COPYRIGHT CONSPIRACY: HOW THE NEW COPYRIGHT ALERT SYSTEM MAY VIOLATE THE SHERMAN ACT

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In July 2011, a consortium of major content providers and Internet service providers announced their intention to implement the Copyright Alert System, a graduated response plan aimed at stemming online copyright infringement by individual users. While other commentators have examined the rise of these systems abroad and certain potential issues with the implementation of such measures in the United States, little has been said about the antitrust implications of a private system of copyright enforcement. This article recounts the history of online infringement leading up to the Copyright Alert System and then analyzes the system from the perspective of antitrust law, taking the position that the system announced raises significant antitrust concerns. The article concludes with recommendations for improving the current system to protect the rights of consumers.

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INTRODUCTION

On July 7, 2011, leaders of the content industries and Internet Service Providers ("ISPs") announced they had reached a landmark agreement for implementing a system of "Copyright Alerts."[1] The highly anticipated[2] system represents the latest line of defense by the content industries against the economic

[1] Press Release, Recording Industry Association of America, *Music, Movie, TV and Broadband Leaders Team to Curb Online Content Theft* (July 7, 2011), http://www.riaa.com/newsitem.php?content_selector=newsandviews&news_month_filter=7&news_year_filter=2011&id=2DDC3887-A4D5-8D41-649D-6E4F7C5225A5 [hereinafter Press Release].

[2] *See* Greg Sandoval, *Exclusive: Top ISPs Poised to Adopt Graduated Response to Piracy*, CNET.COM (June 22, 2011), http://news.cnet.com/8301-31001_3-20073522-261/exclusive-top-isps-poised-to-adopt-graduated-response-to-piracy/.

problems associated with online infringement.[3] While the media has generally responded positively,[4] consumer and civil liberties groups were quick to raise concerns[5] with the new agreement between content owners and ISPs who had been up to now grudging partners in the battle against online infringement.[6]

The new system purports to offer a standard "best practices" framework designed to enable ISPs to effectively alert their individual customers of accusations of online infringement.[7] Studies suggest that Internet users who are educated about copyright infringement and its potential consequences will quickly take steps to ensure that their connection is not used for further infringement.[8] By implementing a system of increasingly severe warnings directed to users accused

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[3] *See, e.g.*, Darren Murph, *ISP's Agree on Copyright Alert System, Plan to Notify You to Death for Piracy Infringements*, ENGADGET (July 7, 2011), http://www.engadget.com/2011/07/08/isps-agree-on-copyright-alert-system-plan-to-notify-you-to-dea/.

[4] *See* Amy Lee, *Top Internet Providers To Step In To Stop Piracy Online*, THE HUFFINGTON POST (July 7, 2011), http://www.huffingtonpost.com/2011/07/07/internet-provide-piracy_n_892385.html; Chloe Albanesius, *Pirates Beware, ISPs Agree to Copyright Alert System* (July 7, 2011), http://www.pcmag.com/article2/0,2817,2388184,00.asp; Eric Engleman, *AT&T Joins Verizon in Web-Piracy Fight to Preempt U.S. Crackdown*, BLOOMBERG (July 7, 2011), http://www.bloomberg.com/news/2011-07-08/at-t-joins-verizon-in-web-piracy-fight-to-preempt-u-s-crackdown.html.

[5] *See CDT, Public Knowledge Joint Statement on 'Copyright Alert System'*, PUBLIC KNOWLEDGE (July 7, 2011), http://www.publicknowledge.org/cdt-public-knowledge-joint-statement-copyright-ale (voicing concern over the allowance of Internet account suspension as a possible remedy); Abigail Phillips, *The Content Industry and ISPs Announce a "Common Framework for Copyright Alerts": What Does it Mean for Users?*, ELECTRONIC FRONTIER FOUNDATION (July 7, 2011), https://www.eff.org/deeplinks/2011/07/content-industry-and-isps-announce-common (voicing concern over the possibility that Internet access will be terminated by ISPs after five or six alerts, the provision that allows failure to secure a wireless router only once as a defense, and educating users about copyright law); Corynne McSherry and 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 (voicing concern over the inadequate representation of subscribers' interest in the executive committee, imposition of mitigation measures on subscribers without adequate due process, use of subscriber education as a means to present subscribers with an unbalanced view of copyright law, and lack of transparency).

[6] *See* Greg Sandoval, *AT&T Exec: ISP Will Never Terminate Service on RIAA's Word* (Mar. 25, 2009), CNET.COM http://news.cnet.com/8301-1023_3-10204514-93.html.

[7] Press Release, *supra* note 2.

[8] *Id. See also* Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1381 (2010) (noting the effective nature of graduated response systems as a deterrent to online infringement).

of online infringement, the parties hope to encourage consumers to confine their online activities to legal ones.[9]

The concept of a graduated response system is not new. Originally developed overseas, many commentators believed it was only a matter of time until some sort of graduated response system made its way to the United States.[10] The topic has already received serious attention from American legal scholars, who have examined the potential interaction of a graduated response system with § 512 of the Digital Millennium Copyright Act ("DMCA"),[11] common carriage,[12] the First Amendment,[13] fair use,[14] and consumer protection.[15]

However, adoption of the Copyright Alert system faces another legal hurdle—one that has elicited little discussion in both the media and from academia.[16] As both a horizontal and vertical agreement between companies who are otherwise competitors, the proposed system may amount to violation of § 1 of the Sherman Antitrust Act.[17] The Sherman Act proscribes private actors from entering into any contract, combination, or conspiracy in restraint of trade.[18] By joining together to combat piracy through private enforcement, the conduct of content owners and ISPs may have crossed the line from a legitimate to an illicit combination in restraint of trade.[19] The antitrust laws are complex, however, and

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[9] *See* Press Release, *supra* note 2.

[10] See Yu, supra note 8, at 1378; Annemarie Bridy, Graduated Response and the Turn to Private Enforcement Ordering in Online Copyright Enforcement, 89 OR. L. REV. 81, 82 (2010).

[11] Yu, *supra* note 8, at 1403–10; Bridy, *supra* note 10, at 87–103.

[12] Bridy, *supra* note 10, at 103–24.

[13] Yu, *supra* note 8, at 1413–16.

[14] *Id.* at 1417–18.

[15] Bridy, *supra* note 10, at 124–31.

[16] *See* James Grimmelmann, *Six Strikes and You're Out at the Antitrust Ball Game?*, THE LABORATORIUM (July 28, 2011), http://laboratorium.net/archive/2011/07/28/six_strikes_and_youre_out_at_the_antitrust_ball_ga; Timothy B. Lee, *What the 1930s Fashion Industry Tells Us About Big Content's "Six Strikes" Plan*, ARS TECHNICA (July 28, 2011), http://arstechnica.com/tech-policy/news/2011/07/what-the-1930s-fashion-industry-means-for-big-contents-six-strikes-plan.ars.

[17] 15 U.S.C. § 1 (2006).

[18] *Id.* The text of the § 1 reads: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." *Id.*

[19] *See, generally,* Lee, *supra* note 16; Grimmelmann, *supra* note 16.

navigating their intricacies remains an ever-challenging goal for many American technology companies.[20]

This article analyzes the new Copyright Alert System from the perspective of antitrust law. Part I discusses the evolution of graduated response, first by recounting the history of online copyright infringement, and then by discussing the development of graduated response systems abroad. It concludes with the salient points of the U.S. graduated response, the Copyright Alert System. Part II shifts the focus to antitrust law, briefly explaining antitrust law and its relationship to copyright law. Next, because the Copyright Alert System most closely resembles a concerted refusal to deal, the evolution of the Supreme Court's doctrine on this form of collusive self-help is explored. Part III then seeks to apply the principles of antitrust law provided in Part II to the Copyright Alert System through a Rule of Reason analysis. The article concludes from this analysis that the system raises significant anticompetitive concerns. The relationship of the parties to each other and the substance of their agreement are discussed first, followed by a discussion of market power. Then, both the potential anticompetitive and pro-competitive effects of the announced agreement are discussed in detail. Finally, because the system has some beneficial elements, Part IV discusses several suggestions for improving the announced system to make sure that it clears any hurdles that antitrust law may place in its path.

I
THE COPYRIGHT ALERT SYSTEM

A. A Brief History of Online Infringement

The Copyright Alert System is only the most recent stage in the evolution of content owners' efforts to protect the value of their works in the face of advancing digital technology. Since the beginning of the Internet, the challenge of adapting copyright law to the information era has been well known. As early as 1993, courts had begun to grapple with complaints of online copyright infringement, while academics were similarly beginning to discuss the ability of the Internet to

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[20] *See, e.g.*, David Goldman, *DOJ Files Antitrust Suit to Block AT&T Merger with T-Mobile*, CNN (Aug. 31, 2011), http://money.cnn.com/2011/08/31/technology/att_tmobile_antitrust/index.htm; Chris Lefkow, *Google Under Scrutiny Over Search Dominance*, GOOGLE (Sept. 19, 2011), http://www.google.com/hostednews/afp/article/ALeqM5hu8xN_IuBB3k1ZGxrZUfrpciaCMw?docId=CNG.457a668ff57c79200805ad29a4efac29.71.

facilitate copyright infringement.[21] The application of copyright law to the Internet, however, was in a state of flux prior to 1998,[22] when Congress passed the Digital Millennium Copyright Act (DMCA).[23]

Signed into law on October 28, 1998, the DMCA was the first legislative enactment specifically designed to clarify the application of copyright law to the Internet. The Act was passed as a response to the adoption by the United States of the 1996 World Intellectual Property Organization (WIPO) Copyright Treaty,[24] which required its members to implement increased intellectual property protection for digital works. Title II of the DMCA, the Online Copyright Infringement Liability Limitation Act,[25] enacted a set of "safe-harbors," through which ISPs could limit exposure to secondary liability for copyright infringement.[26] Qualifying ISPs were specifically immunized from secondary liability for the action of their customers or their automated systems, provided they had no actual or constructive knowledge of the infringement, implemented a "repeat infringer" policy, and responded to requests from copyright holders to remove works that were deemed to be infringing.[27]

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[21] See Alan H. Bomser, et al., A Lawyer's Ramble Down the Information Superhighway, 64 FORDHAM L. REV. 697 (1995); Pamela Samuelson, Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega, 1 J. INTELL. PROP. L. 49 (1993); Don E. Tomlinson, Journalism and Entertainment As Intellectual Property on the Information Superhighway: The Challenge of the Digital Domain, 6 STAN. L. & POL'Y REV. 61 (1994).

[22] *Compare* Religious Tech. Ctr. v. Netcom On-Line Commc'n Services, Inc., 907 F. Supp. 1361, 1365 (N.D. Cal. 1995) (granting summary judgment to ISP for direct and vicarious infringement), *with* Sega Enters. Ltd. v. MAPHIA, 857 F. Supp. 679, 683 (N.D. Cal. 1994) (holding bulletin board liable for contributory infringement).

[23] Digital Millennium Copyright Act, Pub. L. 105-304, Stat. 112 Stat. 2860 (1998) [hereinafter DMCA].

[24] World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65, *available at* http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf.

[25] DMCA, *supra* note 23, at 2877.

[26] *See* 17 U.S.C. § 512 (2006).

[27] *See* § 512(a) (liability limitation for transitory storage); § 512(b) (limited liability for system caching); § 512(c) (limited liability for user generated content); § 512(d) (limited liability for information location tools, i.e. links). As a threshold requirement for these various liability limitations, providers must implement a policy for the termination of access of those deemed "repeat infringers." § 512(i)(1)(A). "Notice-and-takedown" provisions are provided for in § 512(c).

In enacting the DMCA, Congress failed to anticipate the creation in January 1999 of Napster.[28] The effect of the new file-sharing service was to shift the source of online copyright infringement from the centralized online systems controlled by ISPs to users residing in the periphery.[29] Within a year, over 25 million people used Napster software to download music files from the Internet, the vast majority of which were infringing.[30] The Recording Industry Association of America ("RIAA") responded rapidly, filing suit against Napster in December 1999.[31] The United States Court of Appeals for the Ninth Circuit upheld the RIAA's request for a preliminary injunction, holding that Napster, by providing a central repository for the file names, was both contributorily and vicariously liable for the copyright infringement of its users.[32]

Unfortunately, the Whac-A-Mole game had just begun for content owners. No sooner than Napster was vanquished, were other technological tools released that did not rely on the central repository of file names, the key factor to the Ninth Circuit's determination of liability.[33] These software tools either distributed the indexing of files to certain users' computers or used completely decentralized

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[28] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011–12 (9th Cir. 2001); Abbie Woelfel, *The Napster Phenomenon: Turning the Music Industry Upside Down*, UW-LA CROSSE JOURNAL OF UNDERGRADUATE RESEARCH (2001), *available at* http://murphylibrary.uwlax.edu/digital/jur/2001/woelfel.pdf. Napster worked through creating an index of music files on a consumer's computer. This list would then get sent to a central server owned by Napster, and became instantly searchable to any of Napster's other users. *Id.* If another user found a song file of interest, the Napster server would "connect" the two users on the periphery to each other in a "peer-to-peer" connection, and the music file would be copied from one computer to the other. *Id.*

[29] Woelfel, *supra* note 28, at 1.

[30] *Id.* at 2.

[31] *Id.*

[32] *A&M Records*, 239 F.3d at 1024.

[33] Originally, these tools included Gnutella (Morpheus and LimeWire) and FastTrack (Grokster and KaZaA). Matthew Fagin, et al., *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI & TECH L. 451, 461–62 (2002). More recently, BitTorrent has become prevalent, having dispensed with many of the technical challenges raised by the earlier technologies. *See* Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 700–04 (2011). Bridy also notes that centralized online file lockers – or cyberlockers – are now another growing source of online infringement. *Id.* at 704–06.

searches to retrieve file information.[34] Content owners responded by filing lawsuits[35] against the providers of these various tools, but the genie had been let out of the bottle. It was the users of these tools who now posed the greatest threat to the content owners' business model.

Realizing this, content owners aimed their fight at consumers. In September 2003, the RIAA filed the first of 382 lawsuits against individual users for copyright infringement.[36] By February 2004, this number rose to over 2,000.[37] Whether or not these suits reduced file sharing was—and still is—unknown,[38] but the lawsuits were nonetheless roundly condemned by the public.[39] Confronted with this public relations fiasco, content owners changed direction once more, this time toward cooperation with ISPs, and they officially ended the litigation campaign in 2008.[40] Content owners are now firmly invested in what they see as the next promising solution for resolving the problem of online infringement—the graduated response system.[41]

B. The Development of the Graduated Response System

It is no coincidence that, in 2007, content owners were already actively attempting to establish the first graduated response system in Europe. That year the French government announced an agreement—the Olivennes or Elysée

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[34] Stephanos Androutsellis-Theotokis & Diomidis Spinellis, *A Survey of Peer-to-Peer Content Distribution Technologies*, 36 ACM COMPUTING SURVEYS 335, 346 (2004).

[35] *See* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); Arista Records L.L.C. v. Lime Group LLC, 715 F. Supp. 2d 481 (S.D.N.Y. 2010).

[36] Benny Evangelista, Online Music Finally Starts to Rock 'n' Roll, S.F. CHRON., Dec. 29, 2003, at E1; Press Release, Recording Industry Association of America, Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online, RIAA (Sept. 8, 2003), http://www.riaa.com/newsitem.php?id=85183A9C-28F4-19CE-BDE6-F48E206CE8A1.

[37] *Id.*

[38] *See* Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907, 922 n.93 (2004); Jefferson Graham, *College Students Face Lawsuits on File Sharing*, USA TODAY (Apr. 12, 2005), http://www.usatoday.com/tech/news/2005-04-12-internet2-suit_x.htm.

[39] Wendy Davis, *RIAA Ceases Suing Peer-to-Peer Users*, MEDIAPOST (Dec. 22, 2008), http://www.mediapost.com/publications/article/97102/riaa-ceases-suing-peer-to-peer-users.html.

[40] *Id.*

[41] 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.

agreement—between ISPs and the film and music industries.[42] This agreement later led to the *projet de loi favorisant la diffusion et la protection de la création sur internet* ("bill to support the diffusion and protection of creation on the internet"), introduced to the French parliament in June 2008.[43] The bill would ultimately create *Loi HADOPI*, an agency tasked with supervision over the implementation of the law.[44]

The procedural framework was as follows: HADOPI would receive complaints from content owners regarding online infringement.[45] In turn, it would send two warnings to an Internet user regarding infringement by email or registered letter, the second more seriously worded ("graduated") than the first.[46] On the third accusation of infringement, or "third-strike," Internet users could either pay a monetary settlement, have their Internet connection suspended for three months to a year, or have a subpoena issued against them.[47]

The bill was fiercely criticized by citizen's advocacy groups such as *UFC Que Choisir* and *La Quadrature Du Net*, who argued "[t]his text is contrary to European law, whether in the field of human rights or free competition. It denies the social, economical and technical realities and demonstrates a serious lack of reflection concerning digital technology and related issues."[48] Opposition notwithstanding, the bill was approved by the French parliament and became law in 2009.[49] Notably, in response to a ruling by the French constitutional court that

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[42] See Jeremy de Beer & Christopher D. Clemmer, Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?, 49 JURIMETRICS J. 375, 389 (2009).

[43] Patrick Van Eecke & Maarten Truyens, *Recent Events in EU Internet Law*, 12 No. 4 J. INTERNET L. 28, 29 (Oct. 2008).

[44] *Id.* "*Loi HADOPI*" is a shortened acronym for the agency, known as the *Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet* or the High Authority for Dissemination of Works and Protection of Rights On the Internet. *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Christophe Espern, *Exclusive*: *The Latest "Flexible Response" French Law Draft*, LA QUADRATURE DU NET (May 6, 2008), http://www.laquadrature.net/en/exclusive-the-latest-flexible-response-french-law-draft.

[49] Eric Pfanner, *France Approves Wide Crackdown on Net Piracy*, N.Y. TIMES (Oct. 23, 2009), http://www.nytimes.com/2009/10/23/technology/23net.html.

the original law was invalid, the bill's passage became contingent on the additional protection of judicial review prior to account suspension.[50]

France was not the only European government confronted with rising demands of content owners for the adoption of graduated response systems. In late 2008, the United Kingdom telecom regulator (OFCOM), working at the behest of the UK government, came to an agreement with six of the largest ISPs to implement such a system.[51] The UK plan, however, did not go as far as the French system in pushing for the suspension of Internet service and instead resorted to sanctions (such as speed throttling and content filtering) in response to allegations of infringement.[52]

In February 2009, Irish broadband provider Eircom agreed as part of a settlement with content owners to implement a gradual response system and to disconnect Internet users accused of infringement after three offenses.[53] Ireland remains the only country to have implemented a graduated response system through means other than legislative enactment.

Some European states firmly rejected graduated response measures. The Secretary of Justice for Germany stated that such a system was not "a fitting model for Germany or even Europe."[54] Denmark[55] and Spain[56] also rejected a graduated response system. However, the example spread elsewhere worldwide, and in April 2009, South Korea passed its own version.[57] Stricter than the French system, user

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[50] Nate Anderson, *French Court Savages "Three-Strikes" Law, Throws It Out*, ARS TECHNICA (June 10, 2009), http://arstechnica.com/tech-policy/news/2009/06/french-court-savages-3-strikes-law-tosses-it-out.ars.

[51] De Beer, *supra* note 42, at 392; Van Eecke, *supra* note 43, at 30.

[52] *Id.*

[53] Patrick Van Eecke & Maarten Truyens, *Recent Events in EU Internet Law*, 12 No. 9 J. INTERNET L. 26, 26-27 (Mar. 2009).

[54] *Id.*

[55] *Id.*

[56] Howell Llewellyn, '*Three-Strikes' Off Anti-Piracy Agenda In Spain*, BILLBOARD.BIZ (June 22, 2009), http://www.billboard.biz/bbbiz/content_display/industry/news/e3i8071e0d9c25cb6b876d3771fb7e3d102.

[57] IFPI, IFPI DIGITAL MUSIC REPORT 2011 18, *available at* http://www.ifpi.org/content/library/DMR2011.pdf.

accounts in South Korea are suspended after the first accusation.[58] Taiwan has also followed suit.[59]

In April 2010, the United Kingdom signed the Digital Economy Act into law.[60] The Act implemented much of what had previously been a voluntary system and specifically gave OFCOM the authority to promulgate rules for punitive actions against repeat offenders, including service suspension.[61] New Zealand followed the U.K. in April 2011, passing the Copyright (Infringing File Sharing) Amendment Act 2011.[62] Purportedly, Australia, Brazil, Hong Kong, and Japan are also monitoring the success of these measures in other countries with an eye toward implementing their own graduated response systems in the future.[63]

To date, content owners continue to press for countries throughout the world to adopt graduated response systems into law. For a short period of time, graduated response was a component of the Anti-Counterfeiting Trade Agreement.[64] This addition, however, proved to be contentious, and the enforceable provisions regarding graduated response were excised from the final treaty.[65] More recently, content owners have been applying pressure on the Australian government to implement a graduated response law.[66] Such efforts

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[58] *Id.*

[59] IFPI, IFPI DIGITAL MUSIC REPORT 2010 24, *available at* http://www.ifpi.org/content/library/dmr2010.pdf.

[60] Digital Economy Act of 2010, *available at* http://www.legislation.gov.uk/ukpga/2010/24/contents.

[61] *Id.* at § 9. The Act has yet to be implemented and recent news reports illustrate the complexities in creating a graduated response system in the U.K. *See* Ben Woods, *OFCOM: Digital Economy Act Still Needs Clarity*, ZDNET (Oct. 20, 2011), http://www.zdnet.co.uk/news/regulation/2011/10/20/ofcom-digital-economy-act-still-needs-clarity-40094244/.

[62] Copyright (Infringing File Sharing) Amendment Act 2011, *available at* http://www.legislation.govt.nz/act/public/2011/0011/latest/DLM2764312.html.

[63] IFPI, *supra* note 59, at 25. IFPI also maintains Germany is considering adoption of a graduated response system, contrary to the statements made by their public officials. *Id.*; *supra* notes 53–58 and accompanying text.

[64] *See* Annemarie Bridy, *ACTA and the Specter of Graduated Response*, 26 AM. U. INT'L L. REV. 559 (2011).

[65] *Id.* at 568–69. Even excised, however, the final draft contained language encouraging cooperation among ISPs and copyright owners. *Id.* at 569–71.

[66] Asher Moses, *Music and Film Industries Split Over Pirates*, SYDNEY MORNING HERALD (June 6, 2011), http://www.smh.com.au/technology/technology-news/music-and-film-industries-split-over-pirates-20110606-1fo8q.html.

continue to be pushed even in light of a May 2011 report by the Human Rights Council of the United Nations declaring graduated response to be a violation of the International Covenant on Civil and Political Rights.[67]

No other country at this time appears to be considering such legislation. As a result, further implementation throughout the world of graduated response systems will likely come from private agreements between ISPs and content owners.

C. U.S. Graduated Response: The Copyright Alert System

With no graduated response legislation in the United States proposed yet, content owners have turned to an alternative: private negotiation with domestic ISPs.[68] After several years of talks, in 2011, various ISPs and content owners finally announced the creation of the United States graduated response system.[69] Reportedly, the Obama Administration was actively involved behind the scenes in the negotiations and is highly supportive of the announced agreement.[70]

In their Memorandum of Understanding, the parties agreed to a comprehensive graduated response system, including the creation of a private governing body, the development of technical measures to identify online infringement and act on it, the creation of a comprehensive framework for informing and punishing consumers accused of copyright infringement, and the establishment of a due process system for those consumers accused of infringement who wish to challenge their punishment.

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[67] U.N. Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 78, U.N. Doc. A.HRC.17.27 (May 16, 2011), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

[68] *See supra* notes 39-41 and accompanying text.

[69] Press Release, *supra* note 1.

[70] 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.

1. Creation of the Center for Copyright Information

The Memorandum of Understanding ("Memorandum") between ISPs and content owners was finalized for signature by the parties on July 6, 2011.[71] The Motion Picture Association of America ("MPAA") and RIAA represented the interests of content owners. A number of the individual members of both the MPAA and RIAA, including most of the major movie studios and record labels, are also signatories to various parts of the Memorandum. Sixteen ISPs are signatories to the agreement, including Verizon, Comcast, Time Warner Cable, AT&T, and SBC Internet Services. Together, these various ISPs represent more than 60% of the overall ISP market as of August 2011.[72]

According to the recitals, online copyright infringement "imposes substantial costs on copyright holders and the economy each year."[73] The Memorandum further notes that online infringement may also increase network congestion, impacting individuals' legitimate use of the Internet. Recognizing that government plays an important role in enforcing copyright law, the Memorandum asserts that the viral nature of the Internet necessitates alternative solutions to the problem of online infringement:

> Such efforts must respect the legitimate interests of speech, in accessing legitimate content, and in being able to challenge the accuracy of allegations of Online Infringement. This work should include an educational component because evidence suggests that most informed consumers will choose lawful services and not engage in Online Infringement. This work also should include the development of solutions that are reasonably necessary to effectuate the rights that are granted by copyright without unduly hampering the legitimate distribution of copyrighted works online or impairing the legitimate rights and interests of consumers and ISPs. Such efforts serve not only the shared interests of creators and distributors of creative works, but also the interests of Internet users who benefit from constructive measures aimed at education and deterrence in lieu of litigation with its attendant costs and legal risk.[74]

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[71] Mem. of Understanding (July 7, 2011), *available at* http://www.copyrightinformation.org/sites/default/files/Momorandum of Understanding.pdf.

[72] *ISP Usage and Market Share*, STATOWL.COM, http://www.statowl.com/network_isp_market_share.php (last visited April 27, 2012).

[73] Mem. of Understanding, *supra* note 71.

[74] *Id.*

The Memorandum establishes the Center for Copyright Information ("CCI") to oversee the operation of the Copyright Alert system.[75] The CCI is directed by a six-member executive committee, with three members designated by each of the content owner representatives and participating ISPs. An executive director is chosen by a majority of the committee. A three member advisory board is also created, with one member appointed by each side, and the third member selected by the two designees. The advisory board is intended to represent subject matter expertise in both copyright and ISP technology, as well as the interests of consumers. The CCI is tasked with developing an educational program regarding online infringement, legitimate means for obtaining digital works—either online or elsewhere—and technical means that enable consumers to secure their networks to avoid providing others with a means for engaging in online infringement.[76]

2. Identifying Infringing Content

The Memorandum requires content owner representatives to create various methods of identifying peer-to-peer online infringement. Interestingly, the Memorandum specifies that content owners should focus their major efforts on identifying instances of peer-to-peer activity where the files consist of unauthorized copyrighted works in complete or substantially complete form and avoid identification of *de minimis* infringement, probably so as to focus on the worst infringers and reduce the amount of work performed by ISPs.[77] ISPs are tasked with developing technical measures that identify consumers tied to specific IP addresses and allow ISPs to keep a record of repeat alleged infringers.[78] They are further required to develop the technical means to implement a graduated response system.

The CCI is required to retain independent experts to evaluate each of these proposed technical measures.[79] The evaluations are confidential, and only general descriptions of each party's technical implementations are available to the other parties of the Memorandum. In addition, a content owner may not issue notices of alleged infringement to ISPs until its particular methodology for identifying peer-

[75] *Id.* at § 2(A)-(D).
[76] *Id.* at § 3.
[77] *Id.* at § 4(C).
[78] *Id.* at § 4(A).
[79] *Id.* at § 4(B).

to-peer infringement has been reviewed by an independent expert and deemed sufficiently reliable at identifying illegal downloading.[80]

The Memorandum also requires ISPs to amend their Acceptable Use Policies and Terms of Service to reflect that copyright infringement by a consumer violates these policies.[81] The policies must further authorize ISPs to implement Mitigation Measures, as defined below, against repeat infringers. These changes are in addition to any pre-existing policies an ISP may have already implemented under § 512 of the DMCA. Indeed, the Memorandum includes an explicit disclaimer that the ISP's § 512 repeat infringer policy is neither part of, nor enforceable under, the Memorandum.[82]

3. Copyright Alert Program

Under the Memorandum, each ISP is required to create a graduated response system, referred to as the Copyright Alert Program.[83] Copyright Alerts are a series of notices and/or remedial measures directed to an ISP customer in response to the receipt of an allegation of infringement by a content owner. The program is designed to follow a four-step escalation procedure over a series of up to six alerts given to consumers.

First is the Initial Educational Step.[84] Upon receipt of notice from a content provider, an ISP is required to notify their customer of the allegation of infringement and advise the customer that infringement is illegal and that the customer is responsible for all users of their account. The notice should also direct the customer to legitimate alternatives for obtaining the content. Further, ISPs are required to warn the customer that continued infringement might result in the application of Mitigation Measures. Customers are to be advised that prior to the implementation of a Mitigation Measure, they will have an opportunity to seek a due process review. The Memorandum permits, but does not require, an ISP to repeat the Initial Educational Step a second time.

[80] *Id.* at § 4(C).
[81] *Id.* at § 4(F).
[82] *See id.* at 9 n.1.
[83] *Id.* at § 4(G).
[84] *Id.* at § 4(G)(i).

Second is the Acknowledgement Step.[85] The notice will require the customer to acknowledge receipt of the Copyright Alert and agree to cease any infringing conduct, although it will be worded in such a way that the customer will not be required to admit any infringement. The notice will also inform the customer that the ISP will respond to any lawful process made by a content provider or government agency requesting the customer's identity. The ISP will require the acknowledgement through the redirection of the customer's Web browser to a "landing page," or via a "pop-up" notice within the browser.[86] An ISP will deliver at least two Acknowledgement Step notices before escalating to the next level.

Mitigation Measures are the third level of escalation.[87] Mitigation Measures require that the customer acknowledge receipt of a notice that sets forth the specific measure the ISP will apply and, further, gives the customer the opportunity to seek review through a dispute resolution system. If the customer does not dispute the notice within ten business or fourteen calendar days, the ISP will implement various physical measures, which include temporarily stepping-down a customer's Internet service to a slower speed, temporarily redirecting the customer's Web browser to a landing page that will require the customer to contact the ISP or complete a meaningful education program on copyright infringement, or implementing other similar restrictions that the ISP deems equivalent. ISPs are not required to disable a customer's access to voice over IP, email, multichannel video programming, or security/home-health monitoring services. An ISP is allowed to waive implementation of this first active step if they direct their customer to a "final warning" notice.

The final level of escalation is the Post Mitigation Measures step.[88] As with the Mitigation Measures step, the ISP will give notice of the alleged infringement, informing the customer of his or her opportunity to seek review. If the customer does not seek review, the ISP will implement one of the physical measures

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[85] *Id.* at § 4(G)(ii).

[86] A "landing page," as referred to here, is a web page that seizes control of a web browser and displays on a computer before an Internet user may browse to other websites. They are commonly used for access control in places with public Wi-Fi networks to log in before a person may browse the Internet. *See, e.g.*, WORLDSPOT.NET, http://worldspot.net (last visited Apr. 25, 2012). A "pop-up" notice opens a second browser window which serves a similar functionality.

[87] Mem. of Understanding, *supra* note 71, at § 4(G)(iii).

[88] *Id.* at § 4(G)(iv).

described above. In addition, an ISP may at any time take action under its DMCA § 512 repeat infringer policy. An ISP is not required to continue sending notices during the Post Mitigation Measures period, but must continue to track and report the receipt of infringement allegations for use in any lawsuit initiated by the content provider.

A customer is provided a seven-day grace period between the issuance of each Copyright Alert to allow the customer to abate any ongoing online infringement.[89] If multiple copyright notices are received simultaneously, an ISP is only required to issue a single Copyright Alert within that seven-day period. Further, the content owners are allowed to allocate among themselves the number of ISP notices they are entitled to send in a one-month period.[90] ISPs may cease processing notices temporarily if the number of notices overwhelms the ISPs capability to reasonably respond.[91] If twelve months pass between the receipt of allegations of infringement against a specific customer, the ISP will reset the counter of alerts received by the customer back to the beginning.[92]

4. Due Process Under the Copyright Alert System

A customer is not entitled to challenge the content provider's notice of infringement prior to the Mitigation Measures step.[93] At that time, the current Copyright Alert and all prior alerts received against that customer leading up to the Mitigation Measures alert become subject to a due process challenge.[94] In order to initiate a challenge, the customer must pay a filing fee of thirty-five dollars, unless they qualify for a hardship waiver.[95] This fee is refundable in the case of a favorable decision. Reviews are to be performed by lawyers chosen by a panel of neutrals. The agreement is silent on the mechanics of the due process proceedings, leaving much of the system to be fleshed out in the future. For example, there is no indication that a customer has any right to appear in person for a hearing to challenge accusations of infringement, or to obtain any information from the content owners or ISPs regarding the alleged infringement by way of limited discovery.

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[89] *Id.* at § 4(G).
[90] *Id.* at § 5(C).
[91] *Id.* at § 5(D).
[92] *Id.* at § 4(G)(v).
[93] *Id.* at § 4(H).
[94] *Id.* at 30, Attachment C, § 4.1.4.
[95] *Id.* at 30, Attachment C, § 4.1.6.

The substance of a customer's challenge to the notice of infringement is limited to six grounds.[96] First, the customer may claim their account was misidentified as one engaged in infringement.[97] The content owner's method of identifying infringing IP addresses is entitled to a rebuttable presumption of correctness. Second, a customer may claim their account was used in an unauthorized manner by someone who is not a member or invitee of their household.[98] Under this defense, a customer is given only one chance to secure an open wireless router against unauthorized use. Third, a customer may assert they had the permission of the content owner, which must be supported by documentary evidence.[99] Fourth, a customer may assert fair use, which is examined "under prevailing principles of copyright law" as determined by an independent expert.[100] Fifth, a customer can assert that the file at issue is not the alleged copyrighted work.[101] However, there is a rebuttable presumption that the content owner has correctly identified the work. Finally, a customer may assert that the work in question was first published prior to 1923.[102]

II
ANTITRUST

Before analyzing the Copyright Alert System as a potential antitrust violation, brief introductions to antitrust law and its relationship to copyright are in order. Antitrust law is a complex subject, relating the ever-evolving field of economic theory to the practicalities of the law's ability to correct market failures. An overview of antitrust law is followed by a discussion of its relationship to copyright law. Finally, because the enforcement provisions of the Copyright Alert System most closely resemble a group boycott, a variety of self-help enforcement, the development of the antitrust doctrine regarding boycotts is applied to the case at hand.

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[96] *Id.* at 26, Attachment C, § 1(i)-(vi).
[97] *Id.* at 27, Attachment C, § 2.1.
[98] *Id.* at 27, Attachment C, § 2.2.
[99] *Id.* at 27, Attachment C, § 2.3.
[100] *Id.* at 28, Attachment C, § 2.4.
[101] *Id.* at 28, Attachment C, § 2.5.
[102] *Id.* at 28, Attachment C, § 2.6. This provision is curious in that there are many items in the public domain that were published after 1923 due to either the failure to observe the proper formalities or because the original term was never renewed.

A. Brief Overview of Antitrust Law

Antitrust law—or competition law—is generally concerned with promoting and maintaining competition through the regulation of exclusionary business conduct. Competition is said to enhance the efficiency of the marketplace and benefit society as a whole.[103] Without competition, cartels of firms, or single firms known as monopolists, are able to extract rents from consumers by restricting the output of goods or services and raising prices to supracompetitive levels.[104] Monopolistic behavior results in economic waste to society, or "deadweight loss," as wealth is transferred from consumers to monopolists.[105]

In the United States, the Sherman Act[106] and the Clayton Act[107] are the two main statutes that implement antitrust law. Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[108] The Supreme Court has held since 1911 that the scope of the law only extends to unreasonable restraints of trade, as all contracts can be considered restraints of trade to some degree.[109]

The Sherman Act owes its existence to the rise of large trusts such as the Standard Oil Company in the late nineteenth century.[110] These entities arose even though the common law at that time forbade such combinations in restraint of trade.[111] While a person injured by such a combination had standing to sue for relief under the common law, there was no effective enforcement mechanism through which the government could intervene.[112] Congress passed the Act in 1890, with strong public support. The Sherman Act, among other provisions, enabled the Attorney General to sue to enjoin anticompetitive behavior.[113]

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[103] Keith N. Hylton, Antitrust Law: Economic Theory and Common Law Evolution 12 (2003).
[104] *Id.* at 12–13.
[105] *Id.*
[106] 15 U.S.C. §§ 1-7.
[107] 15 U.S.C. §§ 12-27.
[108] 15 U.S.C. § 1.
[109] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 87 (1911).
[110] William Letwin, Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act 54–55 (1965).
[111] *Id.* at 80.
[112] *Id.* at 81.
[113] *Id.* at 94.

Legislators declared that the purpose of the Act was to statutorily enact what had already been a matter of common law.[114] The subsequent judicial interpretation of the Act has also followed a common law-like trajectory, leading some to consider the Sherman Act to be the enabling legislation of the federal common law of competition.[115]

Over the years, the objectives of antitrust enforcement have evolved.[116] Originally, the goals of the antitrust laws were viewed as most effectively furthered through the shielding of small businesses from being underpriced and put out of business, or even bought out, by larger competitors.[117] More recently, the law has been interpreted to protect the welfare of individual consumers, aiming to keep prices as low—and the supply of goods and consumer choice as high—as possible.[118] Thus, the law has shifted its focus from aiding competitors to focusing directly on the process of competition.[119]

The antitrust laws recognize both *per se*, or rule-based violations of the statutes, as well as an intermediate standard called the Rule of Reason.[120] *Per se* antitrust offenses are those practices that the Supreme Court has deemed are

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[114] *Id.* at 96. "It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government." *Id.* (quoting 21 Cong. Rec. 2456). *But see* RICHARD A. POSNER, ANTITRUST LAW 34–35 (2d ed. 2001) (stating the draftsmen of the Sherman Act "borrowed common-law terminology, but without meaning to codify the common law of competition and monopoly.").

[115] *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 52 (2d ed. 1999); Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 266, 267–68 n.9 (1986) (setting forth similar statements from the various different schools of antitrust theorists). For an interesting critique of the "common law" nature of antitrust, see generally *id.*

[116] *See* HYLTON, *supra* note 103, at 40; David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 BERKELEY TECH. L.J. 729, 741–65 (2001).

[117] *See, e.g.*, 95 Cong. Rec. 11484, reprinted in 4 KINTNER, FEDERAL ANTITRUST, LAWS AND RELATED STATUTES 3476 (1980); United States v. Von's Grocery Co., 384 U.S. 270 (1966); HYLTON, *supra* note 103, at 40.

[118] HYLTON, *supra* note 103, at 40–42.

[119] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

[120] HYLTON, *supra* note 103, at 104–31; POSNER, *supra* note 114, at 39. A rule-based violation has lower administrative costs as one can observe the facts and determine whether they violate the rule. A standard-based violation, also known as "totality of the circumstances," requires a much more in depth analysis of all of the facts and a balancing of them before a court may pass judgment, significantly raising the administrative costs.

without any social value, such as direct price fixing between horizontal competitors.[121] The administrative advantage of a strict rule in these circumstances provides both government and private industry bright line guidance on what are not allowable practices.[122] For those types of anti-competitive behavior that may also have significant pro-competitive benefits, courts examine the conduct under a standard known as the Rule of Reason.[123] In a Rule of Reason analysis, courts first look to see if the group accused of improper conduct has market power, or the power to lower output or raise prices without significant market response.[124] If market power exists, courts then review the anticompetitive effects of the challenged practice and balance them against any pro-competitive justifications offered for the conduct.[125]

B. The Relationship Between Antitrust Law and Copyright

At first glance, antitrust law and copyright appear to conflict with each other. In fact, they literally do. Antitrust law seeks to limit the rent seeking that monopoly power allows.[126] Copyright law, on the other hand, seeks to reward authors with a government-granted monopoly so that the author may obtain rents in excess of what their product would otherwise provide.[127]

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[121] HYLTON, *supra* note 103, at 116; Posner, *supra* note 114, at 39. Horizontal refers to competitors at the same level of the distribution chain, i.e. retailers, wholesalers, manufacturers, etc. Price-fixing is an agreement to sell items at a certain price, normally one that is greater than a competitive market would otherwise provide.

[122] HYLTON, *supra* note 103, at 116, 129–31; POSNER, *supra* note 114, at 39.

[123] HYLTON, *supra* note 103, at 104–05.

[124] California Dental Ass'n v. FTC., 526 U.S. 756, 782 (1999) (Breyer, J., dissenting) (noting that there are "four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?"). Market power is generally determined using the "hypothetical monopolist" test, which seeks to define a market where the companies at issue could impose a small but significant and non-transitory increase in price for at least one year. *See* U.S. Dep't of Justice, Fed. Trade Comm'n, Horizontal Merger Guidelines 9, Aug. 19, 2010, *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

[125] *California Dental Ass'n*, 526 U.S. at 782 (Breyer, J., dissenting).

[126] *See* Mem. of Understanding, *supra* note 71, at § 4(C) and accompanying text.

[127] Aaron Xavier Fellmeth, Copyright Misuse and the Limits of the Intellectual Property Monopoly, 6 J. Intell. Prop. L. 1, 3 (1998).

However, the underlying purpose of both laws—correcting market failures—gives the two more in common than a superficial view of either would indicate.[128] In the case of copyright, the existence of a market failure comes from the very nature of copyrighted expression. While the initial costs of creating a single unit of copyrighted material may be quite high, the marginal cost of creating each additional unit after the first is negligible.[129] That is, each additional unit of copyrighted material created after the first costs only the minimal time and material needed to create a duplicate—which in the case of digital content is *de minimis*. Faced with this fact, the government grants to the author the power to exclude others from reproducing a copyrighted good to prevent other producers or customers from free-riding off the copyright owner's initial capital investment. A copyright thus allows the author to earn a fair (or even excessive) return on their investment.[130] As noted by antitrust and intellectual property scholars, "[l]imited exclusive rights have long been seen as desirable and useful rewards for the inventors and creators[,]" and serve as a way to increase their incentives to continue to innovate.[131]

Antitrust law also concerns itself with innovation.[132] Some theorists have surmised that small companies may be more likely to innovate than larger companies with higher market share because the latter must also devote resources to preserve their existing market power.[133] According to the mainstream view though, the pressure to innovate is a direct result of competition, as each competitor seeks to create newer, more desirable products, or lower their own marginal costs of production of goods in an attempt to increase profits and better satisfy consumer needs.[134] Seen in this light, antitrust law, by maintaining the competitive environment, partially serves the same purpose as copyright law – to provide an environment in which innovation can flourish.

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[128] *Id.*

[129] Olivier Bomsel & Heritiana Ranaivoson, *Decreasing Copyright Enforcement Costs: The Scope of a Graduated Response*, 6 REV. ECON. RES. ON COPYRIGHT ISSUES 13, 15 (2009).

[130] *Id.*

[131] Ilkka Rahnasto, Intellectual Property Rights, External Effects, and Anti-trust Law: Leveraging IPRs in the Communications Industry 2 (2003).

[132] McGowen, *supra* note 116, at 765.

[133] *Id.* at 768.

[134] *Id.* at 769.

C. Private Enforcement and Group Boycotts

One aspect of antitrust law that is especially relevant to the Copyright Alert System is its concern with self-regulation, self-help, and methods of 'private enforcement' by industry participants through the use of mandatory boycotts. A mandatory boycott is an agreement by competitors to refuse to deal with a particular party, usually intended to punish that party for violating rules set forth by the private entities. Over the years, the Supreme Court has looked askance at private industry efforts to create private enforcement mechanisms, especially those that mirror powers traditionally within the domain of the state. The enforcement of intellectual property rights is one such power.

1. Early Boycott Cases – Per Se Liability

The Supreme Court first analyzed a group boycott under the Sherman Act in 1914 in *E. States Retail Lumber Dealers' Ass'n v. United States*.[135] A group of lumber retailers had banded together for the purpose of boycotting wholesalers who sold directly to consumers.[136] The dealers argued that such behavior fell within the exclusive right of the dealers to trade with their consumers in the retail market.[137] The Court noted that, although every retailer individually had the right to stop trading with the wholesalers, combining in a group to do so constituted a conspiracy in restraint of trade.[138] Noting again that Congress had the sole right to regulate interstate commerce and that it had exercised this right by banning agreements of this nature, the Court held the boycott illegal under the Sherman Act.[139]

Later, in the 1930s, manufacturers of textiles and garments formed the Fashion Originators' Guild of America (FOGA) in order to combat 'style piracy'—the practice of copying garment patterns and designs created by other manufacturers—claiming that style piracy constituted a form of free-riding on the manufacturers' design innovations.[140] FOGA operated to protect fashion firms by boycotting any seller who sold pirated garments.[141] FOGA even maintained a

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[135] 234 U.S. 600 (1914).
[136] *Id.* at 606 (1914).
[137] *Id.* at 611.
[138] *Id.*
[139] *Id.* at 614.
[140] Fashion Originators' Guild of America v. F.T.C., 312 U.S. 457, 461 (1941).
[141] *Id.* at 461–62.

system of secret shoppers to enforce their policy. If a retailer was found to have violated the policy, there was an "elaborate system of trial and appellate tribunals" to determine whether a retailer deserved punishment.[142]

Upon discovering this system, the Federal Trade Commission brought an enforcement action under the antitrust laws and found FOGA to have violated Section 3 of the Clayton Act.[143] On appeal, the Supreme Court noted that "the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the [antitrust laws.]'"[144] Objecting to the seizure of government-like authority by private industry, the Court found this agreement constituted a *per se* violation of the antitrust laws.[145]

Four years later, the Supreme Court reaffirmed the *Fashion Originators' Guild of America* ruling in *Associated Press v. United States*.[146] The individual newspaper members of the Associated Press were required by the by-laws of their agreement to refuse to sell news to non-members and allowed current members to block potential new members from joining the group.[147] The Justice Department sued, arguing that the by-laws represented an illegal restraint of trade.[148] Discussing the by-law provisions in elaborate detail, the Court noted that they "tied the hands of all of its numerous publishers, to the extent that they could not and did not sell any part of their news so that it could reach any of their non-member competitors."[149] Citing *Fashion Originators' Guild*, the Court also held the AP by-laws, like the lumber dealers' boycott before it, "trenches upon the power of the national legislature," finding a *per se* violation of the Sherman Act.[150]

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[142] *Id.* at 462.
[143] *Id.* at 463–64
[144] *Id.* at 465.
[145] *Id.* at 468.
[146] Associated Press v. United States, 326 U.S. 1 (1945).
[147] *Id.* at 4.
[148] *Id.*
[149] *Id.* at 13.
[150] *Id.* at 19.

2. *Per Se Liability to Rule of Reason*

In keeping with general trends in its antitrust jurisprudence, the Supreme Court has softened the *per se* approach to group boycotts since the middle of the last century. For example, in 1978, a professional association's canon of ethics prohibited its members from participating in competitive bidding, which effectively constituted a type of group boycott.[151] In response to a suit brought by the federal government, the association claimed that it was justified, as firms that bid over price would cut corners on cost, producing shoddy engineering and endangering public safety.[152] Applying the Rule of Reason due to the unique justification offered, the Supreme Court nevertheless held that an economic restraint of trade cannot be justified by non-economic justifications such as health, safety, or welfare.[153]

Less than a decade later, the Supreme Court once again set its sights on group boycotts. Northwest Wholesale Stationers was a purchasing cooperative comprised of retail office supply stores.[154] As in *Associated Press*, the cooperative had by-laws that restricted its members from certain forms of competition.[155] Pacific Stationary and Printing Co. was accused of violating the by-laws and summarily expelled from membership.[156] Pacific brought a private cause of action against Northwest and won in the lower courts on the basis that it had been denied procedural safeguards in its termination and thus was entitled to a *per se* finding of anticompetitive conduct.[157] The Supreme Court rejected the *per se* analysis, subjecting the case instead to the Rule of Reason.[158] Noting that self-regulation was sometimes an essential policy for businesses, the court held that procedural safeguards were only important when Congress had "sanctioned and protected self-regulative activity."[159] Consequently, the Court determined that Pacific had

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[151] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 679 (1978).
[152] *Id.*
[153] *Id.* at 695–96.
[154] Nw. Wholesale Stationers, Inc. v. Pac. Stationary and Printing Co., 472 U.S. 284, 286 (1985).
[155] *Id.* at 287.
[156] *Id.*
[157] *Id.* at 288–89.
[158] *Id.* at 289.
[159] *Id.* at 292 (quoting Silver v. New York Stock Exch., 373 U.S. 341, 364 (1963)).

neither alleged nor proved that Northwest had market power, a prerequisite to a finding of antitrust liability under the Rule of Reason.[160]

The last major boycott case to reach the Supreme Court was decided just a year after *Pacific Stationary*. Indiana dentists had teamed together using their professional organization and refused to submit dental x-rays from patients to insurers on the basis that oversight by the insurers threatened the dentists' professional independence.[161] The Federal Trade Commission brought an enforcement action alleging this practice to be an unfair method of competition.[162] In its opinion, the Supreme Court noted that the refusal to provide the x-rays was similar to a group boycott, historically a *per se* violation of the antitrust laws.[163] The Court declined, however, to find a *per se* violation for this self-regulative conduct and analyzed it under the Rule of Reason.[164]

Responding to the argument by the dentists that supplying x-rays to insurers violated the law of the State of Indiana, the Court held "[t]hat a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it. Anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the State."[165]

While the Supreme Court has generally softened its approach toward self-help in the form of a concerted refusal to deal or group boycott from a *per se* violation to conduct examined under the Rule of Reason, courts and enforcement agencies continue to carefully scrutinize such arrangements.[166] Although

[160] *Id.* at 298.
[161] FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 449 (1986).
[162] *Id.* at 451.
[163] *Id.* at 458.
[164] *Id.* at 459.
[165] *Id.* at 465 (alteration in original) (citation omitted).
[166] HYLTON, supra note 103, at 166–85. See also Fed. Trade Comm'n, FTC Staff; No Present Intention of Challenging Council of Better Business Bureaus' Accountability Program for Online Behavioral Advertising as Anticompetitive (Aug. 15, 2011), available at http://www.ftc.gov/opa/2011/08/cbbb.shtm (demonstrating the FTC's continuing interest in the anticompetitive effects of industry self-regulation). But see C. Paul Rogers III, Consumer Welfare and Group Boycott Law, 62 SMU L. Rev. 665, 666 (2009) (arguing that a "good deal of boycott precedent is effectively overruled"). Nonetheless, Rogers makes the point that consumer welfare remains the main concern of the courts in determining antitrust liability, which is precisely what is at issue with the Copyright Alert System. *Id.*

commentators have noted the benefits of private regulation,[167] the case law makes clear that both fair procedures and government supervision are essential to a finding of compliance with the Sherman Act for entities that contemplate disciplining a market participant via a coordinated boycott.[168]

III
APPLICATION OF ANTITRUST LAW TO THE COPYRIGHT ALERT SYSTEM

As discussed *infra* Part II, a core concern of antitrust law is with agreements between competitors that seek to restrict individuals who may receive service from the cartel. While such coordinated behavior was traditionally viewed as a *per se* violation of the law, more recently it has been analyzed under the Rule of Reason.[169] In this section, I apply the Rule of Reason to the Copyright Alert System. In Part III.A, the restraints imposed by the Memorandum of Understanding are analyzed with attention to both the relationship of the parties to each other and the substance of the parties' agreement. In Part III.B, the market power of the parties is explored, including both the product and geographic markets. Next, in Part III.C, the potentially anticompetitive effects of the agreement on consumer welfare and governance of the parties is examined. Finally, in Part III.D, the likely pro-competitive justifications, including the economic costs of copyright infringement, network management, the potential benefit to consumers, and the possible sanction of the system by the DMCA, is discussed and critiqued.

A. What Is the Restraint at Issue?

The first step in the Rule of Reason analysis performed here is to analyze the restraint of trade that the parties have agreed to implement. When analyzing a restraint, there are two important subsidiary questions. First, what is the nature of the relationship between the parties to the agreement? Second, what is the substantive nature of the restraint of trade itself?

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[167] Robert Pitofsky, *Self-Regulation and Antitrust* (Feb. 18, 1998), *available at* http://www.ftc.gov/speeches/pitofsky/self4.shtm.

[168] *Id.* *See also* Nw. Wholesale Stationers, Inc. v. Pac. Stationary and Printing Co., 472 U.S. 284, 292 (1985); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 449 (1986).

[169] *See supra* Part II.C.2.

1. Horizontal, Vertical, or Hybrid Agreement?

Because the Memorandum of Understanding brings together both content owners and ISPs in an agreement, it can be characterized as both a vertical agreement between the content owners and each ISP, as well as a horizontal agreement amongst the content owners and amongst the ISPs, respectively. The majority of the agreement contains duties owed by individual ISPs to content owners as a group—a vertical arrangement. However, the agreement also contains significant horizontal aspects. For example, the Memorandum specifically contains provisions that limit the ability of the content owners to submit Copyright Alerts to ISPs without express collusion among each other.[170] These provisions constitute a horizontal arrangement between competitors at the same level of the distribution chain. ISPs, on the other hand, seem to have few responsibilities to coordinate with other ISPs. Only the general requirements of what the Alert System mandates of the ISPs are dictated; the specific technical mechanism for doing so is left to the individual companies. On the other hand, ISPs constitute fifty percent of the governing body of the coalition, and therefore have a great deal of control over the process itself and the conduct of other ISPs. Thus, it appears that the arrangement is most similar to a vertical agreement between content owners and each individual ISP, although the Memorandum retains some significant horizontal aspects between each of the ISPs.

This distinction is important because vertical agreements are generally subject to less stringent antitrust oversight than horizontal ones.[171] Agreements between competitors at the same level of distribution to restrain trade have received the most stringent antitrust enforcement scrutiny over the years.[172] Horizontal price fixing, for example, remains one of the few *per se* varieties of antitrust enforcement which has not been relaxed by the Supreme Court since the middle of the last century.[173] Purely vertical agreements, such as those between a manufacturer and a reseller, on the other hand, have generally been allowed greater

[170] Mem. of Understanding, *supra* note 71, § 5(C).

[171] LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 4:20 (4th ed. 2012) ("Vertical agreements are almost invariably agreements between non-competitors. Accordingly, they are not presumptively illegal; they are not similar to those cartel-like transactions that are never economically justifiable.").

[172] *Id.*

[173] *Id.* § 4:34.

leeway by enforcers, and courts generally subject such agreements to a less exacting Rule of Reason scrutiny.[174]

Each party owes duties to the others. Those between content owners are marked by express restrictions between various content owners on how many notices each is entitled to send, such that they must consult with each other to set 'quotas.'[175] Certain content owner signatories to the agreement are not permitted to send any copyright notices.[176] Both the content owners and ISPs jointly govern the program's day-to-day activities. ISPs are required to have their customers adopt a uniform set of conditions under the ISPs' Acceptable Use Policies and Terms of Service. Mandatory information sharing provisions also enable parties to police each other for compliance with the agreement.[177] Such provisions are essential given the incentives normally faced by cartel members to defect from an agreement to gain competitive advantage.

2. Concerted Refusal to Deal and/or Group Boycott

The substantive restraint of trade agreed to by the parties most closely resembles a concerted refusal to deal or group boycott. However, it differs from many group boycotts previously analyzed by courts in one significant way. Whereas group boycotts in the past tended to focus on competitors teaming up to boycott other industry participants, the Copyright Alert System focuses directly on consumers. It prescribes a series of both innocuous as well as punitive actions that ISPs must take against their customers.[178] Starting with the Initial Education Step, ISPs are required to send a warning to their customers. Next, the Acknowledgement Step requires that ISPs divert their customers from Internet browsing, either through a browser pop-up or by redirecting their customers to a landing page without the explicit permission of the customer other than their general agreement to the ISP's Terms of Service.

At the Mitigation Measures step, a customer is subjected to not only a browser redirect, but also a variety of additional physical measures, including possibly a temporary step-down in service— effectively a restriction on output.[179]

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[174] *Id.*
[175] Mem. of Understanding, *supra* note 71, § 5(C).
[176] Mem. of Understanding, *supra* note 71, § 6(A).
[177] Mem. of Understanding, *supra* note 71, §§ 4(B), 4(I).
[178] *See supra* Part I.C.3.
[179] *See supra* Part I.C.3.

Any customer objecting to such treatment by the ISP must pay $35 to initiate a challenge against the infringement action under the "due process" provisions of the Copyright Alert System.[180] The due process proceedings are officiated by a nongovernmental body—an Administering Organization that is selected by the CCI Executive Committee. During the due process proceedings—before an extrajudicial tribunal—the customer must prove they are not guilty of infringement because the content owner's methods of identifying infringing content and the related IP addresses are entitled to a presumption of correctness.

The Copyright Alert System is substantively a self-help enforcement scheme for the benefit of content owners, using the power of individual ISPs to affect their customer's connections—a "refusal to deal" equally with alleged infringers. But the arrangement differs from the traditional concerted refusal to deal in that it places no restriction on a consumer from simply changing to another ISP once they reach the Mitigation Measures step. There appears to be no requirement for any new ISP to interfere with their service or any way to 'carry-over' Copyright Alerts from one ISP to another, as is the case between parties in a traditional group boycott, where all parties are required to participate in the boycott. Thus, a consumer is not completely excluded from the market, but rather, may substitute with another ISP to avoid having punitive measures levied against them. This diminishes the effectiveness of the sanctions implemented by ISPs, provided that it is easy for a customer to switch to another provider—a factor which is in part dependent on market power.

B. Do the Parties Possess Market Power?

The next step in applying the Rule of Reason analysis to the Copyright Alert System is to identify whether the parties to the agreement have market power. Market power is generally determined by examining whether a consumer has the ability to easily obtain substitutes for the good or service in question. The question is subdivided into a determination of the relevant product market and geographic market.

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[180] *See supra* Part I.C.4.

1. Product Market

To begin the analysis of the relevant product market, we must look to the technologies that can provide home broadband Internet access.[181] Generally, a consumer may receive broadband service via cable modem service, fiber-optic service, digital subscriber line (DSL), satellite Internet service, and via cell phone tethering in a 3G service area. Of these, the two wireless alternatives, satellite Internet service and cell phone tethering, can be eliminated as comparable substitutes to the other three. For the former, there are many more restrictions on bandwidth usage than most other broadband Internet services because the capacity of satellites can be quite limited compared to the number of users attempting to access data at any given time.[182] Moreover, the signal latency for satellite Internet traffic can last as much as 0.5 to 0.9 seconds.[183] As such, a user may not consistently get a much faster speed than a regular dial-up connection, or use a satellite connection for sustained high-bandwidth applications such as gaming or video streaming. Likewise, cell phone tethering is also bandwidth constricted, with most cellular telephone companies maintaining both burst data speed caps as well as relatively low monthly bandwidth allotments.[184]

DSL can also be eliminated as a substitute to cable modem and fiber optic service due to the limitations of the technology. While DSL is a wireline technology capable of reaching comparable speeds to cable or fiber optic,[185] it is physically limited by the distance of the customer from the central telephone office.[186] With a maximum range of 3.41 miles for the lowest speed DSL connection, and much shorter ranges for higher DSL speeds, there are many potential broadband customers, especially in suburban and rural areas, who are unable to use DSL as a substitute for Internet service.[187] For this group of

[181] A person may also receive home Internet service via dial-up, which is not considered a broadband technology.

[182] *See Satellite Internet*, ISP REVIEWS, http://www.isp-reviews.org/satellite.htm (last visited Apr. 25, 2012).

[183] *Id.*

[184] *See* Lance Whitney, *Mobile Bandwidth Caps Challenging Web TV*, CNET (July 21, 2010), http://news.cnet.com/8301-1035_3-20011171-94.html.

[185] *See Fast Guide to DSL*, WHATIS.COM, http://whatis.techtarget.com/definition/0,,sid9_gci213915,00.html (last visited Apr. 25, 2012).

[186] *Id.*

[187] Moreover, the presence of bridge taps or load coils on the line between the telephone central office and the customer will greatly reduce the distance that can be served by DSL. *See*

customers, representing a significant portion of the national market for Internet service, cable or fiber optic broadband Internet remain the only options. As such, the relevant product market for broadband Internet can reasonably be narrowed to cable or fiber optic Internet service.

2. Geographic Market

As to the relevant geographic market, the ISPs that are party to the agreement represent over 60% of the national ISP market, [188] which generally is considered the lower limit of market share that gives rise to a presumption of market power.[189] However, Internet service is provided on a local basis, so national market share may not be representative of whether an ISP has market power in a specific location.

In large swaths of the country—containing 75% of the national population—consumers are expected soon to only have a single choice of a high-speed ISP, their local cable television company.[190] If the broadband ISP provider in these markets is a participating ISP, consumers will not have any reasonable alternatives for high-speed Internet service. In effect, these markets are already monopolized—consumers have no ability to switch to alternate providers.

In other larger markets, such as Bethesda, Maryland—a suburb of Washington, D.C. — consumer broadband Internet via cable modem or fiber optic

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Load Coils and Bridge Taps, INFO CELLAR, http://www.infocellar.com/networks/Telecom101/load-coils.htm (last visited Apr. 25, 2012).

[188] *See ISP Usage and Market Share*, *supra* note 72. In fact, this figure may be higher if you limit the market to broadband Internet service provided by cable television companies. Over 71% of all national cable television providers are parties to the Memorandum of Understanding. *See Top 25 Multichannel Video Programming Distributors as of June 2011*, NTCA.COM, http://www.ncta.com/Stats/TopMSOs.aspx (last visited Apr. 25, 2012).

[189] *See, e.g.*, United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005) (holding that a share significantly larger than 55% is generally required to demonstrate market power). Market power is differentiated from monopoly power, which generally requires a market share above 70% to make a prima facie showing. *See* Exxon Corp. v. Berwick Bay Real Estates Partners, 748 F.2d 937, 940 (5th Cir. 1984) (per curiam) (stating a minimum market share of 70% is needed to demonstrate monopoly power); Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989) (same).

[190] FCC, *Connecting America: National Broadband Plan*, at 42 (2010), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf. *See also* Susan P. Crawford, *The Communications Crisis in America*, 5 HAR. L. & POL'Y REV. 245, 249–56 (2011) (describing the increasingly monopolized national market for broadband Internet).

service is readily available from three major companies: Verizon, Comcast, and RCN.[191] Verizon and Comcast are both parties to the Memorandum of Understanding, but RCN is not. Therefore, customers in Bethesda are able to more readily switch to a company that is not part of the agreement if they do not want to do business with a company that may participate in the Copyright Alert System.

Nevertheless, while substitution in Bethesda may be more readily available, often times, customers receive multiple services from their ISP. All three broadband ISPs in Bethesda offer "triple-play" deals, which combine telephone, cable television and Internet into one package.[192] Thus, a customer may determine that switching costs are higher in changing to a new service provider. These switching costs likely create an artificial barrier toward easy substitution, even in a market that offers several choices. This factor weighs toward finding market power even in markets where not all consumer broadband Internet providers are parties to the Memorandum of Understanding.

C. What Are the Anticompetitive Aspects of the Copyright Alert System?

1. Consumer Welfare

As discussed *infra* Part II, antitrust has evolved from concerning itself with the survival of small competitors to directly focusing on consumer welfare. The most fundamental anticompetitive issue with the Copyright Alert System revolves around those terms directed solely at interfering with the provision of service to an ISP customer who is only accused, not proven, to be a copyright infringer.

Significantly, a consumer may be accused of copyright infringement and yet unable to challenge such an assertion until they reach the Mitigation Measures step of the process. And once they do, the consumer faces a difficult set of procedural hurdles to challenge the accusations under the due process provisions of the system. First, he or she must pay a $35 fee to challenge the accusations of infringement. Second, the proceedings are governed by an extra-judicial tribunal,

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[191] *About RCN In D.C. Metro Area*, RCN, http://www.rcn.com/about-rcn/where-we-service/dc-metro (last visited Apr. 25, 2012).

[192] *See Bundles and Special Offers*, VERIZON, http://www22.verizon.com/home/bundles/fios/ (last visited Apr. 25, 2012); *D.C. Metro, Cable TV, Internet and Phone Bundles*, RCN, http://www.rcn.com/dc-metro/bundles (last visited Apr. 25, 2012); *XFINITY Triple Play*, COMCAST, http://www.comcast.com/Corporate/Learn/Bundles/bundles.html (last visited Apr. 25, 2012).

under rules which restrict the arguments that can be made by a consumer and require that they prove that they did not infringe the content owner's goods. There is nothing in the agreement that gives the consumer any right to be provided information by which they can evaluate and challenge the method used to identify the copyrighted good or the alleged infringing conduct. And in order to prevail, the consumer is forced to challenge and rebut all prior allegations of infringement. There does not appear to be any time limitation on these prior accusations and it is possible that the lapse of time could negatively impact a consumer's ability to mount an effective challenge. Finally, the plan provides for no second level or judicial review.

In effect, the burden of proof has been shifted from the copyright holder to prove infringement onto the consumer to disprove infringement. This shifting of the burden of proof is an important factor from a consumer welfare standpoint because it reaches far beyond what content owners are entitled to under the Copyright Act. Section 501 of the Act[193] declares the violation of any of the exclusive rights under that Act to be an infringement of copyright. As a remedy, a content owner may initiate an action for infringement in a Federal Court. Notably, as a plaintiff in an infringement suit, the content owners are required to establish that they are the holder of a valid copyright and prove that the defendant infringed one of the enumerated rights, both by a preponderance of the evidence. Defendants are entitled to present any cognizable defense, of which fair use is but one. Both sides are entitled to pre-trial discovery. The prevailing party may be entitled to attorney's fees under the statute's fee shifting provision.[194] Under this elaborate system, which places burdens on both the copyright owner and the defendant, the number of Type I errors (false positives) is kept to a minimum.

The due process provisions of the Copyright Alert System disturbs this carefully calibrated system created by Congress. In resorting to this self-help system, content owners have vastly increased their power to identify and punish consumers who are suspected of copyright infringement without any effective means for consumers to respond and deny allegations of infringement. The system for identifying alleged infringers is masked in secrecy and consumers have only a limited ability to effectively challenge an allegation because the content owner's identification of the consumer and the work is entitled to a presumption of

[193] 17 U.S.C. § 501 (2006).

[194] The possibility of fee-shifting for attorney's fees represents an important check on content owners from bringing unmeritorious claims.

correctness. Consumers are forced to prove a negative, without having access to essential evidence which would allow them to do so. Because the due process protections provided are minimal, the chances of Type I error are likely to be much greater in the Copyright Alert System. As a result, the likelihood of an innocent user being punished is much higher, even if the system may work to catch a plurality of actual copyright infringers.[195] Given the essential place that the Internet has taken in the everyday life of the average American consumer, the possibility of an erroneous deprivation of Internet services—even momentarily—is a subject that should be of concern to antitrust enforcers and the courts.

2. Governance Provisions

In addition to the consumer directed provisions, the agreement also restricts the ability of ISPs located in competitive markets to engage in competition without the interference of an oversight body consisting of other industry participants. Content owners are similarly restricted from issuing notices, either by means of a quota or a complete ban,[196] without the cooperation of other participants in their industry. These are important provisions because they allow each of the parties—content owners and ISPs alike—to police the others to maintain discipline within their cartel.

From an economic standpoint, such provisions serve to reinforce the anticompetitive nature of the deal. This is a classic free-rider problem: there are significant incentives for a cartel member to cheat on the arrangement for competitive advantage. In the case of this agreement, ISPs in competitive markets who implement less 'successful' Copyright Alert Systems than their competitors could serve to draw additional customers away from other cartel members who implement stricter systems. Similarly, the restrictions on limiting alerts by the various content owners serves to ensure that one content owner is not benefited more than another by the proposed plan. By allowing content owners and other

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[195] Additionally, it is likely that truly devoted infringers will simply adopt technology that will mask the ability of content owners to identify them. *See, e.g.*, Ryan Paul, *Swedish Political Party Offers Commercial Darknet Access*, ARS TECHNICA (Aug. 15, 2006), http://arstechnica.com/old/content/2006/08/7502.ars; BT GUARD ANONYMOUS BITTORRENT SERVICES, http://btguard.com (last visited Apr. 25, 2012) (enabling users to pay $6.95/month to anonymize their IP addresses while participating in peer-to-peer Bittorrent file exchange, most likely exchanges constituting online infringement).

[196] Mem. of Understanding, *supra* note 71, §§ 5(C), 6(A).

ISPs to monitor compliance with the agreement, the parties can catch cheaters and punish them for competing.

Furthermore, although the governance and information sharing provisions primarily function to keep discipline among the participants, such arrangements may also facilitate future collusive efforts. Information sharing between competitors is another means of coordinating conduct that has often been used in the past to facilitate anticompetitive designs.[197] Once the lines of communication are open between the parties, the opportunity to use them for other anticompetitive purposes may rise dramatically.

D. What Are the Pro-Competitive Justifications Offered?

While the Copyright Alert System has not yet been challenged in court, the Memorandum of Understanding contains many of the pro-competitive justifications likely to be offered by its parties, including: the substantial externalities that copyright infringement imposes on the economy each year, the potential for online infringement to contribute to network congestion, and consumer preference for deterrent educational measures over coercive infringement litigation. Finally, an argument can be made that Section 512(i) of the Copyright Act implicitly authorizes ISPs to engage in concerted behavior in their efforts to stem online infringement.[198]

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[197] *See, e.g.*, United States v. U.S. Gypsum Co., 438 U.S. 422 (1978).; United States v. Container Corp. of America, 393 U.S. 333 (1969); American Column & Lumber v. United States, 257 U.S. 377 (1921).

[198] In addition to these publicly known justifications, there are a number of other reasons the parties may have decided to come to this agreement. First, the memorandum itself contemplates the continuing disagreement between the content industries and ISPs regarding the latter's responsibilities to terminate users under the DMCA's repeat infringer provisions. *See* Mem. of Understanding, *supra* note 71 at 9 fn.1. ISPs may have desired to avoid potential litigation against the content industries based on this dispute. Further, Annemarie Bridy has speculated that a combination of political pressure and the convergence of economic interests between the content industries and ISPs related to the latter's need to deliver content over their cable television networks were the major factors that led to the agreement. *See* Annemarie Bridy, *Graduated Response American Style: 'Six Strikes' Measured Against Five Norms*, 4-5 (forthcoming in the Fordham Intellectual Property, Media & Entertainment Law Journal). Because divining the motivations of the parties requires speculation, the article will leave discussion of these additional justifications for the future.

1. *Societal Costs of Copyright Infringement*

The economic costs of copyright infringement to content owners and the resulting effect on their incentive to create is a justification to which courts would look in assessing an antitrust claim. An economic study by the Institute for Policy Innovation, cited by CCI on its website, estimates that online infringement costs the economy $25.6 billion each year and results in a total loss of 312,052 jobs.[199] These and other similarly imposing figures produced by industry are not without their share of criticism,[200] especially in light of their unique methods of calculation.[201] Indeed, such studies are hard to square with other reported statistics. For instance, the emergence of digital markets has actually increased the overall sales of the music industry since the early 2000's.[202] A recent report by the International Intellectual Property Alliance, an industry association, shows that the content industries are outperforming overall economic growth by over 1.1%—contradicting the notion that piracy has killed a large number of industry jobs.[203]

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[199] Stephen E. Siwek, Institute for Policy Innovation, *The True Cost of Copyright Industry Piracy to the U.S. Economy* 9, 12 (Oct. 2007), *available at* http://www.ipi.org/docLib/20120515_CopyrightPiracy.pdf.

[200] Susan Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play*, DIGITAL COMMONS @ AMERICAN UNIVERSITY 22, http://digitalcommons.wcl.american.edu/research/15/; Felix Oberholzer-Gee and Koleman Strumpf, *File-Sharing and Copyright* (2009), *available at* http://www.hbs.edu/research/pdf/09-132.pdf; Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 6-9 (2010) (noting the inherently suspect nature of industry estimates of infringement).

[201] *See* Timothy B. Lee, *Texas-Size Sophistry*, THE TECHNOLOGY LIBERATION FRONT (Oct. 1, 2006), http://techliberation.com/2006/10/01/texas-size-sophistry/; Timothy B. Lee, *Another IPI Piracy Study*, THE TECHNOLOGY LIBERATION FRONT (Aug. 25, 2007), http://techliberation.com/2007/08/25/another-ipi-piracy-study/. As noted by others, many such studies are based upon the fallacy that each copy of a copyrighted good downloaded would have otherwise been a sale at the full value of the item. Mike Masnick, *Message To The BSA: You Aren't Fooling Anyone*, TECHDIRT (Dec. 8, 2005), http://www.techdirt.com/articles/20051208/0947209_F.shtml. It is, of course, equally likely that an illegal downloader never would have purchased the work if they would have had to pay full price for it.

[202] Oberholzer-Gee, *supra* note 200, at 45. *See also* Timothy B. Lee, *Why We Shouldn't Worry About The (Alleged) Decline Of The Music Industry*, FORBES (Jan. 30, 2012), http://www.forbes.com/sites/timothylee/2012/01/30/why-we-shouldnt-worry-about-the-decline-of-the-music-industry/.

[203] International Intellectual Property Alliance, *Fact Sheet: Copyright Industries in the U.S. Economy: The 2011 Report*, *available at* http://www.iipa.com/pdf/2011CopyrightIndustriesFactSheet.PDF.

In addition, several other studies—studies that are not funded or associated with the content industries—have concluded that online infringement has negligible effects on the sales of copyrighted material.[204]

Thus, while the effects of copyright infringement on the incentive to innovate cannot be ignored, neither can they be quantified as a monetary loss or proven to any significant extent based upon the available research.[205] As such, a court would be hard pressed to balance the speculative nature of the figures cited above against the very real harm to consumers who are denied service.

Moreover, the Copyright Alert System serves to internalize the economic costs of content owners from copyright infringement broadly onto consumers, whether they infringe or not. The cost of implementing the program has been calculated to be quite high—as much as $32 per notification issued to a consumer.[206] These costs are not likely to be borne solely by ISPs; instead, the ISPs will factor in these costs when determining the monthly rates that they charge to all consumers for broadband Internet service.[207] As such, the costs of the enforcement system will be transferred to consumers, without ever giving them input into the process or even notifying them of these pass-through costs. In effect, the system represents a surcharge on Internet usage of all users designed to benefit the content industries without any corresponding benefit imparted toward the vast

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[204] Oberholzer-Gee, *supra* note 200, at 35–37; Micheal Masnick & Michael Ho, *The Sky Is Rising: A Detailed Look at the State of the Entertainment Industry*, TECHDIRT (Jan. 2012), http://www.techdirt.com/skyisrising/.

[205] *See* Gov't Acct. Ofc., *Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods* 15–16 (April 2010) (noting "it is difficult, if not impossible, to quantify the net effect of counterfeiting and piracy on the economy as a whole."); Thierry Rayna & Laura Barbier, *Fighting Consumer Piracy with Graduated Response: An Evaluation of the French and British Implementations,* 8 INT. J. FORESIGHT & INNOVATION POL'Y 294 (2010).

[206] *See* Department of Business, Innovation and Skills, et al., *Digital Economy Bill: Impact Assessments* 63–81 (Nov. 2009), *available at* http://www.ialibrary.bis.gov.uk/uploaded/DEB-Impact-Assessments.pdf (outlining the costs of the U.K. graduated response system); Michael Geist, *Estimating the Cost of a Three-Strikes and You're Out System*, MICHAEL GEIST (Jan. 26, 2010), http://www.michaelgeist.ca/content/view/4731/135/; Barry Sookman, *The Costs and Benefits of Graduated Response in Copyright Enforcement*, BARRY SOOKMAN (Feb. 1, 2010), http://www.barrysookman.com/2010/02/01/the-costs-and-benefits-of-graduated-response-in-copyright-enforcement/; Woods, *supra* note 61.

[207] *See* Woods, *supra* note 61.

majority of consumers. All consumers—innocent and guilty alike—are subject to these increased costs.

2. Network Congestion

Another assertion made by content owners and ISPs is that using the Internet to download infringing content slows the network for other users.[208] The cause of this problem, however, is not that an infringer is allowed to use more than his or her fair share of network resources. Rather, ISPs oversell network segments on the assumption that all of the consumers on those segments will not use their allotted network bandwidth at the same time.[209] For example, a single neighborhood might be provisioned in the last mile with a bandwidth of 100 megabits per second. An ISP may then sell to 25 households in the neighborhood Internet connections that can achieve a maximum throughput of 10 megabits per second. As a result, no more than 10 households can utilize those connections at the maximum speed at any given time.

This network congestion problem is not caused by consumers exceeding their allocated bandwidth, but rather because the ISPs have built insufficient excess capacity into their systems to meet demand variability.[210] This failure of the ISPs to provide sufficient network infrastructure compared to the amount that they promise to consumers is only remotely related to the economic goal of stopping infringement. It more resembles a welfare concern for other users, which probably would not be considered by a court under the non-economic harm doctrine enunciated in *National Society of Professional Engineers*.[211] If analyzed as a pure economic concern, it is arguable that ISPs that comply with the Copyright Alert System on the basis of network congestion are actually colluding to restrict the

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[208] Peter Svensson, *Comcast Blocks Some Internet Traffic*, MSNBC.COM (Oct. 19, 2007), http://www.msnbc.msn.com/id/21376597/ns/technology_and_science-internet/t/comcast-blocks-some-internet-traffic/.

[209] Phillip Dampier, *When Providers Oversell the Network: Paying for 10Mbps Service, Getting 1.2Mbps Instead*, STOP THE CAP! (Jan. 31, 2011), http://stopthecap.com/2011/01/31/when-providers-oversell-the-network-paying-for-10mbps-service-getting-1-2mbps-service-instead/.

[210] *See, e.g.*, Karl Bode, *New Comcast Throttling System 100% Online*, DSLREPORTS.COM (Jan. 9, 2009), http://www.dslreports.com/shownews/New-Comcast-Throttling-System-100-Online-100015 (describing how Comcast throttles users who exceed more than 70% of the bandwidth they pay for any length of time).

[211] Nat'l Soc'y of Prof'l Eng'rs v. U.S., 435 U.S. 679, 690–91 (1978).

capacity of their systems. Doing so, while maintaining their current pricing practices, is effectively a hidden price increase—behavior that has quintessentially been found in the past to be anticompetitive.[212]

3. Copyright Alert System Benefits Consumers

The most credible pro-competitive justification contained in the agreement between the parties is that education and deterrence in lieu of litigation benefits consumers. Some studies have shown that the educational notices in graduated response systems have a modest effect on deterring online infringement.[213] Indeed, it is intuitive that the educational steps of the Copyright Alert System provide both an informational benefit to consumers as well as an economic benefit to content owners. However, it is important to note these same studies also have shown that without the threat of action after the warnings, a non-trivial proportion of users will continue to engage in online infringement. Nevertheless, educational steps that do not require action against consumers on the part of ISPs do not directly harm consumers in an economic sense,[214] and in fact can only benefit both them and the content owners.

However, once a consumer reaches the point where Mitigation Measures are to be applied, the issue becomes whether the implementation of such punitive measures works in a pro-competitive fashion. The ISPs are required to implement sanctions against their customers that deprive those customers of their Internet service. It is hard to see what direct benefit accrues either to the process of competition between the ISPs or to consumer welfare as a result. While consumers are benefitted from not having to participate in litigation, with its attendant expenses, they are also forced to give up certain rights of the litigant, including the obvious right of having the content owner prove its case.

The merits of such an arrangement are directly related to whether a person has been accurately identified as an infringer. In the case of a person who is an active infringer, this arrangement seems preferable for all involved parties. For those who are innocent of infringement, however, such a system imposes

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[212] *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[213] *See* Barry Sookman & Daniel Glover, *Why the Copyright Act Needs a Graduated Response System*, THE LAWYERS WEEKLY (Jan. 2010), http://www.lawyersweekly-digital.com/lawyersweekly/2934?pg=10**.**

[214] Except, of course, to the extent to which they raise the overall costs of Internet service. *See supra* section IV.D.1.

substantial burdens. Industry has remained notably silent regarding various instances of misidentification. But misidentified users are not uncommon, considering the poor track record of the various technologies used to date to identify both online infringers and the works they allegedly infringe.[215]

Moreover, one can easily imagine a situation where a grandchild uses their grandparents' Internet without permission, or where a person leaves their Wi-Fi network unsecured, which would subject an innocent person to punitive connection throttling, requiring them to participate in the one-sided due process system. Depending on how the alert system is implemented, it may be that a consumer will never receive any notices prior to the first punitive measure that is implemented. The unauthorized user may simply find a way to divert the Copyright Alert issued by the ISP from being delivered to the subscriber.

The basis for ISPs joining together to do 'harm' to their customers does not have a solid grounding in their own competitive interests, as opposed to the anticompetitive interests of the content owners in enforcing their copyright monopolies. ISPs are only marginally involved in the economic harms imposed by online infringement. While content owners have an obvious—and legally protected—interest in stemming online infringement, ISPs are, at most, secondarily involved via their contractual agreements with content owners to provide copyrighted goods over their networks. As such, it would be hard for a court to conclude that the self-help provisions of the Copyright Alert System which requires ISPs to interfere with their customer's Internet connection is a pro-competitive justification for collusion on the part of the ISPs. The agreement neither increases overall output of Internet service nor produces lower costs of the service for consumers, the yardsticks by which the benefits of increased competition are measured.

[215] *See* Yu, *supra* note 8, at 1395–96 (discussing many instances in which infringement-identifying technology has been found to be unreliable); *see also* Bridy, *supra* note 10, at 126 n.208 (citing further examples); Timothy B. Lee, *Warner Bros: We Issue Takedowns For Files We Never Saw*, ARS TECHNICA (Nov. 9, 2011), http://arstechnica.com/tech-policy/news/2011/11/warner-admits-it-issues-takedowns-for-files-it-hasnt-looked-at.ars (discussing instances where content owners never even examined the files accused of copyright infringement prior to issuing takedown notices due to the use of 'automated' systems to identify infringing content). Considering the content owners are entitled in the Copyright Alert System to a presumption of correctness in identifying infringing works, the lack of care demonstrated by Warner Brothers in issuing alerts to date is extremely troubling.

4. Section 512(i) of the Digital Millennium Copyright Act

Finally, an argument can be made that Section 512(i) of the Copyright Act provides a potential statutory authority for content owners and ISPs to engage in collusive conduct to stem online infringement.[216] Among the other requirements related to eligibility for the DMCA safe harbor, section 512(i)(1)(B) partially shields from liability any ISP that "accommodates and does not interfere with standard technical measures."[217] Section 512(i)(2) defines "standard technical measures" to include anti-infringement technology developed in a broad, open, fair, and voluntary industry standards process.[218] However, this Congressional authorization to cooperate most likely does not cover the Copyright Alert System. The program was not developed as a part of a technical standards process, and its promulgation to date has been anything but open. Moreover, the Supreme Court has articulated a presumption against implied repeal of the antitrust laws.[219] While Section 512 provides a potential statutory exemption from antitrust liability as it relates to standards setting, it is not clear that any immunity would extend beyond that process to the implementation of a technical measure that actually harms consumers. Section 512 does, however, indicate that Congress had intended for the content owners and ISPs to work together in an open fashion to achieve some of the same goals that have thus far been pursued in secret.

E. The Copyright Alert System Fails the Rule of Reason

To summarize, the nature of the self-help enforcement provisions of the Copyright Alert System goes far beyond those found in *Fashion Originators' Guild* as it "provides extra-judicial tribunals for determination and punishment of violations"[220] directed toward individual consumers rather than competitors. In addition, it improperly encroaches on the authority granted solely to Congress by the Constitution to both regulate interstate commerce and allow for limited monopolies under such conditions and when necessary to "promote the Progress of Science and the useful Arts."[221] The pro-competitive justifications offered by the parties, including speculative claims of economic damage, concerns regarding

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[216] 17 U.S.C. § 512(i) (2006).

[217] 17 U.S.C. § 512(i)(1)(B) (2006).

[218] 17 U.S.C. § 512(i)(2) (2006).

[219] "Repeal of the antitrust laws by implication is not favored and not casually to be allowed." Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 682 (1975).

[220] Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 465 (1941).

[221] U.S. CONST. art. I, § 8, cl. 8.

network congestion, and assertions that the system may actually benefit users, all contain significant logical flaws. Nor can content owners or ISPs claim that section 512(i) of the Copyright Act sanctions the agreement they reached.

Nonetheless, as in all antitrust cases that rely on the Rule of Reason, plaintiffs would face a heavy burden in proving their case. The Rule of Reason is a fact-driven, evidence-centric exercise which requires the testimony of economists and other experts to define the scope of the industry, identify the nature of the competitive harm, and provide a measure of the damages that result from the illegal conduct. Given the resources of the companies that would defend against such a claim, each element of proof of plaintiff's claim would be subject to a rigorous challenge. While no one can predict what would happen should the system be challenged in court on antitrust grounds, it is likely that the both sides would face some significant challenges in prosecuting and defending against such a complaint.

IV
RECOMMENDATIONS FOR IMPROVEMENT

There are a number of ways the system can be improved to ensure that it is brought within the confines of the law while allowing it to achieve its goal of lessening online infringement. An obvious fix would be for the parties to renegotiate an agreement addressing line-by-line the antitrust issues with the enforcement provisions that I have discussed *supra*. This, of course, is unlikely due to the lengthy and possibly contentious negotiations that led to the current agreement. The next best solution would be to seek specific legislation that would bring the system inside the law and subject the Copyright Alert System to government supervision. In the alternative, either the Department of Justice or the Federal Trade Commission could intervene to better calibrate the system to avoid consumer harm.

A. Congressional Action

As explained by the Supreme Court in *Indiana Federation of Dentists*, "collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the State."[222] The simplest way to resolve the antitrust difficulties plaguing the Copyright Alert System is to seek some sort of Congressional sanction for the agreement. Such an

[222] FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 465 (1986).

authorization may be the only way to assure the parties of immunity from private suit. Whether Congress would move to authorize the system, however, is less clear. The fact that such an authorization would be perceived by their constituents as another expansion of intellectual property rights similar to the recently defeated Stop Online Piracy Act and PROTECT-IP Acts might make legislators hesitant to enact it.[223]

Nonetheless, a carefully crafted law could create a government oversight authority similar to the French system of graduated response that could lessen the burden for content owners and citizens alike to make and respond to allegations of infringement. Some commentators have suggested that an abbreviated administrative proceeding could take place in front of an administrative law judge located within the Copyright Office.[224] Such a procedure would have similar administrative and cost advantages as the system adopted by the industry without having the same problems with due process and antitrust liability which plague the Copyright Alert System. In the alternative, Congress could implement supervision and reporting requirements for the current system or provide for the opportunity for judicial review upon a finding by the private industry adjudicator that an individual was engaged in online infringement. Such additional due process protections would do much to mitigate the possibility that an innocent party would be subjected to adverse action.

B. The Department of Justice and the Federal Trade Commission

Another possibility—one that does not require Congressional action—is for the Department of Justice or the Federal Trade Commission to intervene and come to a consent decree with the parties that requires monitoring the Copyright Alert System and its effect on consumers. While such an agreement would not altogether immunize the parties to private suit, it would lend an aura of credibility to the system, which would make private plaintiffs think twice regarding wasting resources in such an effort. Of the two agencies, the Federal Trade Commission

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[223] *See* Timothy B. Lee, *Internet Wins: SOPA and PIPA Both Shelved,* ARS TECHNICA (Jan. 20, 2012), http://arstechnica.com/tech-policy/news/2012/01/internet-wins-sopa-and-pipa-both-shelved.ars.

[224] Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation,* 56 STAN. L. REV. 1345, 1413 (2004).

may be the better choice due to its independence and its dual role in our government.[225]

The FTC is a federal regulatory agency devoted to enforcing both competition and consumer protection laws within the United States.[226] It is an independent regulatory agency that is governed by a five commissioners, with no more than three from each political party, each nominated for seven-year terms.[227] It has a broad base of specialized experience in antitrust enforcement and consumer protection that would be directly relevant to protecting the rights of consumers who receive Internet service from one of the participating ISPs. Further, the FTC possesses additional authority under Section 5 of the FTC Act to investigate the Copyright Alert System as a potential unfair trade practice in addition to a violation of the Sherman Act.[228] The independent nature of the FTC would insulate it from the political pressures applied by the various groups affected by the agreement and lend credibility to the system as a whole.

By initiating an investigation, the FTC has the ability to review the operations of the CCI, the independent groups selected to enforce the due process provisions, and the various individual parties to the agreement. Through the use of this oversight authority, the FTC can ensure that the infringement identification systems implemented will fairly serve the goals of the agreement without causing significant consumer harm. Furthermore, the FTC can work with the parties to correct the deficiencies identified in the due process provisions. Any proposed settlement between the FTC and the individual parties would be subject to an open notice and comment period before implementation,[229] giving both industry and the public an opportunity to weigh in on the final system. Finally, the involvement of

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[225] Normally the Federal Trade Commission does not have jurisdiction over entities that are governed by the Federal Communications Commission under the latter's common-carrier or cable television regulations. Internet service, however, is only regulated under the FCC's ancillary jurisdiction under Title I of the Communications Act of 1934, and as such does not appear to be exempted from the FTC's antitrust authority.

[226] *About the Federal Trade Commission*, FTC, http://www.ftc.gov/ftc/about.shtm (last visited May 17, 2012).

[227] *Commissioners*, FTC, http://www.ftc.gov/commissioners/index.shtml (last visited May 17, 2012).

[228] *See* 15 U.S.C. § 45 (2006).

[229] 16 C.F.R. § 2.34(c) (2012).

the FTC in this process would satisfy the requirement of *Indiana Federation of Dentists* for active government supervision and approval of the system.[230]

CONCLUSION

The Copyright Alert System is an idea whose time has come. Identifying consumers who may be engaged in online copyright infringement and educating these consumers regarding the economic and legal consequences of their actions empowers content owners, ISPs, and consumers to take ownership of the growing problem of online infringement. However, such a system should not be used by the content industry to eviscerate our society's notions of fundamental fairness and due process. Nor should the legally sanctioned monopoly held by copyright owners be allowed to extend beyond the boundaries set forth by Congress under its constitutional authority embodied in the Commerce and Progress Clauses. The antitrust laws serve as a bulwark against the extension of the exclusive rights of copyright to the extent that consumers may be directly subjected to harm.

In this article, I have discussed some of the aspects of the Copyright Alert System that may run afoul of the antitrust laws, and suggested various ways in which the system could be improved to conform with the law and protect the rights of consumers. The government has a role in ensuring that both copyright owners and consumers are protected from economic harm. While it is administratively convenient for content owners to cut the government out of copyright enforcement on the Internet, the potential for harm from a private system of justice is too great to tolerate without government supervision. As such, it is important that the government remain actively involved in calibrating the rights of creators against those of consumers.

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[230] FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 465 (1986).