlike with storage providers, the DMCA provides “almost [an] absolute immunity from liability for transitory network communications . . .”³⁴ The rationale for this is that, at least when the DMCA was created, conduit providers had no way of knowing whether infringing activity occurred over their systems. Conduit providers “route and transmit information without modifying it or storing it more than fleetingly.”³⁵ Conduit providers fall under § 512(a) of the DMCA, and are not subject to the notice-and-take-down provisions of § 512(c).³⁶ Rather, to maintain their safe harbor status, conduit providers need only (1) adopt a policy that provides for the termination of access for repeat infringers in appropriate circumstances; (2) implement that policy in a reasonable manner; and (3) inform its subscribers of the policy.³⁷ Yet a conduit provider need not monitor

21. *Movie Industry Attacks Internet Downloading*, WCVBTV BOSTON (May 16, 2008), <http://www.thebostonchannel.com/r/16274816/detail.html>.

22. David Kravets, *MPAA Waffling on Piracy Costs; RIAA Says Illicit CDs Worth \$13.74 Each*, WIRED (Aug. 19, 2008), <http://www.wired.com/threatlevel/2008/08/mpaa-waffling-ol/> [hereinafter MPAA Waffling].

23. See, e.g., McGarrow, *supra* note 17, at 180.

24. Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81, 97 (2010) [hereinafter Bridy II]. Napster, the first popular file-sharing system, launched in July 1999. See Lessig, *supra* note 2.

25. Bridy II, *supra* note 24, at 97.

26. 17 U.S.C. § 512(a), (c) (2006).

27. Bridy I, *supra* note 7, at 713.

28. *Id.* at 719.

29. Bridy II, *supra* note 24, at 97.

30. § 512(c)(1)(A).

31. See *id.*

32. § 512(c)(1)(A)(ii). The law is still evolving regarding what constitutes a “red flag.” See, e.g., *Viacom Int’l v. YouTube Inc.*, 253 F.R.D. 256 (S.D.N.Y. 2008).

33. Or else face suit for copyright infringement on multiple potential theories. For example, Viacom sued Google for direct copyright infringement, inducement to infringe, and contributory infringement. See *id.*

34. David Ludwig, *Shooting the Messenger: ISP Liability for Contributory Copyright Infringement*, B.C. INTELL. PROP. & TECH. F.110701 (2006).

35. Bridy II, *supra* note 24, at 89.

36. See § 512(a); *In re Charter Commc’ns, Inc.*, 292 F.3d 771, 776 (8th Cir. 2005) (“[T]he safe harbor provision [in § 512(a)], which limits the liability of an ISP when it merely acts as a conduit for infringing material without storing, caching, or providing links to copyrighted material[, does] not . . . contain the remove-or-disable-access provision. . .”).

37. Bridy II, *supra* note 24, at 90 (citing 17 U.S.C. § 512(i)(1)(A)); *Ellison v. Robertson*, 357 F.3d 1072, 1080 (9th Cir. 2004).

its service or “affirmatively [seek] facts indicating infringing activity.”³⁸ Therefore, even though a conduit provider must have an anti-infringement policy in place to maintain safe harbor status, the DMCA is not structured to promote collaboration between conduit ISPs and the industry in the same way it promotes collaboration between storage providers and copyright holders.

With the advent of peer-to-peer file sharing in the early 2000s, the industry faced a problem. Most infringing activity began occurring not on traditional client-server websites, but through peer-to-peer downloads.³⁹ But the industry had no means for addressing the problem in a quick, efficient manner, like it does when someone uploaded an infringing movie to YouTube.⁴⁰

III. BEFORE THE GRADUATED RESPONSE: THE FAILED “WAR ON PIRACY”

In 2003, the RIAA began a campaign against online music theft – some referred to as a “war on piracy”⁴¹ while others considered it a “anti-consumer crusade.”⁴² The MPAA began a similar campaign in 2005.⁴³ Notably, while the two organizations launched similar anti-piracy campaigns,⁴⁴ the RIAA’s lawsuits against end-users were both more numerous and more widely publicized.⁴⁵ Both the RIAA and the MPAA used many tactics to combat peer-to-peer file sharing: developing an education campaign,⁴⁶ offering copyrighted works for download through legal means

(through licenses with providers like iTunes),⁴⁷ and targeting websites that facilitated peer-to-peer file sharing such as Napster and Grokster.⁴⁸

Part of the anti-piracy campaign involved suing end-users for peer-to-peer file sharing.⁴⁹ The RIAA sued an estimated 26,000 users through the campaign.⁵⁰ Almost all lawsuits resulted in the end-users settling with the industry, typically for \$3,000 - \$5,000,⁵¹ or paying the statutory fine of (typically) \$750 per song⁵² as part of a default judgment.⁵³ However, in several high-profile lawsuits, the RIAA received huge jury verdicts against individual end-users. These included a \$675,000 verdict against a 25-year-old graduate student for illegally downloading 30 songs⁵⁴ and a \$1.5 million verdict against a Minnesota woman for illegally downloading 24 songs.⁵⁵

The war was widely unpopular due to harsh penalties, what some called “strong arm” enforcement policies, and misidentified or ill-targeted end-users.⁵⁶ Among the targets of RIAA’s suits were “several single mothers, a dead person[,] a 13-year-old girl[,]”⁵⁷ and a

47. See Caraway, *supra* note 45; Kelly Leong, *iTunes: Have They Created a System for International Copyright Enforcement?*, 13 NEW ENG. J. INT’L & COMP. L. 365, 384 (2007) (stating that Apple obtained “licensing agreements from five major record labels—EMI, Sony, BMG, Vivendi-Universal and AOL/Time-Warner—and licensing agreements with independent record labels”).

48. See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *M.G.M. v. Grokster*, 545 U.S. 913 (2005).

49. See Reynolds, *supra* note 46, at 981.

50. *Id.*

51. See Jonathan Salzman, *Trial to Begin in Music Copyright Case*, BOSTON.COM (Jul. 28, 2009), http://www.boston.com/news/local/massachusetts/articles/2009/07/28/four_record_labels_suing_bu_student/; Yu, *supra* note 8, at 1390 (explaining what defendants face with, what Lawrence Lessig refers to, a “mafia-like choice” between a costly settlement and an outrageously high legal bill incurred in defending the lawsuit”).

52. See 17 U.S.C. § 504(c)(1)-(2) (2006) (statutorily, damages can range from \$200 - \$150,000 per infringement, depending on the willfulness of the infringement and at the court’s discretion).

53. See Reynolds, *supra* note 46, at 980-984 (explaining in detail the life-cycle of a RIAA suit against an end-user); see also Ray Beckerman, *How the RIAA Litigation Process Works*, RAY BECKERMAN PC (Apr. 9, 2008), <http://beckermanlegal.com/howriaa.htm>.

54. Denise Lavoie, *Joel Tenebaum: Jury Awards \$675,000 in Boston Music Downloading Case*, HUFFINGTON POST (Jul. 31, 2009, 08:37 PM), http://www.huffingtonpost.com/2009/07/31/joel-tenenbaum-jury-award_n_249155.html.

55. See David Kravets, *Judge Slashes ‘Appalling’ \$1.5 Million File Sharing Verdict to \$54,000*, WIRED (July 22, 2011, 2:29 PM), <http://m.wired.com/threatlevel/2011/07/kazaa-verdict-slashed>.

56. See Matthew Sag, *Piracy: Twelve Year-Olds, Grandmothers, And Other Good Targets For The Recording Industry’s File Sharing Litigation*, 4 NW. J. TECH. & INTELL. PROP. 133, 133 (2006); see also McBride & Smith, *supra* note 5 (referring to the suits against end-users as a “public relations nightmare”).

57. See Sag, *supra* note 57, at 146; Anders Bylund, *RIAA Sues*

38. 17 U.S.C. § 512(m)(1).

39. See, e.g., McGarrow, *supra* note 17, at 180.

40. See 17 U.S.C. § 512(c) (2006).

41. McBride & Smith, *supra* note 5.

42. *How To Not Get Sued for File Sharing*, ELEC. FRONTIER FOUND. (Jul. 1, 2006), <https://www.eff.org/wp/how-not-get-sued-file-sharing>.

43. Bary Alyssa Johnson, *MPAA Anti-Piracy Lawsuits Target Individuals*, PC MAGAZINE (Aug. 29, 2005, 04:32 PM), <http://www.pcmag.com/article2/0,2817,1853573,00.asp#fbid=kCTuxJnUIgJ>.

44. For example, they were both plaintiffs in *MGM v. Grokster*, 543 U.S. 913 (2005).

45. See, e.g., Brett Caraway, *MPAA Talks to Copygrounds About P2P File Sharing and Copyright*, COPYGROUNDS (Oct. 25, 2010), <http://copygrounds.com/2010/10/05/mpaa-talks-to-copygrounds-about-p2p-file-sharing-and-copyright/> (stating that Fritz Attaway, Executive Vice President and Special Policy Advisor for the MPAA, said the MPAA does target end-users, but due to the nature of the respective copyrighted material, the MPAA has filed fewer suits against end-users than the RIAA).

46. Daniel Reynolds, *The RIAA Litigation War on File Sharing and Alternatives More Compatible with Public Morality*, 9 MINN. J.L. SCI. & TECH., 977, 978 (2008); see also Caraway, *supra* note 45.

family without a computer.⁵⁸ One target of an MPAA suit was a 67-year old Wisconsin grandfather whose grandson illegally downloaded four movies.⁵⁹

To properly assess the results of the industry's mass-litigation campaign, two questions must be examined. First, did the campaign decrease illegal file-sharing of copyrighted material? And second, did the campaign correspond to a decrease in losses suffered by the industry? There is inconsistent evidence regarding the first question.⁶⁰ But, while studies yield differing results when it comes to whether internet downloading decreased after the industry's mass-lawsuit campaign, there is widespread agreement that the industry's anti-piracy campaign did very little, if anything, to stop the downward trend in sales.⁶¹ The "RIAA [sic] reported declining revenue in nine [out of ten years between 2000-2010], with album sales falling an average of 8% each year."⁶² No doubt, other factors contributed to this decline,⁶³ but the RIAA clearly attributes much of it to online piracy. In 2008, the year the RIAA ended its mass-litigation campaign,⁶⁴ the RIAA stated that "global theft of sound recordings cost the U.S. economy \$12.5 billion in lost revenue and more than 71,000 jobs and \$2 billion in wages to U.S. workers."⁶⁵ The film industry did not experience a similar overall decline in sales (not consistently over the years and among its various markets (i.e., home video, box office)),⁶⁶ but in 2008 an MPAA report stated that

Internet piracy cost the film industry \$7 billion.⁶⁷ Further, in 2010 the MPAA stated that online piracy costs the creative industries "billions of dollars" and threatens the job security of "hundreds of thousands" of Americans.⁶⁸

Therefore, the industry's mass-litigation campaign was not effective in deterring peer-to-peer file sharing. Years after the campaign began, both music and movie industry representatives continued to claim that piracy is wide-spread and costs them billions of dollars in lost revenue.

In fact, there is evidence that the mass-litigation campaign *added* to the net losses suffered by the industry:

[T]he lawsuits did not increase the payments to artists by even one penny. Overall, in terms of revenues these lawsuits had little, if any, effect. The majority of [the lawsuits] were settled for amounts ranging from \$3,000 to \$11,000, while the cost of pursuing these lawsuits has often exceeded these sums.⁶⁹

Another study concluded that RIAA recovered only 2% of the money it spent on lawsuits through settlements and verdicts against end-users.⁷⁰

IV. THE JULY 2011 GRADUATED RESPONSE DEAL

A. *Why the Deal?*

When it publicly announced an end to its mass-litigation campaign, the RIAA also announced its interest in working with ISPs to implement a graduated response system.⁷¹ But the ISPs initially denied interest in the program.⁷² In fact, as recently as March 2010,

Americans Head to the Cinema, ARS TECHNICA (Jan. 4, 2010), <http://arstechnica.com/media/news/2010/01/dvd-sales-tank-in-2009-as-americans-head-to-the-cinema.ars>.

67. See MPAA Waffling, *supra* note 22.

68. See Motion Picture Ass'n of Am. Reply Comments at 5-6, In re Preserving the Open Internet Broadband Indus. Practices, 24 F.C.C.R. 13064 (2009), available at <http://www.mpa.org/Resources/46ba617a-4dc9-4fdb-acce-9100ac274af4.pdf>.

69. Lital Helman, *When Your Recording Agency Turns into an Agency Problem: The True Nature of the Peer-to-Peer Debate*, 50 IDEA 49, 65 (2009).

70. See Mike Masnick, *RIAA Spent \$17.6 Million In Lawsuits... To Get \$391,000 In Settlements?*, TECHDIRT (Jul. 14, 2010, 09:44 AM), <http://www.techdirt.com/articles/20100713/17400810200.shtml>.

71. See McBride & Smith, *supra* note 5.

72. See David Kravets, *Top Internet Providers Cool to RIAA*

Computer-Less Family, 234 *Others, for File Sharing*, ARS TECHNICA (Apr. 24, 2006), <http://arstechnica.com/old/content/2006/04/6662.ars>.

58. *Id.*

59. Nate Mook, *MPAA Offers Deal to Sued Grandfather*, BETANEWS (Nov. 4, 2005), <http://betanews.com/2005/11/04/mpaa-offers-deal-to-sued-grandfather/>.

60. See Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725, 736-745 (2005) (summarizing empirical studies reaching both a positive and negative result); see also *RIAA v. The People: Five Years Later*, ELECT. FRONTIER FOUND., 9 (2008), <http://www.eff.org/files/eff-riaa-whitepaper.pdf>.

61. Interestingly, if the studies arguing that illegal Internet downloading decreased due to the mass-litigation campaign are correct, this might mean that (as some argue) illegal downloads of copyrighted materials have little effect on music and movie sales.

62. See David Goldman, *Music Industry's Lost Decade: Sales Cut in Half*, CNN.COM (Feb. 3, 2010), http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/.

63. See *id.* (stating that "the two recessions during the decade certainly didn't help music sales. It's also a bit unfair to compare the 2000s with the 1990s, since the '90s enjoyed an unnatural sales boost when consumers replaced their cassette tapes and vinyl records *en masse* with CDs").

64. See McBride & Smith, *supra* note 5.

65. See MPAA Waffling, *supra* note 22.

66. See, e.g., Jacqui Cheng, *DVD sales tank in 2009 as*

a Verizon representative publicly disavowed ISP involvement in a graduated response: “the government and the courts, not ISPs, are responsible for intellectual property enforcement, and only they can secure and balance the various property, privacy, and due process rights that are at play and often in conflict in this realm[.]”⁷³ However, other ISPs appeared more interested in a graduated response system. For example, in 2009, AT&T publicly admitted to taking part in a “trial” graduated response system.⁷⁴ And in July 2011, all of the major ISPs (including Verizon) formally agreed to the graduated response deal with the MPAA and the RIAA.⁷⁵ No consumer groups took part in negotiating the graduated response.⁷⁶

It is not clear why the ISPs changed their tune and agreed to collaborate with the industry on the graduated response. None of the ISPs have provided much of a public explanation about the shift in policy. Below is a list of various theories to explain this shift in policy – the reality is likely a combination of them all.

1. The Government Made Them Do It

Notably, though the ISPs are passive carriers under the DMCA and have significant safe harbor protection, nothing prevents Congress from amending the DMCA to alter this protection. So it is in the ISP’s best interest to cooperate with government pressure. Recently released e-mails between the U.S. Intellectual Property Enforcement Coordinator, Victoria Espinel, and the industry and ISP leaders reveal that the government was very involved and brought the parties to the table, encouraged the deal, and was kept in the loop regarding the terms of the deal.⁷⁷

3-Strikes Plan, WIRED (Jan. 5, 2009, 11:43 AM), <http://www.wired.com/threatlevel/2009/01/draft-verizon-o/>.

73. See Bridy I, *supra* note 7, at 730 (citing Letter from James W. Cicconi, AT&T executive, to Victoria Espinel (March 24, 2010)).

74. See Sarah McBride, *Relationship Status of RIAA and ISPs: It’s Complicated*, WALL ST. J. DIGITS BLOG (Mar. 26, 2009), <http://blogs.wsj.com/digits/2009/03/26/relationship-status-of-riaa-and-isps-its-complicated/>.

75. Antony Bruno, *Labels Reach Deal With ISPs on Antipiracy Effort*, BILLBOARD (July 7, 2011), <http://www.billboard.biz/bbbiz/industry/legal-and-management/labels-reach-deal-with-isps-on-antipiracy-1005267702.story>.

76. See McSherry, *supra* note 6.

77. See David Kravets, *U.S. Copyright Czar Cozied Up to Content Industry, E-Mails Show*, WIRED (Oct. 14, 2011, 06:30 AM), <http://www.wired.com/threatlevel/2011/10/copyright-czar-cozies-up/#more-31071>; see also Anderson, *supra* note 12 (stating “while ISPs were for years seen more like the ‘common carriers’ of yore, who ran a network and were generally not responsible for policing the uses of that network, government sentiment in key quarters is changing”).

2. ISPs have a Closer Relationship with the Industry than in the Past

“Eight years ago, the Recording Industry Association of America had to sue Verizon to try to uncover the identity of a customer who was sharing music online,” but now the industry enjoys a much more collaborative relationship with ISPs.⁷⁸ For example, Comcast owns a majority stake in NBC Universal, and studios license movies to cable providers as part of video on-demand service. “The [ISPs] want to cooperate with Hollywood because the carriers recognize that their own growth depends in part on bundled content strategies . . . [t]hey don’t want to be just utilities providing Internet access, but premium content distributors as well.”⁷⁹

3. No Longer “Dumb Pipes”

As mentioned in Part II, ISPs have traditionally been considered passive carriers and therefore enjoy the strongest safe-harbor protections in the DMCA. But this may be changing because of (a) the ISPs recent implementation of website-filtering technology and (b) a recent district court decision holding that a passive carrier who engages in filtering is not eligible for § 512(a) safe harbor status.

Many ISPs now implement “Deep Packet Inspection” (DPI) technology, which allows them to examine a user’s Internet activity in great detail and to block access to certain websites.⁸⁰ ISPs are interested in DPI technology for many potential reasons unrelated to copyright infringement: “DPI can be used . . . for detection and filtering of viruses and malware, management of network congestion,” “traffic sorting,” “data mining,” and for “law enforcement purposes, as required by the Communications Assistance to Law Enforcement Act (CALEA), to capture and transmit data to government agents.”⁸¹

In *Arista Records LLC v. Usenet.com, Inc.*⁸² the court held that Usenet.com, a website that acted

78. Ben Sisario, *To Slow Piracy, Internet Providers Ready Penalties*, N.Y. TIMES, Jul. 7, 2011, <http://www.nytimes.com/2011/07/08/technology/to-slow-piracy-internet-providers-ready-penalties.html?pagewanted=all>.

79. See Nate Anderson, *Judge Throws Book at Usenet.com in RIAA Lawsuit*, ARS TECHNICA (July 1, 2009, 12:00 PM), <http://newstocks.com/News/4099511/Pirates-of-the-Web-in-Trouble>.

80. See, e.g., Rob Frieden, *Internet Packet Sniffing and Its Impact on the Network Neutrality Debate and the Balance of Power Between Intellectual Property Creators and Consumers*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 633, 656 (2008); see also Bridy II, *supra* note 24, at 104.

81. Bridy II, *supra* note 24, at 104.

82. 633 F. Supp. 2d 124 (S.D.N.Y. 2009).

as a “‘common carrier’ delivering requested files to subscribers without active involvement”⁸³, was not eligible for the DMCA § 512(a) safe harbor provision.⁸⁴ Though superficially Usenet.com appeared to be a passive carrier (i.e., it did not store user’s uploaded files), the court noted that Usenet “took active measures to create servers dedicated to MP3 files and to increase the retention times of newsgroups containing digital music files.”⁸⁵ Further, “Usenet.com also took [many] steps to control subscriber access to material, including automated filtering and human review to block pornography and block access to certain users.”⁸⁶ Because of the *Usenet* decision, some commentators and scholars concluded that “[w]hile monitoring by itself may not eliminate the safe harbor qualification, deep packet monitoring probably does because the packet header information likely will identify significant information about the nature and type of traffic sufficient to put the ISP on actual notice of any copyright infringement.”⁸⁷ So ISPs may have been more willing to implement the graduated response because, due to DPI, they no longer are immune credible claims of direct copyright infringement. Their rationale may have been that it is better to collaborate with the industry than be sued by it.

4. Jumping on the “International Bandwagon”

The “U.K., France, South Korea, and Taiwan have already incorporated a graduated response into their domestic copyright enforcement systems,” and “[s]imilar legislation is making its way through the legislative process in New Zealand”⁸⁸ And in May 2010, one of Ireland’s major ISP providers, Eircom, instituted a graduated response policy.⁸⁹ The fact that ISPs abroad were willing to collaborate with the industry in combating Internet piracy may have signaled to U.S. ISPs that the graduated response is a

worthwhile endeavor.

B. *The Graduated Response Memorandum of Understanding (“MOU”)*

On July 6, 2011, the major ISPs⁹⁰ signed a “Memorandum of Understanding” (MOU) with the RIAA and the MPAA,⁹¹ implementing a graduated response system in the U.S.. The graduated response system as set forth in the MOU is a sort of “six strikes and you’re maybe out” system. The most notable features of the system are as follows:

- Establishment of the Center for Copyright Information (CCI) to oversee implementation of the graduated response.⁹² The CCI is governed by a six member executive committee, with three members designated by copyright owners and three members designated by the participating ISP’s.⁹³ The CCI also has a three member advisory board, with one representative chosen by the copyright holders, one by the ISPs, and the last chosen by those two members. The advisory board members are not employees of the ISPs or industry players, but rather will be experts from the subject matter area and consumer interest communities.
- A six-step “Copyright Alert” system, involving three stages:⁹⁴

90. *Memorandum of Understanding*, *supra* note 9, at 21-23. The participating ISPs include: SBC Internet Services, Inc., BellSouth Telecommunications, Inc., Southwestern Bell Telephone Company, Pacific Bell Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, Nevada Bell Telephone Company, The Ohio Bell Telephone Company, Wisconsin Bell, Inc., The Southern New England Telephone Company, and BellSouth Telecommunications, Inc. (the AT&T Inc. companies); Verizon Online LLC, Verizon Online LLC – Maryland, and Verizon Online Pennsylvania Partnership (the Verizon companies); Comcast Cable Communications Management, LLC; CSC Holdings, LLC (solely with respect to its cable systems operating in New York, New Jersey, and Connecticut) (the Cablevision systems); and Time Warner Cable Inc.

91. *Id.* at 25. The members of said Associations listed as participating are: Walt Disney Studios Motion Pictures, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, and Warner Bros. Entertainment Inc.; Recordings, Inc., Warner Music Group, Sony Music Entertainment, and EMI Music North America.

92. *Id.* at 3-6.

93. *Id.* at 3.

94. *Id.* at 7-13. The ISPs have some discretion about when to implement each measure. An ISP responds to the first instance of alleged infringement with the Educational Alert. It can respond

83. Bridy II, *supra* note 24, at 122.

84. *Usenet.com*, 633 F. Supp. 2d at 148-49.

85. *Id.* at 148.

86. Anderson, *supra* note 79.

87. Rob Frieden, *Internet Packet Sniffing and Its Impact on the Network Neutrality Debate and the Balance of Power Between Intellectual Property Creators and Consumers*, PENN. STATE UNIV., [http://www.personal.psu.edu/rmf5/Net Neutrality and IPR.htm](http://www.personal.psu.edu/rmf5/Net%20Neutrality%20and%20IPR.htm).

88. Bridy I, *supra* note 7, at 727. While most international graduated response systems are government-run (unlike the July U.S. deal), they still require ISP involvement.

89. *ISP Introduces “Graduated Response” Leading to Disconnection for Illegal Downloaders*, REPORTERS WITHOUT BORDERS (May 28, 2010), <http://en.rs.f.org/ireland-isp-introduces-graduated-response-28-05-2010,37583.html>.

- First stage – Information Alert(s): at this stage, the ISP notifies the subscriber of his/her infringement. The ISP sends a notice to the alleged infringer with the following information: (a) copyright infringement is illegal; (b) users must not engage in illegal infringement; (c) there are lawful methods of obtaining copyrighted works; (d) continuing and subsequent receipt of alerts may result in the ISPs taking action by the application of mitigation measures; (e) in addition to these Mitigation Measures, the Participating ISP may also temporarily suspend or terminate Internet service; and (f) information regarding how to challenge the “Copyright Alerts” – CCI’s appeal process. The ISP issues the Information Alert after the first and second instances of alleged copyright infringement.⁹⁵
- Second Stage - Acknowledgment Alert (for a user’s third and fourth alleged infringements): This alert is similar to the educational step, but it requires the user to acknowledge receipt of the alert (through a click-through mechanism, a landing page, or a pop-up page).⁹⁶
- Third Stage - Mitigation Measures (for a user’s fifth and sixth alleged infringements): At the ISP’s discretion, it can take one of the following steps: temporary reduction in uploading and/or downloading transmission speeds; temporary redirection to a landing page until the user contacts his/her ISP to discuss the Copyright Alerts; or tem-

porary restriction of the user’s Internet access.⁹⁷

- Importantly, at none of the stages *must* the ISP cut off Internet access, though it can. Similarly, should the ISP cut off Internet access, at its discretion it need not disable a user’s IP voice service (VOIP), e-mail account, security service, health service (i.e., home medical monitoring), or Internet video programming service.⁹⁸
- A system of what the MOU labels “independent review” for users with who challenge the notification on any one of six grounds: (1) misidentification of account; (2) unauthorized use of account; (3) the use of the copyright work was authorized by the copyright owner; (4) fair use; (5) misidentification of file; or (6) copyrighted work was published before 1923 (and is in the public domain).⁹⁹
- Users must pay a filing fee of \$35 to invoke review, and must electronically submit their complaint within ten business days of receiving the Copyright Alert.¹⁰⁰
- The “independent reviewer” will be an attorney chosen by a “panel of neutrals,” and the review process “will, to the extent relevant, apply prevailing legal principles as determined by the United States federal courts.”¹⁰¹

1. Problems with the MOU

The parties to the MOU claim that it “seeks to establish a consumer-focused process for identifying and notifying” users of infringing activity, and that the primary goal of the MOU is to “educate consumers, deter online infringement, and direct consumers to lawful online legitimate sources of content.”¹⁰² However, though it may be consumer-*focused*, the MOU contains numerous provisions that are not consumer-*friendly*.

to the second instance of alleged infringement with either the Educational Alert or the Acknowledgment Alert, at its discretion. The ISP responds to the third and fourth instances of copyright infringement with the Acknowledgment Alert. Upon receiving notice of a fifth instance of alleged infringement, the ISP can either issue another Acknowledgment Alert or can implement the Mitigation Measures. The Mitigation Measures are not waivable for the sixth instance of alleged infringement, however. Further, the system is reset after a year: whatever measures have been taken against a user, after a year of non-infringing activity the number of infringements is reset back to zero.

95. *Id.* at 8-9

96. *Memorandum of Understanding*, *supra* note 9, at 9-10.

97. *Id.* at 10-13.

98. *Id.* at 12.

99. *Id.* at 26.

100. *Id.* at 30.

101. *Id.* at 31, 33, 35.

102. *Memorandum of Understanding*, *supra* note 9, at 2.

The MOU is certainly an improvement over the industry's former tactic of targeting unassuming, and sometimes ignorant, end-users with lawsuits after what was often only minimal file sharing. The MOU's focus on education over punishment – at least with the first measure – helps to inform unassuming consumers who may simply not know that peer-to-peer file sharing is considered copyright infringement by the industry.¹⁰³ In fact, according to the RIAA, over 25% of Americans still do not know peer-to-peer file sharing is illegal.¹⁰⁴ But the central problem created by the MOU is that it allows an ISP to slow or cut off users' Internet without ensuring them either due process or neutral enforcement.

Notably, the MOU does not require ISPs to cut off Internet service. But it does not stop them from doing so. And its other "mitigation measures" short of cutting off service – for example, slowing service – are similarly harmful to Internet users. This is because cutting off Internet access is not like stopping a cable TV service if a user does not pay his monthly bill. It denies its users access to a fundamental part of their daily lives – the Internet – and basic civil rights associated with the Internet like speech and assembly – not because users fail to pay their Internet bill, but because of allegedly illegal Internet activity.

While Internet access is not recognized as a civil right in the US,¹⁰⁵ the Internet has been compared to a civil right even by the ISPs: David Cohen, Comcast's executive vice president, stated that "[a]ccess to the [I]nternet is akin to a civil rights issue for the 21st century[; it is] that access that enables people in poorer areas to equalize access to a quality education, quality health care and vocational opportunities."¹⁰⁶ Further, there is a clear trend towards expanding Internet access; for example, "in 2009 [Congress] appropriated \$4.7 billion in economic stimulus funds

to enhance the [U.S.] broadband infrastructure and expand access to underserved populations."¹⁰⁷ Thus, because Internet access is an essential component of daily modern life, "termination of Internet access represents a powerful and far-reaching sanction that directly impacts" the "ability of Internet users to consume media, their ability to work, learn, communicate, manage finances, and participate in the collective life of society."¹⁰⁸

Additionally, the Internet is inextricably linked to numerous already-existing civil rights, chief among them the First Amendment rights of expression and assembly. For example, a Pew Research study concluded that 56% of those involved in a civic or political group used the Internet to communicate with other group members.¹⁰⁹ Current jurisprudence does not consider ISPs state actors.¹¹⁰ Thus, while in *Reno v. ACLU*, the Supreme Court held that while the government cannot substantially restrict speech via the Internet, no law prevents ISPs from doing so.¹¹¹ So a user whose Internet is cut off cannot sue ISPs for violating the user's rights to speech and assembly, even though the Internet is many people's primary forum for both.

Further, the MOU provides users very little in the way of procedural protections. The MOU raises three primary process-related concerns. First, it deprives users of due process they would otherwise get in a federal court. The MOU flips many traditional principles of due process on their head. In the graduated response system, the industry is in essence the "plaintiff" and the users are the alleged "defendant infringers." The burden of proof, however, is on the user, as is the filing fee.¹¹² Further, the user only has ten days to perform research to mount its defense – hardly enough time when going up against industry-backed lawyers in an industry-created system. A second problem with the MOU is that it restricts the universe of potential defenses to copyright infringement to six defined defenses, which do not cover the entire universe

103. However, the neutrality of the educational measures is unclear. It is likely that the education will be one-sided as it is coming from the industry; still, for consumer advocates, this is preferable to a system that penalizes users with costly settlements, default judgments, or jury verdicts.

104. *For Students Doing Reports*, RIAA, <http://www.riaa.com/faq.php> (last visited Feb. 19, 2012).

105. Finland recently became the first nation to make Internet access a legal right. *First Nation Makes Broadband Access a Legal Right*, CNN.COM (July 1, 2010), http://articles.cnn.com/2010-07-01/tech/finland.broadband_1_broadband-access-internet-access-universal-service?_s=PM:TECH.

106. Christopher Mitchell, *Comcast: Internet Access Is Temporarily a Civil Right*, HUFFINGTON POST (Aug. 9, 2011), http://www.huffingtonpost.com/christopher-mitchell/comcast-internet-access-i_b_921608.html.

107. Bridy II, *supra* note 24, at 125-26.

108. *Id.* at 126.

109. Aaron Smith, *Civic Engagement Online: Politics as Usual*, PEW RESEARCH CTR. (Sept. 1, 2009), <http://pewresearch.org/pubs/1328/online-political-civic-engagement-activity>.

110. See, e.g., *Noah v. AOL Time Warner Inc.*, 261 F.Supp.2d 532 (E.D. Va. 2004); *Langdon v. Google Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007).

111. 521 U.S. 844 (1997).

112. See Bridy I, *supra* note 7, at 729 (noting "there is a significant risk of abuse inherent in a system that streamlines enforcement by dispensing with the neutral adjudication of claims").

of potential copyright defenses.¹¹³

A third problem presented in the MOU is enforcement. Though the procedural mechanisms the MOU has in place are lacking, perhaps an even bigger problem for users is that there is no guarantee that the CCI will follow those procedures. As mentioned, the government was very involved in brokering the MOU, and if the CCI threw its procedural handbook out the window, it is likely the government would pressure the industry and ISPs to get back in line. However, because the MOU is essentially a contract between two private entities – the ISPs and the industry – compliance simply cannot be guaranteed.

V. AN ALTERNATIVE TO THE JULY GRADUATED RESPONSE MOU

Because the MOU threatens user's Internet access, threatens the rights associated with Internet access, and provides users no promise of due process in doing so, this Article recommends that a different system be adopted. This Article recommends modifying the graduated response to a system of two warnings followed by charging the user a fee for every subsequent file-sharing instance.

A system that imposes fines for each instance of illegal downloading is superior to the plan outlined in the MOU. Like in the MOU, this system would begin with the copyright holder notifying the ISP of infringing activity. Then, for the first two instances of infringement, the ISP will issue the user a warning. This warning will consist of a notification, an educational pamphlet, and information that the user will be charged if he continues to file-share (much like "Information Alerts" outlined in the MOU). After the first two instances of infringement, the ISP will charge the user a fee for each instance of illegal downloading. The charges will show up on the user's monthly bill. The ISPs and industry groups (preferably in collaboration with consumer groups) can determine reasonable fees; they might even agree on graduating the fees with each infringing activity. The ISPs will then pass on most of the proceeds from the fees (as agreed upon with the industry) to industry groups.

This sharing-fee system is preferable to the plan in the MOU for all parties. First, a fee-sharing system does not slow or cut down Internet access. It is a system where, to the extent there is a punishment for file sharing, the punishment fits the crime. Rather than taking away all Internet access for continued infringing

activity, a user would merely be charged in relation to his activity.

Second, the sharing-fee system provides the industry immediate financial compensation for Internet file-sharing. As mentioned, the MOU does no more than deter file sharing with hopes that users will change their ways and download music legally. A fee has the same deterrent effect, and provides the industry *direct* compensation for losses associated with Internet piracy. In fact, so long as the fine is more than the typical cost of a song or movie download (about \$1 and \$15, respectively)¹¹⁴, the industry could conceivably *profit* from illegal downloads (or more realistically, break even).

The sharing-fee system is also preferable for ISPs, who will not have to impose the harsh mitigating measures outlined in the MOU. While consumers may balk at the fines and blame the messenger, so long as the fees are reasonable and are explained on the bill and in an accompanying educational pamphlet, it is unlikely that the backlash will result in lost customers, at least not any more lost customers than would be the result of a policy that slows or cuts off Internet speed.

A sharing-fee system is not without flaws. For instance, it might be conceived as quasi-punitive because of the fees it levies on users. But despite this flaw, an important aspect of the sharing-fee system is that it does not deprive users of a fundamental element of their daily lives – the Internet. Further, some of the same process and misidentification issues that plagued the industry's mass litigation campaign might still exist with this sharing-fee system. To address this, the ISPs should adopt an appeals system that grants the user all of the defenses to copyright infringement the user would have in a court of law. Moreover, due process concerns are less prevalent in a system that does not deprive users Internet access. Another potential problem with the sharing-fee system is that it may hit poorer users harder than wealthy ones. No doubt, if a user cannot pay his or her Internet bill due to hundreds of dollars in sharing-fees, the ISPs will cut off their service. So the end result of the sharing-fees system *could* be the same as the mitigation measures outlined in the MOU. However, slowing Internet

113. McSherry, *supra* note 5.

114. Dawn C. Chmielewski, *iTunes embraces 3-tier pricing, will remove anti-copy software*, L.A. TIMES, Jan. 7, 2009, <http://articles.latimes.com/2009/jan/07/business/ft-itunes7> (showing that on iTunes, songs cost either 69 cents, 99 cents, or \$1.29); *Frequently Asked Questions (FAQ) for purchased movies*, APPLE, <http://support.apple.com/kb/HT1906> (last visited Mar. 26, 2012) (showing that on iTunes, movie prices range from \$9.99 to \$14.99).

service is not part of the sharing-fee system, and cutting off service will not be at the ISPs' discretion, but only if users do not pay their Internet bill. Moreover, any appeal process under this sharing-fee system should be structured to allow a user to appeal before the bill is due rather than after. This process could be akin to the process of appealing a contested credit card charge, which results in no penalty.

A sharing-fee system is both most efficient for the industry and most protective of user's interests. While the industry chose not to implement a similar proposal posited in the mid-2000s—a voluntary licensing scheme that would allow file-sharing in return for a monthly fee¹¹⁵—it may be more receptive to a sharing-fee system now. Unlike a licensing system, a sharing-fee system would not require the industry to work directly with millions of end-users, which addresses issues of efficiency.¹¹⁶ And the requisite collaboration with the ISPs is already in place thanks to the MOU, making the sharing-fee system easy to implement.

Importantly, a sharing-fee system where infringers pay copyright holders for infringing activity is much more in-line with traditional conceptions of U.S. copyright law than is the current plan outlined in the MOU. In the United States, copyright has traditionally been conceptualized as an economic right, not a moral right. The theory behind moral rights “is that authors of copyrightable works have inalienable rights in their works that protect their moral or personal interests.”¹¹⁷ If copyright law is conceived of as a moral right, then it makes more sense to have a system like the MOU in place – a system that punishes those who infringe on another's personhood rights by taking away some of the infringer's personhood rights, in the present case those rights are Internet access and the expression and assembly rights associated with it. But in the United States, copyright infringement is conceptualized as infringing upon a copyright holder's exclusive monopoly to exploit the creator's work for economic gain. If copyright law is conceptualized in this way, it makes more sense to charge the infringer a sum of money for infringement and place these funds

back in the copyright holder's hands.

VI. CONCLUSION

Though a worthy attempt to target Internet piracy of films and music, the 2011 Graduated Response system ultimately levies severe penalties upon end-users for illegal downloads. These penalties include slowing and potential cut-off of Internet access. Moreover, the MOU does not ensure sufficient procedural protections for users. Instead, a sharing-fee system that charges users in proportion to their infringing downloads would place less of a burden on users and result in greater efficiency and financial recovery for the music and movie industries.

115. Jason Schultz, *File Sharing Must be Made Legal*, SALON (Sept. 12, 2003), http://www.salon.com/2003/09/12/file_sharing_two/.

116. On the challenges of administering a voluntary licensing system to end-users, see Meghan Dougherty, *Voluntary Collective Licensing: The Solution to the Music Industry's Crisis?*, 13 J. INTELL. PROP. L., 405, 429 (2006).

117. Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J., 353, 355 (2006).