

EVALUATING GRADUATED RESPONSE

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PART 1: PROMISES & AIMS

The war against online copyright infringement has been fought on a number of different fronts – via litigation against the P2P software providers who enabled it, the end users who engaged in it, and, most recently, against the ISPs who provide the infrastructure that permits the data to flow. This last strategy has seen powerful content interests forcefully lobbying governments and ISPs worldwide to adopt so-called “graduated responses”. The message has been that content owners shouldn’t be responsible for policing infringement. In the view of the International Federation of the Phonographic Industry (**IFPI**):

actions against individual uploaders are onerous and expensive and we shouldn’t have to be taking them. That job should not be ours – it should be done by the gatekeepers of the

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web, the Internet Service Providers (ISPs), who unquestionably have the technical means to deal with copyright infringement, if only they would take responsibility for doing so.²

Big promises have been made about the effects graduated response would have on end user infringement. In its 2007 Annual Digital Music Report, IFPI claimed that “[w]ith cooperation from ISPs, [it] could make huge strides in tackling content piracy globally” and argued that “[d]isconnection of serious copyright offenders by ISPs is the easiest and most practical response to illegal file-sharing.”³ Its view was that “[d]isconnection of service for serious infringers should become the speeding fine or the parking ticket of ISP networks.”⁴ The message in the announcement of its 2008 report was the same: “ISP cooperation, via systematic disconnection of infringers and the use of filtering technologies, is the most effective way copyright theft can be controlled.”⁵ The Motion Picture Association of America (MPAA) has similarly claimed that “[a] variety of approaches, including graduated response policies and technological tools, can meaningfully contribute to thwarting unlawful conduct online”.⁶

These promises have been accepted in a number of jurisdictions around the world. Five countries – France, New Zealand, Taiwan, South Korea, and the UK – have enacted public laws which place some degree of responsibility on ISPs to police their users’ infringements. The first four have all been operational for some time, but the details of the UK arrangement are still being hammered out. In addition to these public graduated response laws, private arrangements between some rightholders and some ISPs have been reached in a few jurisdictions in an effort to achieve the same end result. The most notable of these operate in Ireland and the US. The paper only considers systems that involve some potential penalty or consequence for repeated infringement. So-called “notice-notice” schemes, where ISPs compulsorily or voluntarily forward infringement allegations to their customers but no penalty follows, are outside the scope of the paper.

This paper seeks to identify the effects of the various graduated response schemes around the world, and evaluate the extent to which they are achieving their aims. This is far easier said than done. Influential rightholders have repeatedly claimed that graduated response really does work. For example, IFPI has declared that graduated responses “have been effective where they have been introduced”,⁷ and the MPAA has announced that graduated response strategies “have proven to be successful in various contexts around the world”.⁸ However, judging the “success”

² *IFPI:07 Digital Music Report*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, (2007) <http://www.ifpi.org/content/library/digital-music-report-2007.pdf>, 3.

³ *Ibid*, 19.

⁴ *Ibid*, 3.

⁵ *IFPI publishes Digital Music Report 2008*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, (Jan. 24, 2008), http://www.ifpi.org/content/section_resources/dmr2008.html.

⁶ Comments of the Motion Picture Association of America, Inc. in Response to the Workshop on the Role of Content in the Broadband Ecosystem (Oct. 30, 2009), before the Federal Communications Commission, Washington, DC GN Docket No. 09-51 *available at* http://www.wired.com/images_blogs/threatlevel/2009/11/mpaafiltering.pdf.

⁷ *IFPI Digital Music Report 2013*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, 30 (2013) <http://www.ifpi.org/content/library/DMR2013.pdf>.

⁸ See e.g., *Trade Barriers to Exports of U.S. Filmed Entertainment*, MOTION PICTURE ASSOCIATION OF AMERICA, viii (Oct. 2010) <http://www.mpaa.org/resources/69721865-ac82-4dc4-88ec-01ee84c651a1.pdf>; Re: Global Free Flow of

or “effectiveness” of any copyright policy is a challenging exercise due to longstanding and fundamental disagreements about which factors success should be measured against. What is copyright law actually seeking to achieve?

There has never been universal agreement about what copyright law’s aims are, or even about what they *should* be. Multiplicities of theoretical and pragmatic considerations are part of the policy mix in any jurisdiction seeking to reform its copyright law. In recognition of that reality, this paper considers the extent to which each graduated response law is achieving the three aims that are most commonly used to justify the grant and expansion of copyright.

The first evaluation point will be the extent to which global graduated response reduces infringement. The suggestion that reduced infringement in and of itself is a proper aim of the copyright law is one that has been often been made by major global rightholders. Thus, when IFPI declared that graduated responses “have been effective where they have been introduced”, the evidence it provided in support was a claim of reduced use of P2P services in France and New Zealand, and a fall in cyberlocker usage in South Korea.⁹ Although it sought to link the reduction in South Korea with an increase in the legitimate market, the claims about NZ and France equated reduced infringement with “effectiveness” without addressing whether that reduction would translate to higher sales, increased distribution, more creation or higher quality creative output.¹⁰ In August 2013, the US Patent & Trademark Office (**USPTO**) invited public submissions to help it determine whether voluntary initiatives such as the US graduated response scheme have helped reduce infringement.¹¹ One specific question it asked was “[h]ow should ‘effectiveness’ of cooperative voluntary initiatives be defined?” The Recording Industry Association of America (**RIAA**) argued that, to measure effectiveness, the USPTO should begin by identifying the intended goal of each voluntary initiative.¹² It then recommended that the Office “consider whether or not the intended goal, if achieved, would likely be useful to deter online infringement.”¹³ This seemed to suggest that reduced infringement is a proper aim in and of itself – or at least the one that should be given the greatest weight.

The argument that copyright laws should aim to reduce infringement is often cloaked in the rhetoric of property and theft. One example of this is the MPAA’s long-running “Piracy – it’s a crime” campaign, which features the words:

You wouldn’t steal a car
You wouldn’t steal a handbag

Information on the Internet, MOTION PICTURE ASSOCIATION OF AMERICA, 8 (Dec. 6, 2010)

<http://www.ntia.doc.gov/files/ntia/comments/100921457-0457-01/attachments/international%20filingMPAA.pdf>.

⁹ *IFPI Digital Music Report 2013*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (2013)

<http://www.ifpi.org/content/library/DMR2013.pdf>, 30.

¹⁰ *Ibid.*

¹¹ *Request of the United States Patent and Trademark Office for Public Comments: Voluntary Best Practices Study*, UNITED STATES PATENT AND TRADEMARK OFFICE, (Jun. 20, 2013)

<https://www.federalregister.gov/articles/2013/06/20/2013-14702/request-of-the-united-states-patent-and-trademark-office-for-public-comments-voluntary-best>.

¹² *RIAA Response to Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study*, UNITED STATES PATENT AND TRADEMARK OFFICE, 2 (of the RIAA response); 16 (of the published compilation of responses), <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf>.

¹³ *Ibid.*

You wouldn't steal a television
You wouldn't steal a movie

Downloading pirated films is stealing,
stealing is against the law,
PIRACY. IT'S A CRIME.¹⁴

By using this rhetoric, the MPAA can be seen as relying on a right-based justification that is analogous to the one that underpins the natural rights theory. Natural rightists see authors as acquiring property rights in their works “by virtue of the mere act of creation”, with the “corollary that nothing is left to the law apart from formally recognising what is already inherent in the ‘very nature of things’”.¹⁵ That is, “natural rights arguments[] are less concerned with regulatory techniques to promote social, cultural and economic goals than with a belief that copyright ought to exist because it is proper and correct for it to do so.”¹⁶ As Senftleben explains, “[t]he natural law argument supporting authors’ rights appeals to feelings of rightness and justice. As it is the author who spends time and effort on the creation of a new work of the intellect, it is deemed justified to afford him the opportunity of reaping the fruit of his labour.”¹⁷ The natural rights approach has traditionally driven copyright policymaking in the civil law tradition.¹⁸ However, as Yen and Senftleben have both demonstrated, it has also influenced lawmaking in historically utilitarian jurisdictions such as the US.¹⁹ In recognition of the fact that reducing infringement is regularly claimed as an important aim of copyright law, the paper will analyze the extent to which graduated response is succeeding in doing so.

The second point of evaluation is the extent to which graduated response maximizes the size of the legitimate market. This assumes that reduced infringement may not be a proper aim in and of itself, but only to the extent to which that reduction translates to greater sales.²⁰ This approach is underpinned by the idea that, “if users pirate less but the creators do not earn more, it is the culture that is losing.”²¹ This view has one foot in each of the utilitarian and natural rights camps. Utilitarians see the grant of copyright as being necessary to encourage the creation and dissemination of knowledge and culture. This justification has long been favored in common law countries: the preamble of the Statute of Anne stated that it was “for the Encouragement of Learning, by Vesting the Copies of printed Books in the Authors, or Purchasers, of such Copies”,²² and the United States Constitution gave Congress the power “To promote the Progress

¹⁴ This trailer for this campaign can be viewed on Youtube at <https://www.youtube.com/watch?v=HmZm8vNHBSU>.

¹⁵ MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST 6 (2004) (internal note omitted).

¹⁶ MARK J. DAVISON, ANN L. MONOTTI & LEANNE WISEMAN, AUSTRALIAN INTELLECTUAL PROPERTY LAW 186 (2d ed. 2012).

¹⁷ MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST 11 (2004) (internal note omitted).

¹⁸ See e.g., MARK J. DAVISON, ANN L. MONOTTI & LEANNE WISEMAN, AUSTRALIAN INTELLECTUAL PROPERTY LAW 188 (2d ed. 2012); MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST 6 (2004).

¹⁹ See generally Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession* 51 OHIO STATE LAW JOURNAL 517-559 (1990); MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST 7-10 (2004).

²⁰ See e.g., Daniel Gervais, *Copyright and eCommerce* 16A in INTELLECTUAL PROPERTY IN THE GLOBAL MARKETPLACE (M. Simensky, L. Bryer and N.J. Wilkof eds., 2001 update).

²¹ Guillaume Champeau, *Hadopi : le vrai bilan négatif de la riposte graduée*, NUMERAMA (May 9, 2013) <http://www.numerama.com/magazine/25919-hadopi-le-vrai-bilan-negatif-de-la-riposte-graduee.html>. (Quotation translated from the original French.)

²² 8 Ann. c. 19, §1 (1710) (Eng.).

of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”.²³ A strictly utilitarian view would be interested in maximizing the creation and dissemination of content, and the extent to which those aims were achieved by infringement would only be relevant to whether that might deter future creation. By contrast, a strictly natural rights approach would focus on protecting the rights of authors regardless of whether so-doing achieves any broader cultural ends. Interestingly, though France’s copyright law (the *droit d’auteur*) is strongly rooted in the natural rights tradition, the origins of its graduated response strategy show that the intention was not just to reduce infringement, but to translate that into increased legitimate consumption.²⁴ This may have been a pragmatic recognition of the fact that it’s difficult to reduce infringement without offering reasonable legitimate alternatives: the Olivennes Report, on which the law was based, observed that “[i]t is difficult to deny the persistence of long delays is an invitation to piracy”.²⁵ That dual aim was emphasized again in the Lescure report, commissioned by the French Government to evaluate the success of the French law after several years of operation.²⁶ Although major rightholders sometimes suggest that reduced infringement is a proper aim in and of itself, at other times they link reduced infringement to increased legitimate uptake. For example, the MPAA’s response to the USPTO’s call for submissions suggested that in the context of graduated response, “effectiveness” should be defined as a “decrease in consumer sharing of copyright infringing files; and ... [an] increase in consumer accessing of legal digital content – ideally measured relative to a ‘control’ or *what they would have been* in the absence of the initiative...”²⁷ Accordingly, this work considers the extent to which graduated response regimes increase legitimate markets.

The third evaluation point is the extent to which graduated response laws encourage the creation and dissemination of a range of content. This is squarely rooted in the utilitarian idea that copyright is granted to promote broader public interest aims. As Samuelson and other members of the Copyright Principles Project (**CPP**) explain:

Copyright law should encourage and support the creation, dissemination, and enjoyment of works of authorship in order to promote the growth and exchange of knowledge and culture. ... A successful copyright ‘ecosystem’ should nurture a diverse range of works. It should encourage creators to make and disseminate new works of authorship and support readers, listeners, viewers, and other users in experiencing those works.²⁸

In its response to the USPTO’s call for submissions, the Electronic Frontier Foundation (**EFF**) demonstrated similar priorities. It argued that, “[i]f the PTO evaluates private agreements meant

²³ U.S. Const. art. I, §8, cl. 8.

²⁴ Denis Olivennes, *Le Développement et la Protection des Oeuvres Culturelles sur les Nouveaux Réseaux*, MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION, part 2 (2007) <http://www.culture.gouv.fr/culture/actualites/conferen/albanel/rapportolivennes231107.pdf>.

²⁵ *Ibid*, part 2.1.2. (via Google translate).

²⁶ This report is discussed in more detail at page 9.

²⁷ *MPAA Response to Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study*, UNITED STATES PATENT AND TRADEMARK OFFICE, 8 (of the MPAA response); 78 (of the published compilation of responses), <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf>.

²⁸ Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1181 (2010).

to reduce copyright and trademark infringement, it should consider how well such agreements serve the ultimate goals of those statutes, which are not to ‘reduce infringement’ but to promote knowledge, grow the arts, and protect consumers.”²⁹ Thus:

Effectiveness should be defined in terms of leading to the creation of more literature, audiovisual work, music, photography, software, etc., as well as creating a broader audience for those arts. This should be the primary measure of success of any copyright enforcement effort; indeed of any federal copyright policy.³⁰

Although utilitarian considerations are far from being copyright law’s only aim, they are the rhetorical linchpin of copyright policy in common law countries, and as Senftleben has persuasively demonstrated, have sometimes influenced civil law policy-making as well.³¹ Nothing else explains the fact that the European Copyright Directive records an intention for the harmonized framework to “foster substantial investment in creativity and innovation ... and lead in turn to growth and increased competitiveness of European industry”.³²

If utilitarian considerations are relevant to the implementation of graduated response, then those schemes should be seeking to facilitate the creation of the greatest possible variety of cultural materials, and their widest distribution. This analysis will evaluate the extent to which they do so. If graduated response laws do not achieve these ends, it makes it harder to justify their continued adoption.

The following section will outline the mechanics of the various public and privately-arranged graduated response schemes in existence around the world, providing a detailed and comprehensive snapshot of global graduated response law circa 2013. Readers who are already familiar with the way in which those laws operate may prefer to skip straight to the evaluative analysis in Part 3, which considers the available evidence to determine the extent to which the various graduated responses are satisfying each of the above-identified aims. The paper concludes by weighing the results of the analysis to determine whether the case has been made for retention or further adoption of graduated response.

PART 2: OUTLINE OF THE EXISTING SCHEMES

The public laws

This section provides a detailed snapshot of the public graduated response laws operating in France, New Zealand, Taiwan and South Korea, as well as the current iteration of the still-evolving UK scheme. Organizations such as IFPI sometimes also claim Chile as a member of the

²⁹ *EFF Response to Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study*, UNITED STATES PATENT AND TRADEMARK OFFICE, 1 (of the EFF response); 111 (of the published compilation of responses), <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf>.

³⁰ *Ibid*, 2 (of the EFF response); 112 (of the published compilation of responses).

³¹ MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST 10 (2004).

³² Council Directive 2001/29/EC, On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167/10) (paragraph 4); MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST 10 (2004).

graduated response club.³³ However, Chilean law simply provides that, in order to enjoy the benefit of safe harbor provisions, service providers must have reserved the power to terminate subscriber accounts where a judge has declared the account holder to be a repeat infringer.³⁴ This provision originates in the US *Digital Millennium Copyright Act*,³⁵ and Chile is just one of many countries to have imported it via a free trade agreement with the US.³⁶ It does not impose any proactive obligations on ISP to police infringements, and therefore won't be considered further in this paper.

A. FRANCE

The law

The French graduated response law is known as HADOPI, an acronym for “Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet”³⁷ (or, in English, “High Authority for the Dissemination of Works and the Protection of Rights on the Internet”). The same word refers to both the law and the agency tasked with its administration. This paper refers to the former as HADOPI, and the latter as Hadopi.³⁸

The earliest iteration of the law, HADOPI-1, had envisaged an administrative body that would issue warnings to alleged infringers and have the power to suspend their internet access up to twelve months if the behavior continued.³⁹ This was overturned by the Constitutional Council, which held that only a judge, not an administrative body, had the power to suspend or terminate internet access.⁴⁰ In September 2009 a revised version – HADOPI-2 – allocated that power to a judicial authority instead, and this time largely survived the Council's scrutiny.⁴¹ HADOPI-2 came into operation in 2010.⁴² As discussed in more detail below, in July 2013 the law was

³³ See e.g., *IFPI Digital Music Report 2011*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, 19 (2011) <http://www.ifpi.org/content/library/DMR2011.pdf>.

³⁴ Intellectual Property Act 2010 (Ley N° 20.435 que modifica la Ley N° 17.336) (Chile), Article 85O, *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=241575.

³⁵ See 17 U.S.C. §512.

³⁶ Regarding importation of the D.M.C.A. via trade agreements, see Andrew Christie, Sophie Waller and Kimberlee Weatherall, *Exporting the DMCA through Free Trade Agreements*, in *INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS* (C. Heath and A.K. Sanders eds., 2007). The text of the US-Chile free trade agreement is available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file912_4011.pdf.

³⁷ See <http://www.hadopi.fr/>.

³⁸ A precursor to HADOPI, known as DADVSI, is discussed in Christophe Geiger, *Honourable attempt but (ultimately) disproportionately offensive against peer-to-peer on the internet (HADOPI) - a critical analysis of the recent anti-file-sharing legislation*, 42(4) *FRANCE INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION LAW* 457, 458-465 (2011).

³⁹ As reported at Rich Trenholm, *France passes harsh antipiracy bill: Un, deux, trois you're out*, CNET (May 13, 2009) <http://crave.cnet.co.uk/software/france-passes-harsh-antipiracy-bill-un-deux-trois-youre-out-49302255>.

⁴⁰ The judgment is available online at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009-580DC-2009_580dc.pdf. For a detailed discussion of the original legislation and the constitutional challenge, see Nicola Lucchi, *Access to network services and protection of constitutional rights: Recognizing the essential role of internet access for the freedom of expression* 645 *CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW*, 650-672 (2007).

⁴¹ Alain Strowel, *The 'Graduated Response' In France: Is it the Good Reply to Online Copyright Infringements?*, in *COPYRIGHT ENFORCEMENT AND THE INTERNET* (Irene A.. Stamatoudi (ed., 2010), 148.

⁴² For a comprehensive description of the background to the Hadopi law's introduction, see Christophe Geiger, *Counterfeiting and the Music Industry: Towards a Criminalization of End Users? The French "HADOPI" Example*

significantly revised. The following paragraphs describe how HADOPI-2 operated prior to July, and then outlines the changes made to create HADOPI-3.

Under HADOPI-2, accredited copyright owner representatives provided Hadopi with allegations of infringement.⁴³ While the scheme was not expressly limited to infringement carried out via P2P file sharing technologies, rightholders initially focused their efforts on that variety of infringement.⁴⁴ The Commission for Protection of Rights, “an autonomous body within the Hadopi in charge of the implementation of the graduated response”⁴⁵ then reviewed the allegations and, after verifying ownership, “identifie[d] the individuals concerned by requesting subscriber data from ISPs”.⁴⁶ The Commission could then decide to contact the user via their ISP, warning them that their internet access should not be put to infringing use.⁴⁷ The notice was required to alert the subscriber to the possible consequences of continuing infringement as well as information about legitimate offerings and the impact of infringement on copyright owners.⁴⁸ If a second allegation was made within six months, the Commission could send another notice with the same information via email, together with a registered letter in the same terms.⁴⁹ If any additional allegation was then made within a year of the second notification, the Commission would investigate the matter and prepare a report advising whether it considers the subscriber’s internet connection should be suspended.⁵⁰ The case file may then be forwarded to prosecutors,⁵¹ and then it’s up to a judge to determine what sanction, if any, should be imposed.⁵² Possible penalties included suspension of internet access for up to 12 months⁵³ and a fine of up to 1500€.⁵⁴ The law separately imposed liability on subscribers who were found to have negligently failed to secure their internet connections (but who were not proved to have themselves

in CRIMINAL ENFORCEMENT OF INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH (Christophe Geiger ed., 2012), 386.

⁴³ Alain Strowel, *The ‘Graduated Response’ In France: Is it the Good Reply to Online Copyright Infringements?*, in COPYRIGHT ENFORCEMENT AND THE INTERNET (Irene A. Stamatoudi (ed., 2010), 149.

⁴⁴ See e.g., Johnny Ryan and Caitriona Heintz, *Internet access controls: Three Strikes ‘graduated response’ initiatives*, INSTITUTE OF INTERNATIONAL AND EUROPEAN AFFAIRS, 6 (2010) <http://www.iiea.com/documents/draft-overview-of-three-strikes-measures-nlm-study>. This makes sense as P2P file sharing technologies permit identification of users’ IP addresses and downloading activities in a way that is not generally feasible in the case of client-server direct download and streaming sites.

⁴⁵ See *Réponse graduée*, HADOPI (undated) <http://www.hadopi.fr/usages-responsables/nouvelles-libertes-nouvelles-responsabilites/reponse-graduee>.

⁴⁶ Alain Strowel, *The ‘Graduated Response’ In France: Is it the Good Reply to Online Copyright Infringements?*, in COPYRIGHT ENFORCEMENT AND THE INTERNET (Irene A. Stamatoudi (ed., 2010), 149.

⁴⁷ Ibid. See also *Réponse graduée*, HADOPI (undated) <http://www.hadopi.fr/usages-responsables/nouvelles-libertes-nouvelles-responsabilites/reponse-graduee>.

⁴⁸ Alain Strowel, *The ‘Graduated Response’ In France: Is it the Good Reply to Online Copyright Infringements?*, in COPYRIGHT ENFORCEMENT AND THE INTERNET (Irene A. Stamatoudi (ed., 2010), 149-150.

⁴⁹ Ibid, 150-151.

⁵⁰ Ibid, 150; *Réponse graduée*, HADOPI (undated) <http://www.hadopi.fr/usages-responsables/nouvelles-libertes-nouvelles-responsabilites/reponse-graduee>.

⁵¹ See *Réponse graduée*, HADOPI (undated) <http://www.hadopi.fr/usages-responsables/nouvelles-libertes-nouvelles-responsabilites/reponse-graduee>.

⁵² Alain Strowel, *The ‘Graduated Response’ In France: Is it the Good Reply to Online Copyright Infringements?*, in COPYRIGHT ENFORCEMENT AND THE INTERNET (Irene A. Stamatoudi (ed., 2010), 150-151.

⁵³ Ibid.

⁵⁴ Boris Manenti, *The Repeal of HADOPI is running*, OBSESSION (Jul. 7, 2012)

<http://obsession.nouvelobs.com/high-tech/20120703.OBS5858/l-hadopi-court-toujours.html>.

committed the resulting infringements).⁵⁵ The maximum fine was the same as for proven infringement, and the maximum suspension was a month instead of a year.⁵⁶ Subscribers whose access was suspended under either mechanism were required to keep paying subscription fees during the term of any suspension, and may not be permitted to switch ISPs to avoid the sanction.⁵⁷

Almost the entire cost of enforcing the law has been borne by the French Government and ISPs. The governmental contribution has been tens of millions of euros so far.⁵⁸ It's unclear how much it has cost ISPs to play their part in the scheme. There has been some suggestion that there is a legal obligation for their costs to be covered by the Hadopi agency, but they have reportedly never been reimbursed.⁵⁹ Rightholders have no obligation to contribute to the costs of administering the scheme or issuing notices, though they pay for and carry out the investigations on which infringement allegations are made.⁶⁰

Shortly after being elected, the Hollande government commissioned Pierre Lescure, former CEO of the Canal + cable television network, to report on cultural policy, including the role and future of HADOPI. The Lescure report, published in May 2013, found that HADOPI-2 had not achieved its aims. Its conclusion was that, while it had perhaps brought about some reduction in P2P infringement, that traffic had been diverted to other infringing sources rather than to the legitimate market.⁶¹ The report recommended abolishing the Hadopi agency and transferring its responsibilities elsewhere, reducing the maximum fine for infringement to 60€, and removing internet termination as a possible remedy.⁶²

The French government moved swiftly to respond to the report. On Jul. 8, 2013 it passed a decree that introduced something that can be dubbed HADOPI-3. The decree abolished suspension as a possible penalty for a subscriber's negligent failure to secure their internet

⁵⁵ Code de la Propriété Intellectuelle [C. Prop. Intell.] art. R335-5 (Fr.)

⁵⁶ Code de la Propriété Intellectuelle [C. Prop. Intell.] art. R335-5 (Fr.)

⁵⁷ Alain Strowel, *The 'Graduated Response' In France: Is it the Good Reply to Online Copyright Infringements?*, in COPYRIGHT ENFORCEMENT AND THE INTERNET (Irene A. Stamatoudi (ed., 2010), 151.

⁵⁸ Alexandre Laurent, *Hadopi: € 12 million budget for 2011*, CLUBIC (Sep. 30, 2010)

<http://pro.clubic.com/legislation-loi-internet/hadopi/actualite-369364-hadopi-12-budget-2011.html>; Seamus Byrne, *French illegal downloads agency Hadopi may be abolished*, CNET AUSTRALIA (Aug. 6, 2012)

<http://m.cnet.com.au/french-illegal-downloads-agency-hadopi-may-be-abolished-339341011.htm>.

⁵⁹ *French ISPs demand compensation for Hadopi cooperation*, TELECOMPAPER (Aug. 12, 2010)

<http://www.telecompaper.com/news/french-isps-demand-compensation-for-hadopi-cooperation>; *Battle of the costs of strikes New Zealander*, TECHTEAM (2012) <http://tech.techteam.gr/battle-of-the-costs-of-strikes-new-zealander/1324>.

⁶⁰ See New Zealand Federation Against Copyright Theft, *Copyright (Infringing File Sharing) Regulations – Fee Review*, MINISTRY FOR ECONOMIC DEVELOPMENT (2012) www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/illegal-peer-to-peer-file-sharing-submissions-on-fee-review-discussion/nzfact.pdf, 2.

⁶¹ Pierre Lescure, *Mission « Acte II de l'exception culturelle » Contribution aux politiques culturelles à l'ère numérique*, MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION (May 2013)

www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescur/index.htm#/1, 371.

⁶² *Ibid*, 379-381.

connections, while retaining the maximum fine of 1500€. ⁶³ In an accompanying press release, the Culture Minister announced that the Hadopi agency would be abolished and its remaining responsibilities allocated elsewhere. The announcement explicitly explained that suspension was no longer seen as an appropriate remedy, and that the government would switch its enforcement focus to commercial piracy. ⁶⁴ Although suspension of internet access remains a possible penalty in cases involving proven infringement (rather than failure to secure connections against infringement), it has been suggested that this is only because that particular provision could not be changed by simple decree. ⁶⁵

Application so far

The first notices under HADOPI were sent in September 2010. ⁶⁶ By December, reports suggested that rightholders were issuing between 25,000 and 50,000 infringement allegations per day. ⁶⁷ By July 2011, the Commission had reportedly received 18,380,844 infringement allegations. ⁶⁸ However, as of the end of July 2013, three years later, Hadopi had only issued 2,004,847 first notices and 201,288 second notices, and there have been just 710 “délibérations”, or investigations, to see whether subscribers who have received three allegations should be referred to prosecutors (though it’s not entirely clear whether this number covers only the completed ones, or current investigations as well). ⁶⁹ That is, after almost three years of operation, the total number of allegations that had been acted upon reflected just 12% of the infringement allegations made in just the scheme’s first eight months.

Of the users who do make it to the final stage, it appears that many are never actually referred for prosecution. An organization called “SOS Hadopi” has represented five individuals who reached the third strike stage, and the New York Times has reported that “all five [were] cleared before

⁶³ Décret n° 2013-596 du 8 juillet 2013 supprimant la peine contraventionnelle complémentaire de suspension de l'accès à un service de communication au public en ligne et relatif aux modalités de transmission des informations prévue à l'article L. 331-21 du code de la propriété intellectuelle.

⁶⁴ *Publication du décret supprimant la peine complémentaire de la suspension d'accès à Internet*, MINISTERE DE LA CULTURE ET DE LA COMMUNICATION (9 July 2013)

www.culturecommunication.gouv.fr/content/download/72701/555642/file/130709_MCC%20-%20cp%20suspension%20d%27acc%C3%A8s%20%C3%A0%20internet.pdf.

⁶⁵ See e.g., Bertrand Sautier, *HADOPI to disappear and the French graduated response system to be partially dropped*, IPKAT (Jul. 10, 2013) <http://ipkitten.blogspot.fr/2013/07/hadopi-to-disappear-and-french.html>; Marc Rees, *Hadopi : la suspension est abrogée, l'échange avec les FAI est automatisé*, PCINPACT (Jul. 9, 2013) www.pcinpact.com/news/81084-hadopi-suspension-est-abrogee-echange-avec-fai-est-fluidifie.htm.

⁶⁶ *IFPI Digital Music Report 2011*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, 18 (2011) <http://www.ifpi.org/content/library/DMR2011.pdf>.

⁶⁷ Aymeric Pichevin, *French Anti-Piracy Scheme's 25,000 Daily Reports* BILLBOARD (Oct. 22, 2010) <http://www.billboard.biz/bbbiz/others/french-anti-piracy-scheme-s-25-000-daily-1004123926.story> (reporting 25,000 music related reports per day within a month of the regime commencing operation); Jared Moya, *French 'Three-Strikes' Warnings Far Below Music Industry Hopes*, ZEROPAID (Dec. 15, 2010) <http://www.zeropaid.com/news/91562/french-three-strikes-warnings-far-below-music-industry-hopes> (reporting 50,000 submissions in December 2010).

⁶⁸ Aymeric Pichevin, *France's HADOPI Sends Out Final Copyright Infringement Notices, But Many Are Critical*, BILLBOARD (Jul. 19, 2011) <http://www.billboard.biz/bbbiz/others/france-s-hadopi-sends-out-final-copyright-1005282382.story>.

⁶⁹ *Réponse graduée – Les chiffres clés*, HADOPI (Aug. 2013) http://www.hadopi.fr/sites/default/files/page/pdf/Chiffresreponsegraduee_aout.pdf, 1, 3, 5.

going to court.”⁷⁰ By the time the scheme had been operating for some twenty months, Hadopi had referred only 14 cases to prosecutors for possible further action,⁷¹ and as of September 2013, just four cases had gone to trial. In the first case the Belfort Court fined a 40 year old Frenchman 150€ after his IP address was associated with infringement of the song “Rude Boy” by Rihanna (represented by the Universal label).⁷² His then-wife had admitted using the connection to download songs.⁷³ The penalty was imposed despite the account holder reportedly disconnecting his internet access after the second warning, voluntarily attending the local police station, and paying to have his computer “cleaned”.⁷⁴ In the second, a subscriber’s IP address was associated with the infringement of French film “Heartbreaker”.⁷⁵ The St Gaudens Court found him guilty of failing to secure his internet connection, but decided not to impose any penalty on the basis that he did not fully understand the nature of the technology and the infringements alleged against him.⁷⁶ In a third case, the subscriber was acquitted by the Lille Court for procedural irregularity; the notice had been dispatched too long after the alleged infringements took place.⁷⁷ The judgment did not disclose the content the account holder was alleged to have infringed.⁷⁸ In the fourth case (and final one to date), the subscriber was reportedly alleged to have infringed one song by Rohff (on the Warner Music Group label) and another by the Collectif Métissé (Universal).⁷⁹ When the defendant did not appear in court, the District Court of Montreuil issued a default judgment imposing a fine of 600€ and requiring the relevant ISP to limit the subscriber’s access for 15 days.⁸⁰ This was the first time the suspension power had ever been

⁷⁰ Eric Pfanner, *Copyright Cheats Face the Music in France* THE NEW YORK TIMES (Feb. 19, 2012) <http://www.nytimes.com/2012/02/20/technology/20iht-piracy20.html?pagewanted=all>.

⁷¹ Megan Geuss, *French anti-piracy agency Hadopi only sued 14 people in 20 months*, ARS TECHNICA (Sep. 5, 2012) <http://arstechnica.com/tech-policy/2012/09/french-anti-piracy-agency-hadopi-only-sued-14-people-in-20-months/?asid=03cabdde>.

⁷² The judgments applying HADOPI do not appear to be publicly available, but have been obtained and posted by a reporter for PC INPact. The judgment in the first can be found at Marc Rees, *Hadopi : condamné pour un seul titre, flashé 150 fois*, PCINPACT (Oct. 7, 2012) <http://www.pcinpact.com/news/74364-hadopi-condamne-pour-seul-titre-flashe-150-fois.htm>.

⁷³ See *ibid*.

⁷⁴ Cyrus Farivar, *France convicts first person under anti-piracy law (even though he didn’t do it)*, ARS TECHNICA (Sep. 13, 2012) <http://arstechnica.com/tech-policy/2012/09/france-convicts-first-person-under-anti-piracy-law-even-though-he-didnt-do-it>.

⁷⁵ See judgment posted at Marc Rees, *Hadopi: condamné pour un seul film, flashé plus de 100 fois*, PCINPACT (Feb. 19, 2013) <http://www.pcinpact.com/news/77604-hadopi-condamne-pour-seul-film-flashe-plus-100-fois.htm>.

⁷⁶ *Ibid*. This case was also discussed in Pierre Lescure, *Mission « Acte II de l’exception culturelle » Contribution aux politiques culturelles à l’ère numérique*, MINISTERE DE LA CULTURE ET DE LA COMMUNICATION (May 2013) www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescore/index.htm#/1, 361.

⁷⁷ See judgment posted at Marc Rees, *Hadopi: le premier jugement de relaxe*, PCINPACT (Jan. 23, 2013) <http://www.pcinpact.com/news/76967-hadopi-premier-jugement-relaxe.htm>. See also Julien L. *Hadopi: la relaxe d’un suspect causée par une erreur de procédure*, NUMERAMA (Jan. 11, 2013) www.numerama.com/magazine/24751-hadopi-la-relaxe-d-un-suspect-causee-par-une-erreur-de-procedure.html.

⁷⁸ See judgment posted at Marc Rees, *Hadopi: le premier jugement de relaxe*, PCINPACT (Jan. 23, 2013) <http://www.pcinpact.com/news/76967-hadopi-premier-jugement-relaxe.htm>.

⁷⁹ Marc Rees, *Première suspension Hadopi: un titre de Rohff, un autre du Collectif Métissé*, PCINPACT (Jun. 17, 2013) <http://www.pcinpact.com/news/80590-premiere-suspension-hadopi-titre-rohff-autre-collectif-metisse.htm>.

⁸⁰ The judgment is posted at Marc Rees, *Hadopi: 15 jours de suspension contre un employé municipal, le jugement*, PCINPACT (Jun. 20, 2013) <http://www.pcinpact.com/news/80691-hadopi-15-jours-suspension-contre-employe-municipal-jugement.htm>. The circumstances of the case have been further reported at Marc Rees, *Hadopi: 600 € d’amende et quinze jours de suspension pour un abonné*, PC INPACT (Jun. 12, 2013) www.pcinpact.com/news/80487-hadopi-600-d-amende-et-quinze-jours-suspension-pour-abonne.htm.

exercised. By contrast, the French culture minister originally suggested that the scheme would result in 1000 disconnections per *day*.⁸¹

Notably, none of the four cases decided so far attempted to prove that the account holder actually engaged in the infringement. Instead, each involved the lesser charge of failing to appropriately secure an internet connection, which, at the time, was punishable by a maximum fine of 1500€ and suspension for up to a month.⁸² As described above, the suspension penalty for that offence has now been abolished. It has been announced that the one application of the penalty would not take place due to that repeal.⁸³ At the time of writing the future status of the provision permitting suspension in cases of proven infringement by the subscriber is unclear. However, even if it remains on the law books, its practical import is likely to be small: none of the cases decided to date have involved that charge, and even if a successful prosecution is brought in future, courts may be disinclined to impose suspension in light of the government's message that it is an inappropriate penalty in cases of non-commercial infringement.

B. NEW ZEALAND

The law

New Zealand was one of the earliest adopters of graduated response, making its first attempt to enact a statutory regime in 2008.⁸⁴ Section 92A of the *Copyright (New Technologies) Amendment Act 2008* imposed an obligation on ISPs to “adopt and reasonably implement” policies for the termination of access to repeat infringers. Vigorously criticized for its breadth (“ISP” was defined in a way that enveloped all organizations that provided internet access, including libraries and schools⁸⁵) and lack of due process, the Government was forced to announce that the section would not come into force as scheduled, but would be “re-examined and reworked to address concerns”.⁸⁶

Some three years later, the *Copyright (Infringing File Sharing) Amendment Act 2011* repealed s92A and replaced it with a new framework. The new system came into effect for fixed-line internet access in September 2011; mobile providers will be obliged to follow suit from October 2013.⁸⁷

⁸¹ *France, the first country to implement the controversial ‘three-strikes-and-you’re-out’ legislation*, EPM MUSIC (Jun. 17, 2009) <http://epm-music.com/digital-distribution/news/47-france-the-first-country-to-implement-the-controversial-three-strikes-and-you-re-out-legislation>.

⁸² Code de la Propriété Intellectuelle [C. Prop. Intell.] art. R335-5 (Fr.)

⁸³ Marc Rees, *Hadopi: la peine de 15 jours de suspension à Internet ne sera pas appliquée*, PCINPACT (Sep. 5, 2013) http://www.pcinpact.com/news/82170-hadopi-peine-15-jours-suspension-a-internet-ne-sera-pas-appliquee.htm?utm_source=PCi_RSS_Feed&utm_medium=news&utm_campaign=pcinpact.

⁸⁴ For a more detailed discussion of the N.Z. law see Rebecca Giblin, *On the (new) New Zealand graduated response law (and why it’s unlikely to achieve its aims)* 62(4) TELECOMMUNICATIONS JOURNAL OF AUSTRALIA 54.1 (2012).

⁸⁵ *Internet Blackout NZ*, CREATIVE FREEDOM NZ (2008) <http://creativefreedom.org.nz/blackout.html>.

⁸⁶ *Government to amend Section 92A: Press Release*, New Zealand Government (2009) SCOOP INDEPENDENT NEWS (Mar. 23, 2009) <http://www.scoop.co.nz/stories/PA0903/S00330.htm>.

⁸⁷ Copyright (Infringing File Sharing) Amendment Act 2011 (N.Z.) s 2; Copyright Act 1994 (N.Z.) s 122S.

The revised law is narrower in scope than its predecessors, and applies only to Internet Protocol Address Providers (IPAPs).⁸⁸ This covers businesses that, other than as an incidental feature of their main commercial activities, offer the transmission, routing and providing of connections for digital online communications, allocate IP addresses to their account holders, charge those account holders for their services, and are not primarily operated to cater for transient users.⁸⁹ This is intended to capture only traditional ISPs, not organizations (like libraries and businesses) that merely provide incidental access to their members and employees.⁹⁰

The law utilizes a three notice framework. A rights owner can identify a subscriber as belonging to a particular IPAP via its IP address, and then contact it to make an infringement allegation. The IPAP must then identify the subscriber and issue an appropriate notice within 7 days.⁹¹ Since the same IP address will typically be allocated to a vast number of subscribers over time, the IPAP must carefully identify the subscriber to which it was assigned at the time of the impugned conduct. A first notice relating to particular subscriber from a rights owner is referred to as a “detection notice”, the second as a “warning notice” and the third as an “enforcement notice”. In each case the notice must include the name of the complainant rights owner, details concerning the infringement that triggered the notice, an explanation of the consequences, and instructions for challenging the notice should the recipient wish to do so.⁹²

Applicant rightholders are required to defray the IPAP’s costs of issuing notices. From the commencement of the scheme, regulations have capped that amount at NZ\$25 per notice.⁹³ This allocation of costs has been controversial, with rightholders arguing that the per notice fee is too high. A review carried out six months after the scheme came into operation found that at that price point ISPs were out of pocket between \$5.50 and \$79 each time they issued a notice.⁹⁴ Nonetheless, the recording industry proposed that the fee be eliminated or reduced to \$2 or less,⁹⁵ and the film industry – which, despite being a major driver of the scheme, had refused to issue a single notice at the \$25 price point – argued that it should be eliminated altogether, or reduced to just a few cents.⁹⁶ The review concluded that the fee should remain at \$25, since the claimed reduction in the amount of infringing file sharing suggested that cost considerations

⁸⁸ Copyright Act 1994 (N.Z.), s 122A(1).

⁸⁹ Copyright Act 1994 (N.Z.), s 122A(1).

⁹⁰ Copyright (Infringing File Sharing) Amendment Bill 2010 No 119-1, Explanatory note, General policy statement, 4. However c.f. Pheh Hoon Lim and Louise Longdin, *P2P online file sharing: transnational convergence and divergence in balancing stakeholder interests* 33(11) EUROPEAN INTELLECTUAL PROPERTY REVIEW 690, 692 (2011) (suggesting that libraries and universities may nonetheless be captured by the scheme).

⁹¹ Copyright Act 1994 (N.Z.) s 122C(1).

⁹² Copyright Act 1994 (N.Z.), s 122D(2), E(2), F(2).

⁹³ Copyright (Infringing File Sharing) Regulations 2011 (N.Z.), r 7.

⁹⁴ *Copyright (Infringing File Sharing) Regulations – Review of Notice fee*, OFFICE OF THE MINISTER OF COMMERCE (2012) <http://www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/cabinet-paper.pdf>, 4.

⁹⁵ *Copyright (Infringing File Sharing) Regulations – Fee Review*, RECORDING INDUSTRY ASSOCIATION OF NEW ZEALAND AND INDEPENDENT MUSIC NEW ZEALAND (Apr. 30, 2012) www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/illegal-peer-to-peer-file-sharing-submissions-on-fee-review-discussion/rianz.pdf, 6.

⁹⁶ New Zealand Federation Against Copyright Theft, *Copyright (Infringing File Sharing) Regulations – Fee Review* (2012) MINISTRY FOR ECONOMIC DEVELOPMENT (2012) www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/illegal-peer-to-peer-file-sharing-submissions-on-fee-review-discussion/nzfact.pdf, 2.

were not preventing the law from working as intended, and because at that rate ISPs were able to recover an appropriate level of costs.⁹⁷

To give subscribers an opportunity to take steps to prevent future infringements, there's no obligation to issue a notice if the allegation of infringement refers to conduct that occurred within 28 days of an earlier one.⁹⁸ Detection and warning notices each expire nine months after issue (or after the quarantine period, if an enforcement notice has been issued).⁹⁹ Enforcement notices are valid for the quarantine period, which spans the 35 days from the issue of an enforcement notice. Once the notices expire, the cycle begins anew. The next allegation of infringement, if one occurs, will start the process again with a new detection notice.¹⁰⁰

Unlike the French system, the rightholder need not provide evidence in support of an allegation of infringement. However, the subscriber may challenge any notice within 14 days.¹⁰¹ If the rights owner does not reject the challenge within 28 days, it is deemed to be accepted.¹⁰² If the challenge is rejected by the rights owner, the account holder has no further recourse at that time, but may re-raise its objections during any subsequent enforcement proceedings.¹⁰³

The requirement that the three notices issued to any given subscriber must relate to the same rightholder means that, theoretically, a subscriber could receive many more than three notices in the relevant period without any one rightholder being able to institute enforcement action. In practice however, this requirement is considerably less difficult to satisfy than it first appears. That is because the Act effectively provides for rights owners to "pool" infringements. It does so by defining a "rights owner" as being either "a copyright owner" or "a person acting as agent for 1 or more copyright owners".¹⁰⁴ It then provides that, "[i]f a rights owner acts as agent for 1 or more copyright owners":

- a) a reference to the copyright of a rights owner is to be taken as a reference to the copyright of any of the copyright owners for whom the rights owner acts as agent; and
- b) a reference to infringement against a rights owner is to be taken as a reference to infringement against the copyright of any of the copyright owners for whom the rights owner acts as agent.¹⁰⁵

After the "third strike" or enforcement notice has finally been issued, the IPAP will provide a copy of it to the rights owner so they can seek redress. Although the NZ legislation does provide for repeat infringers to have their internet access disconnected, those provisions are currently

⁹⁷ *Copyright (Infringing File Sharing) Regulations – Review of Notice fee*, OFFICE OF THE MINISTER OF COMMERCE (2012) <http://www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/cabinet-paper.pdf>, 1.

⁹⁸ Copyright Act 1994 (N.Z.) s 122E, s 122F.

⁹⁹ Copyright Act 1994 (N.Z.) s 122D(3), 122E(3), 122F(4).

¹⁰⁰ Copyright Act 1994 (N.Z.) s 122D(1)(b).

¹⁰¹ Copyright Act 1994 (N.Z.) s 122G(1)-(2).

¹⁰² Copyright Act 1994 (N.Z.) s 122H(1).

¹⁰³ Copyright Act 1994 (N.Z.) s 122G(4)-(5).

¹⁰⁴ Copyright Act 1994 (N.Z.), s 122A.

¹⁰⁵ Copyright Act 1994 (N.Z.), s 122A(1).

dormant and may only be brought into force by an Order in Council.¹⁰⁶ Currently, the only available remedy is a financial penalty, which the infringing user may be ordered to pay by the Copyright Tribunal upon application from the rightholder.¹⁰⁷ The Tribunal is required to make such an order where it is satisfied that the allegations that triggered the infringement notices related to infringements of the rights owner's copyright, were committed from an IP address assigned to the account holder, and that the notices were validly issued - except where it considers it "manifestly unjust" to do so.¹⁰⁸

To calculate the sum payable, the Tribunal must add together the value of each infringed work, the amount paid by the rights owner to enforce its rights under the process and any amount the Tribunal "considers appropriate as a deterrent against further infringing."¹⁰⁹ In determining the latter, the Tribunal can take into account any relevant circumstances, including the flagrancy of the infringement and its possible effect on the market.¹¹⁰ The Regulations expressly anticipate that a sum may already constitute a sufficient deterrent without the Tribunal exercising its discretion to impose any additional impost.¹¹¹ The Tribunal must then require an account holder to pay the identified sum up to a ceiling of NZ\$15,000.¹¹²

Application so far

Within the New Zealand scheme, the Recording Industry Association of New Zealand (**Rianz**) appears to be the only rightholder to have issued *any* notices under the scheme.¹¹³ While comprehensive information regarding the number and source of notices is not publicly available, Rianz claims to have issued 2766 notices between the commencement of the scheme in September 2011 and the end of April 2012.¹¹⁴ It has done so as agent for a number of record labels.

As of August 2013, the Tribunal had decided thirteen cases. It is worth briefly considering the facts and resolutions reached in each as they demonstrate some significant emerging patterns. In each case the applicant was Rianz, acting on behalf of various record labels. None of the cases involved three different infringements: instead, at least two of the notices always related to the same song.¹¹⁵ In each case the Tribunal took the view that, because sending the first notices had an educative effect, the applicant should not be reimbursed for their full cost of issue, and that

¹⁰⁶ Copyright Act 1994 (NZ) s 122R(2).

¹⁰⁷ Copyright Act 1994 (N.Z.) s 122O.

¹⁰⁸ Copyright Act 1994 (N.Z.) s 122O.

¹⁰⁹ Copyright (Infringing File Sharing) Regulations 2011 (N.Z.), r 12(2).

¹¹⁰ Copyright (Infringing File Sharing) Regulations 2011 (N.Z.), r 12(3).

¹¹¹ Copyright (Infringing File Sharing) Regulations 2011 (N.Z.), r 12(3)(c).

¹¹² Copyright Act 1994 (N.Z.) s 122O(4); Copyright (Infringing File Sharing) Regulations 2011 (N.Z.), r 12(1).

¹¹³ See e.g., Chris Keall, *The number of infringement notices sent by the movie industry? None. Not a sausage*, THE NATIONAL BUSINESS REVIEW (Jan. 31, 2013) <http://www.nbr.co.nz/not-a-sausage> (reporting that the National Business Review has been unable to discover any infringement notices issued by anyone other than Rianz by January 2013).

¹¹⁴ *Copyright (Infringing File Sharing) Regulations – Fee Review*, RECORDING INDUSTRY ASSOCIATION OF NEW ZEALAND AND INDEPENDENT MUSIC NEW ZEALAND (Apr. 30, 2012) www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/illegal-peer-to-peer-file-sharing-submissions-on-fee-review-discussion/rianz.pdf, 1, 10.

¹¹⁵ The decisions are *available at* <http://www.nzlii.org/nz/cases/NZCopyT/2013/> (this paper reflects decisions decided up to and including Sep. 1, 2013).

the reasonable cost of the copyrighted work should be determined by reference to the price at which it could be purchased (and without regard to the number of infringements the respondent may have facilitated). The sums awarded to deter further infringement represented the biggest variable, and ranged from \$0 (in three cases where defendants responded to the allegations and explained why they were unable to pay or otherwise should not be obliged to do so)¹¹⁶ to \$600 (being \$100 for each of six detected infringements).¹¹⁷

C. SOUTH KOREA

The law

South Korea's graduated response scheme was enacted in April 2009.¹¹⁸ The Korean regime is unique in that it provides two separate pathways to termination of access. The first is based upon Article 133-2 of the *Copyright Act 1959* (Korea).¹¹⁹ Where infringing copies have been transmitted through "information and telecommunications networks", the Minister of Culture, Sports and Tourism ("the Minister") may order the online service provider to take a number of measures including issuing warnings against the transmitters of illegal copies.¹²⁰ Where an alleged infringer has received three or more warnings, the Minister may order suspension of the account.¹²¹ An associated Presidential Decree provides that a subscriber's first suspension must be for less than one month, the second for at least one but less than three months, and the third for at least three but less than six months.¹²² While accounts are suspended, users are not prevented from signing up with other online service providers to resume access.¹²³ Before the Minister can issue the order the matter will be deliberated by the Korea Copyright Commission.¹²⁴ The regulations provide that the Commission must take into account factors such as the alleged infringer's recidivism, the volume of copies reproduced and/or transmitted, the type of copies and possibility of market substitution, and the impact of the unlawful copies on legitimate distribution.¹²⁵

The second pathway to disconnection from internet services is via recommendation of the Commission itself. It has authority to make various recommendations to online service providers, including that they issue warnings to infringers, delete infringing copies, or suspend accounts which have been "repeatedly" involved in infringement.¹²⁶ Unlike the Article 133-2 procedure,

¹¹⁶ See *Recording Industry Association of New Zealand v CAL2012-E00609* [2013] NZCopyT 5; [2013] NZCOP 5, *Recording Industry Association New Zealand v Telecom NZ 4366* [2013] NZCopyT 11; [2013] NZCOP 11, *Recording Industry Association New Zealand v TCLE[A]-T6518151* [2013] NZCopyT 12; [2013] NZCOP 12.

¹¹⁷ *Recording Industry Association New Zealand v Telecom NZ 3728* [2013] NZCopyT 8; [2013] NZCOP 8.

¹¹⁸ Jeremy de Beer and Christopher D. Clemmer, *Global trends in online copyright enforcement: A non-neutral role for network intermediaries?*, 49 JURIMETRICS JOURNAL 375, 395 (2009).

¹¹⁹ Copyright Act 1959 (South Korea) art 133-2.

¹²⁰ Copyright Act 1959 (South Korea) art 133-2.

¹²¹ Copyright Act 1959 (South Korea) art 133-2.

¹²² Enforcement Decree of the Copyright Act (South Korea) art 72-3(3).

¹²³ Sun-Young Moon and Daeup Kim, *The 'Three Strikes' Policy in Korean Copyright Act 2009: Safe or Out?*, 6 WASHINGTON JOURNAL OF LAW, TECHNOLOGY & ARTS 171, 175-176 (2011).

¹²⁴ Copyright Act 1959 (South Korea) art 133-2.

¹²⁵ Enforcement Decree of the Copyright Act (South Korea) art 72-3(3)(1).

¹²⁶ Copyright Act 1959 (South Korea) art 133-3.

the Act does not require any prior warnings – only a determination that infringement is “repeated”. As IP activist Heesob Nam explains:

[i]n this regard, the suspension by the Commission’s recommendation is neither a three-strike rule nor a notice-suspension system. The Korean government also does not call this a three-strike rule. But the reason is quite different. It is not a three-strike rule because the suspension is a voluntary measure taken by an ISP...¹²⁷

While the Commission is not *required* to give warnings prior to disconnection, Nam reports that it has an internal bylaw which does require multiple warnings before it will recommend disconnection.¹²⁸

It’s important to emphasize that suspension is not limited to internet access, but also covers user accounts on various services. The Commission bears all costs associated with the scheme, other than the costs of investigations carried out by rightholders.¹²⁹

Application so far

Between the South Korean scheme’s commencement in July 2009 and the end of 2012, 468,446 warnings and takedown notices were issued.¹³⁰ This figure includes the suspensions imposed by the Commission as well as the Minister, though in 2012 the Minister issued no warnings and required no suspensions.¹³¹ Although ISPs are required to act on the Minister’s orders, they have discretion regarding whether they act on the Commission’s recommendations.¹³² In practice however, they consistently do so. Data for the first year the scheme was in operation demonstrates that ISPs suspended user accounts in response to 99.94% of Commission recommendations.¹³³ None of the suspensions under either the Commission or Ministerial processes were of internet access – only for accounts to other services, such as online file hosting.¹³⁴ To provide some context to these numbers, South Korea had over 40 million internet users in 2011.¹³⁵

¹²⁷ Heesob Nam, *Facts and Figures on Copyright Three-Strike Rule in Korea*, HEESOB’S IP BLOG (Oct. 24, 2010) <http://hurips.blogspot.com.au/2010/10/facts-and-figures-on-copyright-three.html>.

¹²⁸ *Ibid.*

¹²⁹ New Zealand Federation Against Copyright Theft, *Copyright (Infringing File Sharing) Regulations – Fee Review* (2012) MINISTRY FOR ECONOMIC DEVELOPMENT (2012) www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/illegal-peer-to-peer-file-sharing-submissions-on-fee-review-discussion/nzfact.pdf, 2-3.

¹³⁰ *Copyright Reform - Abolishing Three-Strikes-Out Rule from Copyright Law*, OPENNET (2013) <http://reformcopyright.opennet.or.kr>.

¹³¹ *Ibid.*

¹³² Doug Jay Lee, Misung Kim and Jong Won Hong, *Annual Report 2009*, KOREA APAA COPYRIGHT COMMITTEE (2009) http://www.apaaonline.org/pdf/APAA_56th_&_57th_council_meeting/copyright/2-Korea%20Copyright%20Cttee%20Country%20Report%202009.pdf, 7.

¹³³ Heesob Nam, *Facts and Figures on Copyright Three-Strike Rule in Korea*, HEESOB’S IP BLOG (Oct. 24, 2010) <http://hurips.blogspot.com.au/2010/10/facts-and-figures-on-copyright-three.html>.

¹³⁴ *Ibid.*

¹³⁵ *South Korea*, NEW MEDIA TREND WATCH (Jun. 29, 2013) www.newmediatrendwatch.com/markets-by-country/11-long-haul/63-south-korea.

In March 2013 the National Human Rights Commission of South Korea called for the three strikes law to be repealed.¹³⁶ The report reportedly questioned its regulatory effectiveness, and found that the law ‘may restrict the right to culture and information’.¹³⁷ Around the same time, a dozen members of the Korean National Assembly introduced a Bill seeking to repeal the law.¹³⁸ As in France, the law’s future is far from assured.

D. TAIWAN

The law

Taiwan was another early adopter of graduated response. However, its version seems to have fewer teeth than that of its northern neighbor. Its *Internet Service Provider (ISP) Liability Limitation Bill* was passed on 21 April 2009, amending the principal *Copyright Act*.¹³⁹ The scheme links a “three strikes” system together with immunity for complying ISPs. Article 90quinquies provides that ISPs will only be entitled to rely on statutory safe harbors where they:

1. Inform users of their copyright or plate right protection policies, and take “concrete action” to implement them;
2. Inform users that in the event of repeat alleged infringements up to three times the service provider shall terminate the service in whole or in part;
3. Publicly announce information regarding their “contact window” for receipt of notification documents; and
4. Pass on notifications alleging infringement to the relevant user, and implement technical measures for protecting copyrighted or plate-righted works, if those measures have been ratified by the “competent authority”.

It’s notable that the law does not actually require ISPs to terminate user access, only to advise users that they will do so.¹⁴⁰ The accompanying regulations provide little detail about how the scheme is to operate in practice. They simply set out the contact information that ISPs must make available,¹⁴¹ the particulars that must be contained in any notification or counter-

¹³⁶ At time of writing, there is no English-language translation of the report available. The report is available in Korean at www.humanrights.go.kr/common/board/fildn_new.jsp?fn=1364343699994.pdf. An English-language description of the report’s findings is available at Heesob Nam, *National Human Rights Body Recommends Abolishing Three-Strike-Out Rule*, HEESOB’S IP BLOG (Mar. 27, 2013) <http://hurips.blogspot.kr/2013/03/national-human-rights-body-recommends.html>.

¹³⁷ Heesob Nam, *National Human Rights Body Recommends Abolishing Three-Strike-Out Rule*, HEESOB’S IP BLOG (Mar. 27, 2013) <http://hurips.blogspot.kr/2013/03/national-human-rights-body-recommends.html>.

¹³⁸ Jae Yeon Kim, *South Korean Politician Moves to Repeal Biased Copyright Law*, GLOBAL VOICES ADVOCACY (Mar. 28, 2013) <http://advocacy.globalvoicesonline.org/2013/03/28/south-korean-politician-moves-to-repeal-biased-copyright-law/>.

¹³⁹ Yulan Kuo and Charles Chen, *Taiwan provides safe harbour for ISPs in copyright infringement cases – International Report*, INTELLECTUAL ASSET MANAGEMENT (Jul. 22, 2009) <http://www.iam-magazine.com/reports/detail.aspx?g=8e991417-0853-4730-9bb6-3c45ebbf8f97>.

¹⁴⁰ See e.g., Johnny Ryan and Catriona Heintz, *Internet access controls: Three Strikes ‘graduated response’ initiatives*, INSTITUTE OF INTERNATIONAL AND EUROPEAN AFFAIRS (May 2010) <http://www.iiea.com/documents/draft-overview-of-three-strikes-measures-nlm-study>, 16.

¹⁴¹ Regulations Governing Implementation of ISP Civil Liability Exemption (2009) (Taiwan); art 2.

notification regarding an infringement allegation,¹⁴² and outline the circumstances in which ISPs may require issuers to correct inadequate notifications or counter-notifications.¹⁴³

One possible explanation for the scheme's lack of detail can be gleaned from commentary published by a Taiwanese law firm in late 2009. It suggested that "[t]he amendments to the Copyright Act and the regulations appear to have been carefully thought through to appease those parties lobbying for the inclusion of a "three-strikes" mechanism while ensuring that the ISP and individual users of connection services have a degree of protection."¹⁴⁴

Application so far

Although the Taiwanese scheme has now been in operation for several years, there seems to be no reports of any user actually having had their access suspended under the law. Despite the scheme's limitations, IFPI has cited Taiwan approvingly when reporting its successes on the graduated response front,¹⁴⁵ and the country's efforts towards implementing graduated response were cited as a key reason for Taiwan's removal from the USTR's "special watch list" in 2009.¹⁴⁶

E. UNITED KINGDOM

The law

The final public law graduated response regime is that of the UK. As it hasn't yet come into operation, its effects cannot be evaluated. However, the design of the UK model and the hurdles faced by those seeking to implement it are nonetheless instructive.

The framework for the UK's graduated response is contained in the *Digital Economy Act 2010* (UK), which amended the *Communications Act 2003* (UK).¹⁴⁷ The statute was designed to be supplemented by two pieces of secondary legislation: a so-called "Initial Obligations Code", which would contain the details of the way in which the notification scheme would operate,¹⁴⁸

¹⁴² Regulations Governing Implementation of ISP Civil Liability Exemption (2009) (Taiwan); arts 3 and 5 respectively.

¹⁴³ Regulations Governing Implementation of ISP Civil Liability Exemption (2009) (Taiwan); Articles 4 and 6 respectively.

¹⁴⁴ This commentary is no longer online, but a copy is on file with the author, and as of Sep. 1, 2013 it could be accessed via the Wayback Machine. See <http://web.archive.org/web/20100302092545/http://www.winklerpartners.com/a/2009/11/>. The relevant regulations are available at www.tipo.gov.tw/en/MultiMedia_FileDownload.ashx?guid=930423d1-3094-4571-afd6-55f2ef208768.

¹⁴⁵ See e.g., *IFPI Digital Music Report 2010*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (2010) www.ifpi.org/content/library/DMR2010.pdf, 3.

¹⁴⁶ *USTR Announces Conclusion of the Special 301 Out-of-Cycle Review for Taiwan*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Jan. 2009) www.ustr.gov/about-us/press-office/press-releases/2009/january/ustr-announces-conclusion-special-301-out-cycle-re.

¹⁴⁷ Unless indicated otherwise, section numbers cited below refer to the *Communications Act 2003* (U.K.).

¹⁴⁸ *Communications Act 2003* (U.K.), ss 124D; 124E. See also *Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012*, OFCOM (2012) <http://stakeholders.ofcom.org.uk/consultations/infringement-implementation/summary>.

and a “Costs Order”, which would determine the allocation of the scheme’s costs.¹⁴⁹ Communications industry regulator Ofcom is charged with formulating both documents. Ofcom published a draft version of the Initial Obligations Code in May 2010,¹⁵⁰ and laid an initial draft of the Costs Order before Parliament in early 2011.¹⁵¹ Two ISPs sought judicial review to clarify the compatibility of the *Digital Economy Act* and draft Costs Order with various EU directives.¹⁵² Their challenge resulted in ISPs being exempted from any obligation to contribute to the costs of Ofcom or the appeals body in carrying out their functions, or to the costs of appeals, but was otherwise rejected.¹⁵³ Ofcom released modified versions of the draft Initial Obligations Code¹⁵⁴ and Costs Order¹⁵⁵ in June 2012, expecting the statutory instruments to be reviewed by the EC and put before the UK Parliament by the end of 2012.¹⁵⁶ However, as of June 2013, more than three years after the Digital Economy Act received Royal Assent,¹⁵⁷ neither hurdle has been leapt. This is largely attributable to continued controversies regarding the allocation of costs. In July 2012 the House of Lords Secondary Legislation Scrutiny Committee drew the revised Costs Order “to the special attention of the House on the grounds that it gives rise to issues of public policy likely to be of interest to the House and it may imperfectly achieve its policy objective.”¹⁵⁸ The Committee was particularly concerned about the allocation of costs being decided before key aspects of the scheme were finalized (and thus while the actual costs remain unknown).¹⁵⁹ More recently it has also been suggested that the continued delays in laying the revised Costs Order before Parliament are due to a dispute regarding whether Treasury approval is also necessary.¹⁶⁰

¹⁴⁹ Communications Act 2003 (U.K.), s 124M. See also *Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012*, OFCOM (2012) <http://stakeholders.ofcom.org.uk/consultations/infringement-implementation/summary>.

¹⁵⁰ See *Online Infringement of Copyright and the Digital Economy Act 2010*, OFCOM (2010) <http://stakeholders.ofcom.org.uk/consultations/copyright-infringement>.

¹⁵¹ See *Draft Statutory Instrument - The Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2011*, GOV.UK (2011) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78348/10-1199-Darft-SI-online-infringement-of-copyright-costs-order.pdf.

¹⁵² *British Telecommunications Plc v. Secretary of State for Culture, Olympics, Media and Sport*, [2012] E.W.C.A. Civ. 232, [1].

¹⁵³ See *British Telecommunications Plc v. Secretary of State for Culture, Olympics, Media and Sport*, [2012] E.W.C.A. Civ. 232, especially [101]-[107].

¹⁵⁴ *Notice of Ofcom’s proposal to make by order a code for regulating the initial obligations*, OFCOM (Jun. 26, 2012) <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>.

¹⁵⁵ *Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012*, OFCOM (Jun. 26, 2012) <http://stakeholders.ofcom.org.uk/binaries/consultations/onlinecopyright/summary/condoc.pdf>.

¹⁵⁶ *New measures to protect online copyright and inform consumers*, OFCOM (Jun. 26, 2012) <http://media.ofcom.org.uk/2012/06/26/new-measures-to-protect-online-copyright-and-inform-consumers/>.

¹⁵⁷ *British Telecommunications Plc v. Secretary of State for Culture, Olympics, Media and Sport*, [2012] E.W.C.A. Civ. 232, [21].

¹⁵⁸ Secondary Legislation Scrutiny Committee, *Seventh Report: Instruments Drawn to the Special Attention of the House*, UK HOUSE OF LORDS (Jul. 4, 2012) <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldsecleg/32/3203.htm>.

¹⁵⁹ *Ibid.*

¹⁶⁰ James Firth, *Sources: No Digital Economy Act Copyright Warning Letters until 2016 at the Earliest*, SLIGHTLY RIGHT OF CENTRE (May 30, 2013) <http://www.sroc.eu/2013/05/sources-no-digital-economy-act.html?m=1>.

The UK scheme envisages a two-tiered response to allegations of repeat infringement. It achieves this by drawing a distinction between “initial obligations” (which will apply from the time the scheme is finally implemented) and “technical obligations” (which will not apply until some time later, if at all). Strictly speaking the scheme utilizes a “notice and notice” framework, rather than “notice and sanction”, as the initial obligations do not impose any penalties on repeat infringers. However, the scheme does make it easier for rightholders to identify repeat infringers, and places obligations on ISPs to assist in the policing of their users, which makes it appropriate to include the UK in the graduated response club.

At this stage it is by no means clear that either statutory instrument will ever be passed. However, the following analysis provides an overview of how the scheme will work if it is implemented as currently drafted.

If and when the scheme finally comes into operation, ISPs will have two “initial obligations”. The first requires them to notify subscribers of allegations of infringement made by rightholders, in accordance with detailed procedures set out within the Act and the Initial Obligations Code. The second obligation is to maintain infringement lists in accordance with that Code, which must be provided to rightholders upon request.¹⁶¹ The lists will be required to identify, on an anonymized basis, all subscribers who have at least the threshold number of infringement reports in relation to the requesting copyright owner.¹⁶² Rightholders can then seek disclosure of the personal information of subscribers via court order.

The draft Initial Obligations Code provides that the scheme will only apply to the largest ISPs – those who offer 400,000 or more broadband-enabled lines.¹⁶³ Ofcom justifies this on the basis that, for others, “costs of participation would be disproportionately high compared to the expected low reduction in overall levels of online copyright infringement that participation would bring”.¹⁶⁴ The scheme will also be limited to certain pre-defined rightholders. The Code will apply only to “qualifying copyright owners”, defined as copyright owners who have “made an estimate of the number of copyright infringement reports [they] will make to a qualifying internet service provider in that notification period”, and provided it to ISPs and Ofcom in accordance with the code.¹⁶⁵ Special arrangements will apply to the first notification period, but for subsequent ones, estimates of notice levels must be provided at least two months before the beginning of the notification period.¹⁶⁶ ISPs will have no obligation to issue notices unless and until the copyright owner has paid the issuance fee in full.¹⁶⁷

Ofcom must approve the evidence-gathering and verification procedures of qualifying copyright owners before they can begin issuing notices to ISPs.¹⁶⁸ The UK scheme is not restricted to infringements committed via P2P file sharing technologies. However, as the gathering of

¹⁶¹ Communications Act 2003 (U.K.), s 124B.

¹⁶² Communications Act 2003 (U.K.), s 124B(2), (3).

¹⁶³ *Notice of Ofcom’s proposal to make by order a code for regulating the initial obligations*, OFCOM (Jun. 26, 2012) <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, 3.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*, 18.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*, 4.

¹⁶⁸ *Ibid.*, Annex 3 (Draft Initial Obligations Code), s 6.

evidence concerning widespread infringement tends to focus on P2P networks, it's likely that this technology will nonetheless trigger the bulk of allegations.

After the first copyright infringement report for any given user is sent to an ISP by a rightholder, the ISP must match the IP address and send an "initial notification" to the associated subscriber.¹⁶⁹ On the second occasion, an "intermediate notification" must be sent alerting the subscriber to the allegation and warning them that a third notification may result in their inclusion on a copyright infringement list.¹⁷⁰ If a third copyright infringement report is made against the same subscriber within the 12 month period, the ISP must notify the account holder of the allegation and explain that a statement setting out the infringement reports made by a particular copyright owner in relation to them may be provided to that copyright owner upon request.¹⁷¹ The notice must explain that, while the subscriber's identity will not be disclosed, the rightholder may seek a court order for disclosure, and may be able to bring legal action against the subscriber for infringement.¹⁷² Fourth and subsequent notifications are issued in much the same terms.¹⁷³ Rightholders are permitted to seek a list of subscribers who have reached the "three strike" threshold from each ISP up to once a month, and ISPs must comply within ten working days.¹⁷⁴ The lists will contain only the allegation(s) of infringement referable to the requesting rightholder.¹⁷⁵ Copyright infringement reports will remain active for 12 months after receipt by the ISP.¹⁷⁶

Rightholders must send their infringement allegations to ISPs within a month of the supporting evidence being gathered,¹⁷⁷ and ISPs then have a further month to notify subscribers of the allegation.¹⁷⁸ To give putative infringers an opportunity to remedy their ways (or secure their networks), there must be a minimum 20 day grace period between any previous notification and the evidence which triggers the next.¹⁷⁹

Subscribers will be able to appeal notifications alleging infringement to a designated body,¹⁸⁰ but must do so within 20 working days of receiving the notice or infringement report.¹⁸¹ There are four possible grounds of appeal:

- a) that the apparent infringement to which a copyright infringement report relates was not actually an infringement;
- b) that the copyright infringement report did not relate to the subscriber's IP address at the relevant time;

¹⁶⁹ *Ibid*, Annex 3 (Draft Initial Obligations Code), s 11.

¹⁷⁰ *Ibid*, Annex 3 (Draft Initial Obligations Code), s 12.

¹⁷¹ *Ibid*, Annex 3 (Draft Initial Obligations Code), s 13.

¹⁷² *Ibid*.

¹⁷³ *Ibid*, Annex 3 (Draft Initial Obligations Code), s 14.

¹⁷⁴ *Ibid*, Annex 3 (Draft Initial Obligations Code), s 19.

¹⁷⁵ *Ibid*, Annex 3 (Draft Initial Obligations Code), s 19.

¹⁷⁶ *Ibid*, Annex 3 (Draft Initial Obligations Code), s 10.

¹⁷⁷ *Ibid*, Annex 3 (Draft Initial Obligations Code), s 4.

¹⁷⁸ *Ibid*, Annex 3 (Draft Initial Obligations Code), s 15.

¹⁷⁹ *Ibid*, Annex 3 (Draft Initial Obligations Code), ss 12, 13. For fourth and subsequent "strikes", there must be at least a 90 day grace period. See s 14.

¹⁸⁰ *Ibid*, Annex 3 (Draft Initial Obligations Code), s 24.

¹⁸¹ *Ibid*, Annex 3 (Draft Initial Obligations Code), s 26.

- c) that the act constituting the apparent infringement was not done by the subscriber (and the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service); or
- d) that there was a contravention of the Initial Obligations Code or related regulation by a participating copyright owner or ISP.¹⁸²

The appeals body must find in favor of the subscriber unless the copyright owner shows that the alleged infringement was in fact infringing, and the relevant ISP shows that the IP address set out in the infringement report was indeed allocated to the subscriber at the relevant time.¹⁸³ Appeals must also be determined in favor of the subscriber where they demonstrate that they did not do the act constituting the apparent infringement, and that they took reasonable steps to prevent others from infringing via their account.¹⁸⁴

As flagged above, the allocation of the costs of the scheme has generated considerable controversy. Ofcom's current draft consultation paper on the sharing of costs proposes that:

1. Copyright owners will bear the costs incurred by Ofcom in setting up the system (with each owner's contribution being proportionate to the number of notices it proposes to send);¹⁸⁵
2. Copyright owners will bear the costs of processing any appeal against an allegation they have made (other than £20, which each appellant must contribute, and which will be refunded if the appeal is upheld);¹⁸⁶ and
3. Copyright owners will bear 75% of the costs "efficiently and reasonably incurred by ... ISPs in carrying out their obligations", with this again being determined pro rata with reference to the number of notices each owner proposes to send. Participating ISPs will contribute the remaining 25%.¹⁸⁷

Copyright owners have indicated an intention to issue some 2 million copyright infringement reports each year, but made it clear that "their cooperation is entirely dependent on financial considerations."¹⁸⁸ The Impact Assessment of the current version of the Costs Order estimates Ofcom's likely set-up costs at £5.8 million, and the capital costs of ISPs at a further £7.6 million¹⁸⁹ (although ISPs have argued that the proposed Costs Order significantly underestimates

¹⁸² *Ibid*, Annex 3 (Draft Initial Obligations Code), s 25.

¹⁸³ *Ibid*, Annex 3 (Draft Initial Obligations Code), s 29.

¹⁸⁴ *Ibid*.

¹⁸⁵ *Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012*, OFCOM (Jun. 26, 2012) <http://stakeholders.ofcom.org.uk/binaries/consultations/onlinecopyright/summary/condoc.pdf>, 1.

¹⁸⁶ *Ibid*.

¹⁸⁷ *Ibid*.

¹⁸⁸ Secondary Legislation Scrutiny Committee, *Seventh Report: Instruments Drawn to the Special Attention of the House*, UK HOUSE OF LORDS (Jul. 4, 2012) <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldsecleg/32/3203.htm>, [37].

¹⁸⁹ *Impact Assessment of draft SI "The online infringement of copyright (Initial Obligations)(Sharing of Costs) order 2011"*, GOV.UK (Jun. 29, 2011) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78093/IA_Sharing_of_Costs_SI.pdf, 9, 10.

their likely costs).¹⁹⁰ The Secondary Legislation Scrutiny Committee has expressed concern that rightholders have no obligation to actually use the system if and when it is implemented.¹⁹¹ If they choose not to, or if volumes are significantly lower than expected, these hefty start-up costs may be unable to be recovered.

Application so far

ISPs will have no obligations under the law until the Initial Obligations Code comes into effect.¹⁹² It is not clear when (or if) this will occur. It was originally anticipated that the first notices would be issued by the beginning of 2011,¹⁹³ but Ofcom has most recently indicated that the first notifications are expected to be sent three years late, “in early 2014.”¹⁹⁴ This deadline looks impossible to meet, given that the statutory instruments have not yet been passed. Music Week has reported that implementation may now not occur until “late 2014 or even 2015”.¹⁹⁵ Digital policy expert James Firth has cited Westminster sources suggesting that the statutory instruments won’t be passed before the general election (expected in 2015), and hypothesized that the first warning notices won’t be dispatched before 2016.¹⁹⁶

The scheme is intended to bring about a 75% reduction in the amount of infringement committed by UK internet users.¹⁹⁷ In the event that it is insufficiently effective, the Secretary of State may choose to impose the second-tier measures, which are referred to as “technical obligations”. These may include “bandwidth capping or shaping that would make it difficult for subscribers to continue file-sharing ... If appropriate, temporary suspension of broadband connections could be considered”.¹⁹⁸ Permanent disconnection will not be an option. Technical obligations cannot be

¹⁹⁰ See e.g., *Ofcom Sharing of Costs Order Consultation (June 2012) – BT Response*, BT (Sep. 21, 2012) <http://stakeholders.ofcom.org.uk/binaries/consultations/onlinecopyright/responses/BT.pdf>; *Everything Everywhere's response to Ofcom's Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012*, EVERYTHING EVERYWHERE (Sep. 18, 2012) http://stakeholders.ofcom.org.uk/binaries/consultations/onlinecopyright/responses/Everything_Everywhere.pdf; *TalkTalk Group Submission*, TALKTALK (Sep. 2012) http://stakeholders.ofcom.org.uk/binaries/consultations/onlinecopyright/responses/TalkTalk_Group.pdf.

¹⁹¹ Secondary Legislation Scrutiny Committee, *Seventh Report: Instruments Drawn to the Special Attention of the House*, UK HOUSE OF LORDS (Jul. 4, 2012) <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldsecleg/32/3203.htm>, [26].

¹⁹² *Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012*, OFCOM (Jun. 26, 2012) <http://stakeholders.ofcom.org.uk/binaries/consultations/onlinecopyright/summary/condoc.pdf>, 23.

¹⁹³ See e.g., Emma Barnett, *Digital Economy Act: what happens next?* THE TELEGRAPH (Apr. 9, 2010) <http://www.telegraph.co.uk/technology/news/7571532/Digital-Economy-Act-what-happens-next.html>.

¹⁹⁴ *Notice of Ofcom's proposal to make by order a code for regulating the initial obligations*, OFCOM (Jun. 26, 2012) <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, 7.

¹⁹⁵ Tim Ingham, *Digital Economy Act delayed AGAIN*, MUSICWEEK (Feb. 7, 2013) <http://www.musicweek.com/news/read/digital-economy-act-delayed-again/053507>.

¹⁹⁶ James Firth, *Sources: No Digital Economy Act Copyright Warning Letters until 2016 at the Earliest*, SLIGHTLY RIGHT OF CENTRE (May 30, 2013) <http://www.sroc.eu/2013/05/sources-no-digital-economy-act.html?m=1>.

¹⁹⁷ Secondary Legislation Scrutiny Committee, *Seventh Report: Instruments Drawn to the Special Attention of the House*, UK HOUSE OF LORDS (Jul. 4, 2012) <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldsecleg/32/3203.htm>.

¹⁹⁸ See e.g., Johnny Ryan and Catriona Heintz, *Internet access controls: Three Strikes 'graduated response' initiatives*, INSTITUTE OF INTERNATIONAL AND EUROPEAN AFFAIRS (May 2010).

imposed until at least 12 months after the initial obligations have been in operation,¹⁹⁹ and Ofcom must first make “a technical obligations code for the purpose of regulating those obligations.”²⁰⁰ Given how long it has already taken to get to this stage of the initial obligations phase – and how far away it still seems from implementation – technical obligations may not be introduced for many years, if at all. In recognition of this reality, it was reported in September 2013 that the British Video Association and British Recorded Music Industry groups have started pushing for ISPs to separately adopt voluntary measures to police infringement.²⁰¹

The private arrangements

In addition to the public laws described above, private agreements are in place between various rightholders and ISPs around the world. This section provides an overview of the most notable of these, which operate in Ireland and the US.²⁰²

F. IRELAND

The law

The Irish scheme is the most closely analogous to the Australian experience, having emerged from litigation between various record industry companies and Eircom, Ireland’s largest ISP. The record companies were seeking to force the installation of filtering technologies to block infringing downloads at the ISP level.²⁰³ However, after eight days of evidence, and before the Court ruled on the matter, the parties reached a settlement involving the implementation of a private “three strikes” scheme.²⁰⁴

The precise terms of the graduated response protocol negotiated via the settlement are confidential.²⁰⁵ However, its main contours can be pieced together from a decision of the High Court of Ireland considering whether the settlement complied with relevant data protection legislation, and information published on Eircom’s website.

<http://www.iiea.com/documents/draft-overview-of-three-strikes-measures-nlm-study>, 6, citing Explanatory Notes, Digital Economy Act 2010, Office of Public Sector Information, 12.

¹⁹⁹ Communications Act 2003 (U.K.), s 124H.

²⁰⁰ Communications Act 2003 (U.K.), s 124I.

²⁰¹ Juliette Garside, *Record labels ask broadband providers to collect data on illegal downloads*, THE GUARDIAN (Sep. 1, 2013) <http://www.theguardian.com/technology/2013/sep/01/record-labels-broadband-database-illegal-downloads>.

²⁰² For more detailed discussion of these schemes, and the rationales for this shift away from enforcement via litigation and towards private ordering, see Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OREGON LAW REVIEW 81 (2010); Annemarie Bridy, *Graduated Response American Style: ‘Six Strikes’ Measured Against Five Norms* 23 FORDHAM INTELLECTUAL PROPERTY MEDIA & ENTERTAINMENT LAW JOURNAL 1 (2012). See also Mary LaFrance, *Graduated Response by Industry Compact: Piercing the Black Box*, 30 CARDOZO ARTS & ENT. L.J. 165 (2012) (examining the US scheme).

²⁰³ Tim Healy, *Eircom may face music in illegal files row*, THE INDEPENDENT (Mar. 11, 2008)

<http://www.independent.ie/national-news/eircom-may-face-music-in-illegal-files-row-1313154.html>.

²⁰⁴ *E.M.I. Records v. Eircom* [2010] I.E.H.C. 108, [1]-[2].

²⁰⁵ *Statement on Illegal File Sharing*, EIRCOM (Dec. 8, 2010)

http://pressroom.eircom.net/press_releases/article/eircom_Statement_on_Illegal_File_Sharing/.

Under the terms of the settlement, the signatory record companies are responsible for making infringement allegations. They have engaged DtecNet – the same company as was involved in *iiNet* – to monitor P2P networks on their behalf.²⁰⁶ When an infringement appears to occur at an IP address associated with an Eircom customer, it sends a notification to the ISP containing details of the allegation.²⁰⁷ Eircom passes it on to the relevant subscriber with their regular bill.²⁰⁸ If the same subscriber is detected a second time (after a 14 day grace period has elapsed), Eircom sends a second warning in a formal letter.²⁰⁹ If a third notice is received (after a further fortnight's grace), the High Court explained that Eircom employees would manually "review all the evidence" and then give the customer notice that their access will be terminated.²¹⁰ This seems inconsistent with a statement more recently made by Eircom's Director of Corporate Affairs, Paul Bradley, to the effect that Eircom does not investigate allegations, but simply matches the IP address to the relevant subscriber and issues the notice.²¹¹

Once a termination notice has been issued, the High Court indicates that the subscriber can make representations to Eircom regarding extenuating circumstances that justify waiver of the penalty, or seeking to prove that the infringements did not occur as alleged.²¹² The overview of the protocol published on Eircom's website omits to mention this step, and since the protocol itself is not available to the public, it's unclear whether it remains part of the arrangement. According to Bradley, there is in fact no avenue of appeal.²¹³ Assuming that this informal right of appeal does exist, if no such representations are made (or if they are not accepted by Eircom), internet access will be withheld. The scheme as described by the High Court originally provided for a permanent termination of the subscriber's internet access.²¹⁴ This was subsequently amended: under the revised scheme, a 7 day account suspension is to be imposed after a third notification, and a 12 month suspension after a fourth.²¹⁵ Eircom's power to suspend or terminate access arises by virtue of a clause in its standard form subscriber contract.²¹⁶ Subscription fees are waived or refunded during periods of suspension.²¹⁷ The program was formally launched in December 2010,²¹⁸ following a pilot program which ran from May that year.²¹⁹

²⁰⁶ John Collins, *Eircom to cut broadband over illegal downloads*, IRISH TIMES (May 24, 2010)

<http://www.irishtimes.com/newspaper/frontpage/2010/0524/1224271013389.html>.

²⁰⁷ *E.M.I. Records v. Eircom* [2010] I.E.H.C. 108, [9]; *Statement on Illegal File Sharing*, EIRCOM (Dec. 8, 2010)

http://pressroom.eircom.net/press_releases/article/eircom_Statement_on_Illegal_File_Sharing/.

²⁰⁸ *E.M.I. Records v. Eircom* [2010] I.E.H.C. 108, [13].

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ Telephone Interview with Paul Bradley, Director of Corporate Affairs, Eircom (Sep. 7, 2012) (Contemporaneous notes of conversation on file with author).

²¹² *E.M.I. Records v. Eircom* [2010] I.E.H.C. 108, [13].

²¹³ Telephone Interview with Paul Bradley, Director of Corporate Affairs, Eircom (Sep. 7, 2012) (Contemporaneous notes of conversation on file with author).

²¹⁴ *E.M.I. Records v. Eircom* [2010] I.E.H.C. 108, [13].

²¹⁵ *Statement on Illegal File Sharing*, EIRCOM (Dec. 8, 2010)

http://pressroom.eircom.net/press_releases/article/eircom_Statement_on_Illegal_File_Sharing/.

²¹⁶ *E.M.I. Records v. Eircom* [2010] I.E.H.C. 108, [14].

²¹⁷ *Legal Music*, EIRCOM (2012) <http://www.eircom.net/notification/legalmusic/faqs>.

²¹⁸ Cían Nihill, *Illegal music downloaders face cut-off, Eircom Warns*, IRISH TIMES (Dec. 9, 2010)

<http://www.irishtimes.com/newspaper/ireland/2010/1209/1224285100549.html>.

²¹⁹ John Collins, *Eircom to cut broadband over illegal downloads*, IRISH TIMES (May 24, 2010)

<http://www.irishtimes.com/newspaper/frontpage/2010/0524/1224271013389.html>.

As the High Court itself pointed out, the settlement was likely to have a negative effect on Eircom: “it [i]s likely to be deeply unfair that only Eircom with about 40% of the market share... should bear the burden of this settlement, thus activating the winds of market forces to drive customers towards Eircom’s competitors”.²²⁰ In recognition of this, the record industry agreed to initiate proceedings against other ISPs.²²¹ However, this has not resulted in any adverse findings or any other ISPs agreeing to an Eircom-style private graduated response, and Charleton J ruled in 2010 that there is currently no legal obligation for ISPs to implement their own “three strikes” regimes.²²²

Due to its origin in litigation instituted by the recording industry, the Irish scheme is quite narrow. Not only is it limited in operation to just one ISP, but it extends only to infringement allegations made by the parties to the settlement, being the Irish branches of the EMI, Sony, Universal and Warner music labels.²²³ Eircom does not pass on any allegations of infringement made by other rightholders.²²⁴ The costs of issuing notices and terminating users are borne by the ISP.

Application so far

It is unclear how many users have been affected by the Eircom scheme, because the confidential nature of the settlement agreement means that information is not available to the public. However, EMI Ireland Chief Executive Willie Kavanagh apparently disclosed some of this data in a meeting with the Minister of State for Research and Innovation in December 2011, claiming that Eircom had issued 29,000 individual letters, and that “100 customers had reached the fourth stage of losing their access for one week and 12 customers are at the stage where they will be permanently cut off by Eircom.”²²⁵ Despite this claim, an Eircom representative stated in September 2012 that the ISP had not suspended any user for longer than a week.²²⁶

Implementation of the scheme has not been entirely smooth. Although the settlement was cleared by the High Court as complying with the relevant data protection legislation,²²⁷ the Data Protection Commissioner announced an investigation into the scheme just six months after it formally launched, following revelations that basic technical errors had led to 391 subscribers being incorrectly identified as infringers and issued with notices.²²⁸ In December 2011 the Commissioner issued an enforcement order to Eircom requiring it to cease disconnecting users.²²⁹ In June 2012, this was overturned by Mr. Justice Peter Charleton, the same High Court

²²⁰ *E.M.I. Records v. Eircom* [2010] I.E.H.C. 108, [10].

²²¹ *Ibid.*

²²² *E.M.I. Records (Ireland) v. U.P.C. Communications Ireland* [2010] I.E.H.C. 377.

²²³ Telephone Interview with Paul Bradley, Director of Corporate Affairs, Eircom (Sep. 7, 2012) (Contemporaneous notes of conversation on file with author).

²²⁴ *Ibid.*

²²⁵ Eamonn Laird, *Note of Minister Sherlock’s meeting with the Irish Recorded Music Association on Monday 5th December 2011*, SCRIBD (Dec. 7, 2011) www.scribd.com/doc/83984745/EMI-Briefing-001.

²²⁶ Telephone Interview with Paul Bradley, Director of Corporate Affairs, Eircom (Sep. 7, 2012) (Contemporaneous notes of conversation on file with author).

²²⁷ See *E.M.I. Records v. Eircom* [2010] I.E.H.C. 108.

²²⁸ See *E.M.I. Records (Ireland) v. The Data Protection Commissioner* [2012] I.E.H.C. 264, [1.3]-[1.4].

²²⁹ The notice has not been separately published but is extracted in Charleton J’s judgment. *E.M.I. Records (Ireland) v. The Data Protection Commissioner* [2012] I.E.H.C. 264, [4.0]-[4.1].

judge who originally cleared the settlement, who found the Commissioner's notice invalid for failing to give sufficient reasons,²³⁰ a decision subsequently upheld by the Supreme Court.²³¹

G. THE UNITED STATES

The law

The most comprehensive and widespread privately-arranged graduated response is the one that recently came into operation in the United States. It took a long and winding road to implementation, with rightholders and ISPs in negotiations for some three years (reportedly with some involvement of the White House²³²) before the deal was finally reached.²³³ In July 2011 it was announced that a stable of the largest ISPs would collaborate with rightholders such as the MPAA and the RIAA to create a graduated response regime based on a system of "copyright alerts".²³⁴ After repeated delays,²³⁵ the scheme finally began to be implemented on Feb. 25, 2013.²³⁶

The organization charged with administering the scheme is the Center for Copyright Information (CCI), which is governed by a six-member "executive committee" comprising an even split of content and ISP industry representatives.²³⁷ Funding to run the CCI is provided by participating content owners and ISPs in equal shares.²³⁸ Three consumer representatives are permitted on a separate "Advisory Board", but their opinions and contributions have no authority over the Executive.²³⁹ The scheme is limited in scope to alleged infringements facilitated by P2P file sharing technologies.²⁴⁰ Thus it does not apply to infringements committed via online file lockers, message boards and other non-P2P technologies.

²³⁰ *E.M.I. Records (Ireland) v. The Data Protection Commissioner* [2012] I.E.H.C. 264, [14].

²³¹ See *E.M.I. Records (Ireland) v. The Data Protection Commissioner* [2013] I.E.S.C. 34.

²³² Matthew Lasar, *Big Content, ISPs nearing agreement on piracy crackdown system*, ARS TECHNICA (Jun. 24, 2011) <http://arstechnica.com/tech-policy/2011/06/big-content-isps-nearing-agreement-on-piracy-crackdown-system/>.

²³³ Annemarie Bridy, *Graduated Response American Style: 'Six Strikes' Measured Against Five Norms* 23 FORDHAM INTELLECTUAL PROPERTY MEDIA & ENTERTAINMENT LAW JOURNAL 1, 10 (2012).

²³⁴ Greg Sandoval, *Top ISPs agree to become copyright cops*, CNET (Jul. 7, 2011) http://news.cnet.com/8301-31001_3-20077492-261/top-isps-agree-to-become-copyright-cops/.

²³⁵ The scheme was originally anticipated to start operating in 2011. See *Music, Movie, TV and Broadband Leaders Term to Curb Online Content Theft*, RECORDING INDUSTRY ASSOCIATION OF AMERICA (Jul. 2011) http://www.riaa.com/newsitem.php?content_selector=newsandviews&news_month_filter=7&news_year_filter=2011&id=2DDC3887-A4D5-8D41-649D-6E4F7C5225A5. This was subsequently pushed back to 1 July 2012 (Greg Sandoval, *RIAA chief: ISPs to start policing copyright by July 1* CNET (Mar. 14, 2012) http://news.cnet.com/8301-31001_3-57397452-261/riaa-chief-isps-to-start-policing-copyright-by-july-1) and then again to the end of 2012 (see e.g., Cyrus Farivar, *Six strikes' Internet warning system will come to US this year*, ARS TECHNICA (Sep. 12, 2012) <http://arstechnica.com/tech-policy/2012/09/six-strikes-internet-warning-system-really-truly-coming-to-us-this-year>).

²³⁶ Jill Lesser, *Copyright Alert System Set to Begin*, CENTER FOR COPYRIGHT INFORMATION (Feb. 25, 2013) <http://www.copyrightinformation.org/uncategorized/copyright-alert-system-set-to-begin>.

²³⁷ *Memorandum of Understanding*, CENTER FOR COPYRIGHT INFORMATION (Jul. 6, 2011) <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf>, 3.

²³⁸ *Ibid.*, 4.

²³⁹ *Ibid.*, 3-4.

²⁴⁰ *Ibid.*, 2.

The US process is set out in detail in the publicly available Memorandum of Understanding that was reached between the parties (as amended from time to time).²⁴¹

When a participating content owner believes that its copyright has been infringed by a subscriber of a participating ISP (as determined by IP address) it may send an allegation to the relevant ISP.²⁴² The ISP then matches the IP address to the subscription account to which it was assigned at the time of the alleged infringement. After that, the ISP's actions depend on whether and when any previous allegations have been made against that account.

The first time an ISP receives a notice associated with a particular subscriber's account, it is required to dispatch an "Educational Step Copyright Alert".²⁴³ This lets the subscriber know of the allegation, and, among other things, reminds them that their accounts are not permitted to be put to infringing use, lets them know that there are legitimate ways of obtaining copyright protected content, and warns them that continued infringement may result in the imposition of Mitigation Measures or other sanctions permitted under the subscription agreement.²⁴⁴ Subscribers are not required to take any action in response to educational alerts.

If a second allegation is made against a subscriber account, the ISP may (at its option) issue a second Educational Step Copyright Alert in the same manner as described above, or it may move on to the "Acknowledgement Step".²⁴⁵ Most commentators have assumed that ISPs will in practice indeed issue two educational notices, and this paper makes the same assumption. If that is the case, then ISPs will enforce the Acknowledgement Step for any third and fourth allegations. These alerts differ from the previous step in that they "require acknowledgement of receipt", perhaps by diversion to a "landing page" or via a pop-up notice.²⁴⁶ Although users are not required "to acknowledge participation in any allegedly infringing activity", they are required to "agree[] immediately to cease, and/or agree[] to instruct other users of the Subscriber's account to cease infringing conduct".²⁴⁷

A fifth allegation against a subscriber's account may result in an ISP issuing a "Mitigation Measure Copyright Alert". This requires notification to the subscriber that, unless they seek review under the scheme's appeal process, a Mitigation Measure will be applied to their account.²⁴⁸ ISPs have considerable discretion in determining the scope of mitigation measure to impose. A non-exhaustive list of possibilities includes reductions of upload and download speeds, account downgrades, or "temporary restriction of the Subscriber's Internet access for

²⁴¹ See *Memorandum of Understanding*, CENTER FOR COPYRIGHT INFORMATION (Jul. 6, 2011) <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf>; *Memorandum of Understanding (first amendment)*, CENTER FOR COPYRIGHT INFORMATION (Aug. 25, 2011) <http://www.copyrightinformation.org/wp-content/uploads/2013/02/CCI-MOU-First-Amendment.pdf>; *Memorandum of Understanding (second amendment)*, CENTER FOR COPYRIGHT INFORMATION (Oct. 29, 2012) <http://www.copyrightinformation.org/wp-content/uploads/2013/02/CCI-MOU-Second-Amendment.pdf>.

²⁴² *Memorandum of Understanding*, CENTER FOR COPYRIGHT INFORMATION (Jul. 6, 2011) <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf>, 5-6.

²⁴³ *Ibid.*, 8.

²⁴⁴ *Ibid.*, 8-9.

²⁴⁵ *Ibid.*, 9.

²⁴⁶ *Ibid.*, 10.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*, 11.

some reasonable period of time as determined in the Participating ISP's discretion".²⁴⁹ The ISP may choose to waive the mitigation measure once per account.²⁵⁰ At this point the subscriber would receive a "final warning", informing them that if another allegation is received, a mitigation measure will be imposed.²⁵¹ If a subsequent allegation is made, the ISP must impose a Mitigation Measure.²⁵² If yet another allegation is made after that, the ISP must impose a further Mitigation Measure (which may be the same as before, or a different variation) and notify the account holder that they may be sued for copyright infringement, or have their internet access suspended to terminated under the ISP's terms of service.²⁵³

There are no further graduations after this step. ISPs may choose to pass on any further notices to the subscriber, but have no obligation to do so. They must however maintain records regarding the number of notices received in relation to that subscriber's account, and report that information to rightholders.²⁵⁴ To give account holders an opportunity to take steps to prevent infringement, there is a seven day "grace period" after the issue of each notice. ISPs may choose to pass on infringement allegations made during this time, but they will not count for the purposes of moving forward in the enforcement program.²⁵⁵ If an ISP does not receive a subsequent infringement allegation relating to a subscriber account for 12 months after the previous one, the system resets: regardless of how far the process had progressed, the next notice will be treated as the first to be issued.²⁵⁶

Subscribers may request "independent review" of their cases²⁵⁷ via a scheme administered by the American Arbitration Association.²⁵⁸ Perhaps to avoid perceptions that it is usurping the role of the judiciary, the Memorandum of Understanding (as amended) provides that:

This Independent Review process does not prevent Subscribers or Copyright Owners from addressing disputes through the courts, and that is the proper forum for addressing issues that are beyond the scope of this Independent Review process.²⁵⁹

Three key restrictions limit each subscriber's right of review. First, review cannot occur until a subscriber has been advised that a Mitigation Measure is pending – even if the subscriber's complaint concerns an earlier notice.²⁶⁰ Second, the subscriber must pay a fee of \$35.²⁶¹ Third,

²⁴⁹ *Ibid*, 11-12.

²⁵⁰ *Ibid*, 12.

²⁵¹ *Ibid*.

²⁵² *Ibid*.

²⁵³ *Ibid*, 12-13.

²⁵⁴ *Ibid*, 13.

²⁵⁵ *Ibid*, 7, 9, 10.

²⁵⁶ *Ibid*, 13.

²⁵⁷ *Ibid*, 14. See also *Memorandum of Understanding (second amendment)*, CENTER FOR COPYRIGHT INFORMATION (Oct. 29, 2012) <http://www.copyrightinformation.org/wp-content/uploads/2013/02/CCI-MOU-Second-Amendment.pdf> (Attachment C).

²⁵⁸ Jill Lesser, *The Copyright Alert System: Moving to Implementation* CENTER FOR COPYRIGHT INFORMATION (undated) <http://www.copyrightinformation.org/uncategorized/the-copyright-alert-system-moving-to-implementation>.

²⁵⁹ *Memorandum of Understanding (second amendment)*, CENTER FOR COPYRIGHT INFORMATION (Oct. 29, 2012) <http://www.copyrightinformation.org/wp-content/uploads/2013/02/CCI-MOU-Second-Amendment.pdf>, 4.

²⁶⁰ *Ibid*.

²⁶¹ *Ibid*, 8.

the subscriber must lodge the prescribed “Application to Commence Independent Review” form, materials in support of its defense and the filing fee within 14 calendar days of the Mitigation Measure Copyright Alert being issued.²⁶² Failure to do so “shall be deemed a waiver of the right to seek Independent Review”.²⁶³ The brevity of this appeals window, particularly in light of the complexity of the relevant law, is one of the EFF’s key criticisms of the scheme.²⁶⁴

If the review is of the first mitigation measure to be imposed on a subscriber, they may seek review of all previous alerts.²⁶⁵ If it concerns a subsequent mitigation measure, the subscriber may only challenge the notice that triggered that measure.²⁶⁶ There are six possible defenses that a subscriber may raise in relation to each alert:

1. Misidentification of account – i.e. if a factual error was made regarding the identification of the IP address to which the infringement related, or in matching that address to the subscriber.²⁶⁷
2. Unauthorized use of account. “A Subscriber shall prevail on this defense if the Subscriber adequately and credibly demonstrates that the alleged activity was the result of unauthorized use of the Subscriber’s account by someone who is not a member or invitee of the household (e.g. via an unsecured wireless router or a hacked Internet connection) of which the Subscriber was unaware and that the Subscriber could not reasonably have prevented.”²⁶⁸ A subscriber can generally only rely on this defense once.²⁶⁹
3. That the use of the material was “specifically authorized” by the Copyright Owner or their agent.²⁷⁰
4. That the alleged infringement was actually “fair use” under “prevailing principles of copyright law”.²⁷¹
5. That the file was misidentified. “A Subscriber shall prevail on this defense if the Subscriber adequately and credibly demonstrates that a factual error was made in identifying the file at issue as consisting primarily of the alleged copyrighted work. In making this determination, the Content Owner Representative Methodology used to identify the file shall have a rebuttable presumption that it works in accordance with its specifications...”²⁷²
6. That the work was published before 1923.²⁷³

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ Corynne McSherry and Eric Goldman, *The ‘Graduated Response’ Deal: What if Users Had Been At the Table?* ELECTRONIC FRONTIER FOUNDATION (Jul. 18, 2011) <https://www.eff.org/deeplinks/2011/07/graduated-response-deal-what-if-users-had-been>.

²⁶⁵ *Memorandum of Understanding (second amendment)*, CENTER FOR COPYRIGHT INFORMATION (Oct. 29, 2012) <http://www.copyrightinformation.org/wp-content/uploads/2013/02/CCI-MOU-Second-Amendment.pdf>, 5.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*, 6.

²⁷¹ *Ibid.*

²⁷² *Ibid.*

²⁷³ *Ibid.*

As the EFF notes, “there are many other possible defenses available in a copyright litigation”, and “even the six enumerated defenses are incomplete. For example, the ‘public domain’ defense applies only if the work was created before 1923 – even though works created after 1923 can enter the public domain in a variety of ways.”²⁷⁴ However, any non-infringing use that falls outside of the above defenses will not result in a subscriber succeeding in their appeal.

Subscribers seeking to prevail on one of these defenses must bring evidence to support their case – there is no presumption of innocence. However, various presumptions do exist in favor of the rightholders and ISPs administering the scheme. One of the most significant is the presumption that the technologies and methodologies that provide the foundation of infringement allegations work as specified unless an independent expert finds them inadequate,²⁷⁵ though even then the underlying methodologies themselves will be kept confidential.²⁷⁶ Infringement allegations will initially be generated by MarkMonitor (the new owner of DtecNet, the company that was responsible for the alerts at issue at iiNet and under the Irish scheme as well).²⁷⁷ The “independent expert” initially appointed to review its technology was the firm of Stroz Friedberg.²⁷⁸ However, its independence was thrown into doubt after the discovery of an undisclosed link between the firm and RIAA lobbying, which triggered widespread cynicism about the process.²⁷⁹ The CCI has acknowledged the controversy and will select a replacement.²⁸⁰

For a subscriber to successfully avoid imposition of a first mitigation measure, “the Reviewer must find in favor of the Subscriber for at least half of the previously issued Copyright Alerts (i.e. 2 of 4 or 3 of 5).”²⁸¹ To avoid a second mitigation measure, the Reviewer must find that a defense applies with regard to the allegation that triggered that measure.²⁸² If the subscriber prevails, the filing fee will be refunded, record of the alerts will be removed from the account, and the mitigation measure will not be imposed.²⁸³ If the subscriber does not successfully prove

²⁷⁴ Corynne McSherry and Eric Goldman, *The ‘Graduated Response’ Deal: What if Users Had Been At the Table?* ELECTRONIC FRONTIER FOUNDATION (Jul. 18, 2011) <https://www.eff.org/deeplinks/2011/07/graduated-response-deal-what-if-users-had-been>.

²⁷⁵ *Memorandum of Understanding (second amendment)*, CENTER FOR COPYRIGHT INFORMATION (Oct. 29, 2012) <http://www.copyrightinformation.org/wp-content/uploads/2013/02/CCI-MOU-Second-Amendment.pdf>, 5.

²⁷⁶ See generally *Memorandum of Understanding*, CENTER FOR COPYRIGHT INFORMATION (Jul. 6, 2011) <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf>, 5.

²⁷⁷ See *MarkMonitor Acquires DtecNet: Acquisition Extends Anti-Piracy Capabilities for Digital Content* MARKMONITOR (OCT. 18, 2010) <https://www.markmonitor.com/pressreleases/2010/pr101018.php>.

²⁷⁸ Jill Lesser, *The Copyright Alert System: Moving to Implementation* CENTER FOR COPYRIGHT INFORMATION (undated) <http://www.copyrightinformation.org/uncategorized/the-copyright-alert-system-moving-to-implementation>.

²⁷⁹ Jill Lesser, *CCI Recommits to Independent Evaluation of Content Methodology*, CENTER FOR COPYRIGHT INFORMATION (undated) <http://www.copyrightinformation.org/uncategorized/ci-recommits-to-independent-evaluation-of-content-methodology>.

²⁸⁰ *Ibid.* The CCI also subsequently made a heavily redacted version of the Stroz Friedberg report available to the public. See Stroz Friedberg, *Independent Expert Assessment of MarkMonitor AntiPiracy Methodologies [Redacted]*, CENTER FOR COPYRIGHT INFORMATION (Nov. 1, 2012) <http://www.copyrightinformation.org/wp-content/uploads/2012/12/Independent-Expert-Assessment-Content-CCI-Redacted.pdf>.

²⁸¹ *Memorandum of Understanding (second amendment)*, CENTER FOR COPYRIGHT INFORMATION (Oct. 29, 2012) <http://www.copyrightinformation.org/wp-content/uploads/2013/02/CCI-MOU-Second-Amendment.pdf>, 5.

²⁸² *Ibid.*

²⁸³ *Ibid.*, 6-7.

that half or more of the notices should be set aside, the threatened mitigation measure will be applied.²⁸⁴

Application so far

There is very little information available about the application of the US program in its first six months of operation. The CCI's most recent update on the matter was posted after the program had been running for almost three months.²⁸⁵ It confirmed that "[e]ach ISP has been processing notices and generating Alerts and the few consumers who have elected to challenge their Alerts have been able to file those challenges with the American Arbitration Association."²⁸⁶ No numbers have yet been provided regarding the number of notices issued, with the CCI simply stating that it planned to "provide further updates to the public" after it had had "sufficient time to thoroughly evaluate the program".²⁸⁷ The CCI's response to the USPTO's call for submissions regarding whether initiatives such as the US graduated response scheme have helped reduce infringement, made six months after implementation, was similarly light on data, providing no numbers about notices at all.²⁸⁸ The submission of the Independent Film & Television Alliance, which participates in the "six strikes" arrangement, stated that, "numerical data is not yet publicly available", hinting that data has been collected which the controlling organizations do not yet wish to release.²⁸⁹

PART 3: ARE GRADUATED RESPONSES FURTHERING THE AIMS OF COPYRIGHT LAW?

The above descriptions of the various regimes raise obvious issues regarding lack of due process, privacy, transparency, accuracy and proportionality. These have been comprehensively explored elsewhere and this paper will not rehash that ground.²⁹⁰ Instead, its focus is on identifying,

²⁸⁴ *Ibid.*, 7.

²⁸⁵ Jill Lesser, *Early Reports: CAS Moving Forward*, CENTER FOR COPYRIGHT INFORMATION (undated) <http://www.copyrightinformation.org/uncategorized/early-reports-cas-moving-forward/>.

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*

²⁸⁸ *Center for Copyright Information Response to Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study*, UNITED STATES PATENT AND TRADEMARK OFFICE, 5-6 (of the CCI response); 44-45 (of the published compilation of responses), <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf>.

²⁸⁹ *Independent Film & Television Alliance Response to Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study*, UNITED STATES PATENT AND TRADEMARK OFFICE, 4 (of the IFTA response); 10 (of the published compilation of responses), <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf>.

²⁹⁰ This paper does not purport to deal with these issues, but they have been comprehensively dealt with elsewhere. See e.g., Nicolas Suzor and Brian Fitzgerald, *The legitimacy of graduated response schemes in copyright law* 34(1) UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL 1 (2011) (arguing that a number of existing graduated response regimes fail to comply with key tenets of the rule of law); Annemarie Bridy, *Graduated Response American Style: 'Six Strikes' Measured Against Five Norms* 23 FORDHAM INTELLECTUAL PROPERTY MEDIA & ENTERTAINMENT LAW JOURNAL 1 (2012) (evaluating the US graduated response law); Frank LaRue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UNITED NATIONS GENERAL ASSEMBLY HUMAN RIGHTS COUNCIL (May 16, 2011) http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (criticizing graduated response laws that provide for disconnection of access as being "disproportionate"); Peter K. Yu, *The Graduated*

synthesizing and evaluating the evidence of the effects of the various graduated response schemes in order to determine the extent to which they are achieving any of the copyright law's aims. As discussed in Part 1, it is impossible to identify any one unifying aim or rationale. Accordingly, this analysis seeks to evaluate the extent to which the global graduated response is helping to achieve any of several distinct aims that are often put forward to justify the grant and expansion of copyright, while being agnostic as to which, if any, should be preferred. Thus, it asks:

1. To what extent does graduated response reduce infringement?
2. To what extent does graduated response maximize authorized uses?
3. To what extent does graduated response promote learning and culture by encouraging the creation and dissemination of a wide variety of creative materials?

I. TO WHAT EXTENT DO GRADUATED RESPONSES REDUCE INFRINGEMENT?

This section makes a jurisdiction-by-jurisdiction examination of the evidence that has been put forward to suggest that graduated response reduces infringement. In recognition of the fact that most graduated responses have been operating for two years or more, the focus is on actual results, not studies asking participants to hypothesize about how they would react if they received a notice of infringement. The UK law is obviously omitted from this evaluation as it has not yet come into operation.

A. FRANCE

As evidenced by the number and nature of enforcement actions to date, the HADOPI system has been slow to identify and process repeat infringers. As discussed above, in the law's first three years of operation, just four subscribers have been prosecuted, and only three of those were convicted.²⁹¹ None of those prosecutions alleged actual infringement, only failure to appropriately secure internet connections.²⁹² Fines have been small, and access suspension was imposed only once before the partial repeal abolished that remedy in negligence cases.²⁹³ The limited penalties imposed by the courts indicate that even those who were finally prosecuted were far from the most egregious cases. By contrast, the French culture minister originally suggested that the scheme would result in 1000 disconnections per *day*.²⁹⁴ One possible explanation for the dearth of enforcement action is that the system has worked extremely well, by massively reducing infringement. This section tests the evidence to consider whether that might be the case.

Response, 62 FLA. L. REV. 1373, 1416 (2010) (noting the general failure of graduated response regimes to view the amount of infringement relative to the amount of legal use).

²⁹¹ See discussion at pp 11-12.

²⁹² See discussion at p 12.

²⁹³ See discussion at pp 11-12.

²⁹⁴ *France, the first country to implement the controversial 'three-strikes-and-you're-out' legislation*, EPM MUSIC (Jun. 17, 2009) <http://epm-music.com/digital-distribution/news/47-france-the-first-country-to-implement-the-controversial-three-strikes-and-you-re-out-legislation>.

Some of the strongest claims that HADOPI reduces infringement have come from the Hadopi administrative body. In a report on its first one and a half years of operation it cited four separate studies, conducted between October 2010 and December 2011. Two of the figures claimed that P2P “audience levels” had declined because of Hadopi (by 17%, according to one, and 29% according to the other); the other two figures claimed reductions of “illegal data sharing” of between 43% and 66%.²⁹⁵

There is quite a lot to unpack in those claims. To start, the assertion of a 17% reduction in the P2P audience was attributed to Nielsen/IFPI, and the source is listed as the “Digital Music Report 2012”.²⁹⁶ IFPI publishes a “Digital Music Report” each year. However, its 2012 report makes no such assertion. Instead, with regard to the French regime, it actually claims (in several places) that the number of P2P file sharers fell by 26 per cent.²⁹⁷ No methodology is provided to explain how this figure was reached. Oddly, in its 2013 report, published a full year after Hadopi first cited that figure,²⁹⁸ IFPI *did* claim that Hadopi brought about a 17% reduction in infringement.²⁹⁹ As it did not provide any authority for that number either however, its provenance cannot be determined.

The second figure quoted in the Hadopi report, claiming a 29% reduction in audience levels, is attributed to Médiamétrie//NetRatings. This is a French audience measurement company that is affiliated with Nielsen and which uses its NetSight computer monitoring technology.³⁰⁰ As noted above, Nielson apparently worked in conjunction with IFPI to develop the figures referred to above. The report does not appear to be publicly available, and a request for access went unanswered.³⁰¹ No details of the methodology used to derive the figures is included in the Hadopi report. Both Médiamétrie//NetRatings and Nielsen utilize metering software to measure network usage patterns, which means that their data only captures users who have freely agreed to have that software installed and their behavior tracked.³⁰² Any change in behavior by users who are aware their usage is being carefully monitored is unlikely to be representative of the general population.

The other two studies cited in the Hadopi report as evidence of the law’s effect on infringement were conducted by Peer Media Technologies and Association de Lutte Contre la Piraterie Audiovisuelle (ALPA), and claimed reductions of “illegal data sharing” of 43% and 66%

²⁹⁵ *Hadopi, 1 ½ year after the launch*, HADOPI (March 2012)
http://www.hadopi.fr/sites/default/files/page/pdf/note17_en.pdf, 3.

²⁹⁶ *Ibid.*, 4.

²⁹⁷ *Digital Music Report 2012*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (2012)
www.ifpi.org/content/library/dmr2012.pdf, 9, 17.

²⁹⁸ *IFPI publishes Digital Music Report 2013*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (Feb. 26, 2013) http://www.ifpi.org/content/section_resources/dmr2013.html (announcing the release of the 2013 report). By contrast, the Hadopi report was published in March 2012. See *Hadopi, 1 ½ year after the launch*, HADOPI (March 2012) http://www.hadopi.fr/sites/default/files/page/pdf/note17_en.pdf, 16.

²⁹⁹ *IFPI Digital Music Report 2013*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (2013)
<http://www.ifpi.org/content/library/DMR2013.pdf>, 30.

³⁰⁰ *Médiamétrie//NetRatings Panel*, MÉDIAMÉTRIE (undated)
<http://www.mediametrie.com/internet/solutions/mediametrie-netratings-panel.php?id=8>.

³⁰¹ The request was made by email on Jun. 4, 2013 (on file with author).

³⁰² *Hadopi, 1 ½ year after the launch*, HADOPI (March 2012)
http://www.hadopi.fr/sites/default/files/page/pdf/note17_en.pdf, 7.

respectively.³⁰³ Peer Media Technologies describes itself as a “world wide leader in anti-piracy services”.³⁰⁴ Its core business is being paid to identify apparent infringers and then issue customized infringement notices.³⁰⁵ Once again, repeated requests seeking access to its report elicited no response.³⁰⁶ ALPA is the French affiliate of the MPAA, and has a strong vested interest in promoting global adoption of graduated response in pursuit of its enforcement agenda.³⁰⁷ Its study does not appear to be publicly available either, and nor is any information about the methodology used to reach the figures. ALPA’s head has separately claimed that not one single French film was downloaded between May and December 2011 thanks to its enforcement efforts.³⁰⁸ The outlandishness of this claim further suggests that ALPA’s figures should be viewed with caution.

Although Hadopi acknowledged that analyzing the law “is a complex endeavour and one to be undertaken cautiously”, and that “[a] number of ‘marginal effects’ remain difficult, if not impossible to quantify”,³⁰⁹ its use of these figures is open to criticism. Notably, every figure it cited in support of the claim that the French law reduces infringement was supplied by one or more organizations that is closely allied to the interests of major rightholders, and which, in several cases, has a strong and obvious vested interest in promoting graduated response. None of them appear to have been subjected to peer review or have made their full reports or methodologies available for public scrutiny. The figures are headline-grabbing, but impossible to substantiate or evaluate in any meaningful way. It’s also unclear whether any or all of those studies attempted to identify what proportion of any reduction was attributable to licensed services, like Spotify (which became widely available in France shortly after HADOPI came into operation³¹⁰), or Deezer, an increasingly popular French music streaming service which experienced rapid growth over the same period.³¹¹ The impact of such services is far from negligible. As IFPI reported in its 2012 Digital Music Report, France experienced an increase in music subscription revenues of more than 90% in the first 11 months of 2011.³¹²

Notice volume data has also often been used to support the contention that Hadopi reduces infringement. As noted above, as of the end of July 2013, Hadopi had issued 2,004,847 first notices and 201,288 second notices, and there have been 710 “délibérations”, or investigations, to see whether subscribers who have received a third allegation should be referred to

³⁰³ *Ibid*, 3.

³⁰⁴ *World Wide Leader in Anti-Piracy Services*, PEER MEDIA TECHNOLOGIES (undated) <http://peermediatech.gja07.com>.

³⁰⁵ *Notification Services*, PEER MEDIA TECHNOLOGIES (undated) <http://peermediatech.gja07.com/notification.html>.

³⁰⁶ Requests were made by email on Oct. 25, 2012 and Nov. 7, 2012 (on file with author).

³⁰⁷ *Around the World*, MOTION PICTURE ASSOCIATION OF AMERICA (undated) <http://www.mpa.org/about/around-the-world>.

³⁰⁸ Marc Rees, *Entre le 15/05 et le 15/12/11, aucun film français téléchargé sur le Web*, PCINPACT (May 24, 2012) <http://www.pcinpact.com/news/71129-nicolas-seydoux-gaumont-alpa-hadopi.htm>.

³⁰⁹ *Hadopi, 1 ½ year after the launch*, HADOPI (March 2012) http://www.hadopi.fr/sites/default/files/page/pdf/note17_en.pdf, 2.

³¹⁰ *Spotify now available to everyone in France*, SPOTIFY (Feb. 1, 2010) <http://www.spotify.com/us/blog/archives/2010/02/01/spotify-disponible-pour-tous-en-france>.

³¹¹ Pascal Rozat, *Deezer: Profitability Down the Line?*, INA GLOBAL (Aug. 19, 2011) <http://www.inaglobal.fr/en/music/article/deezer-profitability-down-line?tq=4>.

³¹² *Digital Music Report 2012*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (2012) www.ifpi.org/content/library/dmr2012.pdf, 10.

prosecutors.³¹³ There is clearly a striking difference between the number of users receiving a second notice compared to a first, and entering into the third phase compared to the second. The same pattern is exhibited by previously published volume data.³¹⁴ It has been repeatedly argued that the discrepancy is proof that HADOPI reduces infringement. In the words of the Hadopi Commission's President, "[t]he less third warnings we send ... the more the law will have proven effective."³¹⁵ The recording industry has also repeatedly cited the difference between the number of users who receive a first notice and the number who receive a second as evidence that the scheme is working. In its submission to New Zealand's graduated response fee review, Rianz stated: "[t]here is evidence that P2P levels have reduced dramatically... According to Hadopi, as many as 95% of first notices from Hadopi do not give rise to a second notice; 92% of second notices do not give rise to a third."³¹⁶ IFPI has used the same trick, noting that "Hadopi has now sent more than one million notices, with only 8 per cent of infringers receiving a second warning."³¹⁷

However, the fact that less people receive subsequent notices than first notices does not mean that the issue of an earlier notice prevented subsequent infringing behavior. There are a number of other possibilities that might also explain the difference.

For one thing, a higher number of earlier than later notices will *always* be reflected in published figures because, by definition, subsequent notices cannot be issued to subscribers until after they have been issued with earlier ones. This creates an unavoidable time lag. Some idea about the extent of that lag can be gleaned from Hadopi's figures, which show that no second notices were issued until five months after the issue of the earliest first notices, and no délibérations (i.e. the third or enforcement stage) were undertaken until five months after the earliest second notices were sent.³¹⁸ This suggests that it is reasonable to expect that users who have received an earlier notice will not receive a subsequent one for at least five months, even if they do not change their infringing behavior. This inevitable lag will always skew the numbers in favor of earlier notices, and must be controlled for before attributing the numerical difference to a possible reduction of infringement.

³¹³ *Réponse graduée – Les chiffres clés*, HADOPI (Aug. 2013)

http://www.hadopi.fr/sites/default/files/page/pdf/Chiffresreponsegraduee_aout.pdf, 1, 3, 5.

³¹⁴ See e.g., Newsletter no. 1 – Décembre 2011, HADOPI (Dec. 2011)

www.hadopi.fr/sites/default/files/page/pdf/Hadopi_Newsletter12_2011.pdf, 3 (Hadopi newsletter from December 2011, stating that the agency had issued 750,000 first warnings, 63,000 second warnings, and that 150 individuals had reached the enforcement stage); *La lettre d'information de l'Hadopi*, HADOPI (Jul. 2013)

http://www.hadopi.fr/sites/default/files/page/pdf/Hadopi_Newsletter6.pdf (Hadopi newsletter from July 2013, stating that the agency had issued 1,839,847 first notices, 170,453 second notices, and that 599 individuals had reached the enforcement stage).

³¹⁵ Aymeric Pichevin, *France's HADOPI Sends Out Final Copyright Infringement Notices, But Many Are Critical* BILLBOARD (Jul. 19, 2011) <http://www.billboard.biz/bbbiz/others/france-s-hadopi-sends-out-final-copyright-1005282382.story>.

³¹⁶ *Copyright (Infringing File Sharing) Regulations – Fee Review*, RECORDING INDUSTRY ASSOCIATION OF NEW ZEALAND AND INDEPENDENT MUSIC NEW ZEALAND (Apr. 30, 2012) www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/illegal-peer-to-peer-file-sharing-submissions-on-fee-review-discussion/rianz.pdf, [37] (internal citation omitted).

³¹⁷ *IFPI Digital Music Report 2013*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, 30 (2013) <http://www.ifpi.org/content/library/DMR2013.pdf>.

³¹⁸ *Réponse graduée – Les chiffres clés*, HADOPI (Aug. 2013)

http://www.hadopi.fr/sites/default/files/page/pdf/Chiffresreponsegraduee_aout.pdf, 1, 3, 5.

Another explanation for the higher number of earlier notices is that a second notice can only be issued to any given subscriber if a second allegation is made within six months of the first.³¹⁹ After that period expires, Hadopi can only respond to an allegation of infringement by issuing another “first” notice.³²⁰ Similarly, a third “strike” can only arise within a year of the second.³²¹ Thus it is entirely possible that, over the 34 months of operation covered by the figures, some users received more than one “first” or “second” notice, causing an over-representation of those numbers without actually suggesting any reduction of infringement. As Hadopi has not released information detailing how many subscribers received a first or second notice on more than one occasion, this factor cannot be controlled for.

Another explanation for the difference in notice volumes is that, if some infringers do change their behavior in response to receiving a notice, that change might simply mean making a switch to less easily detectable sources of infringement. The considerable evidence that this has been occurring in France (and elsewhere) is discussed below, in the section evaluating the extent to which graduated response maximizes authorized uses.³²²

In addition to these possible explanations, it is well worth doing some simple modeling to examine the mathematical foundation on which the notice volume data argument is built. There is evidence that Hadopi issues relatively few notices compared to the number of infringement allegations it receives. As noted above, the number of allegations that had been acted upon after 34 months of operation seems to reflect just 12% of the allegations that had been made in the scheme’s first eight months alone.³²³ There’s also some specific information in two of the decided cases about the total number of reports made regarding each infringement, separate to those which gave rise to the formal notices. In the case involving Rihanna’s “Rude Boy”, the subscriber had been the subject of almost 150 reports to Hadopi before the enforcement action was eventually brought,³²⁴ and in the case involving the “Heartbreaker” film over 100 reports had been made.³²⁵ Thus it appears that only a very small proportion of infringements give rise to a first notice at all. If we assume that subscribers who do receive a notice do not change their behavior in response, the probability of accruing two notices is exponentially lower, and the chance of receiving a third notice lower still. That’s because, if there is no behavioral change, the chance of an individual receiving a subsequent notice is entirely independent of whether or not they have previously received one. To illustrate this, we will assume that individuals have a 12% chance of receiving a notice in any given period. (Hadopi has not released sufficient enough data to enable precise determination of the probability of that occurring, so this is an approximation based on the figures that *are* available, in order to demonstrate the principle). Assume also that the individuals who receive notices do not change their infringing behavior upon doing so. In

³¹⁹ Alain Strowel, *The ‘Graduated Response’ In France: Is it the Good Reply to Online Copyright Infringements?*, in COPYRIGHT ENFORCEMENT AND THE INTERNET (Irene A. Stamatoudi (ed., 2010), 150-151.

³²⁰ See discussion of the HADOPI system at p 8.

³²¹ *Ibid.*

³²² See discussion at pp 51-53.

³²³ See report discussed at p 10.

³²⁴ Marc Rees, *Hadopi: condamné pour un seul titre, flashé 150 fois*, PCINPACT (Oct. 7, 2012) <http://www.pcinpact.com/news/74364-hadopi-condamne-pour-seul-titre-flashe-150-fois.htm>.

³²⁵ See judgment posted at Marc Rees, *Hadopi: condamné pour un seul film, flashé plus de 100 fois*, PCINPACT (Feb. 19, 2013) <http://www.pcinpact.com/news/77604-hadopi-condamne-pour-seul-film-flashe-plus-100-fois.htm>.

that case, they would have about a 1.44%³²⁶ chance of being issued two notices, and less than a fifth of a percent chance³²⁷ of reaching the enforcement stage. Hadopi has not released precise numbers regarding the number of allegations made, which makes it impossible to permit comparison with the number of notices actually issued. However, we can apply the mathematical model to the numbers above. Given the issue of 2,004,847 first notices, it could be anticipated that some 240,581³²⁸ individuals would receive a second notice, *even if none of the subscribers who received a notice changed their infringing behavior*. The figures show that some 201,288 actually did. That is, just 39,293 individuals, or 16%,³²⁹ of the number who received a first notice *might* plausibly have changed their behavior as a result of receiving it. However, we have to refine the numbers a little further before considering the possibility that some of that 16% of subscribers actually changed their behavior in response to a notice. Remember, these calculations do not take into account the five month time lag before repeat infringers can reasonably be expected to receive a second notice. We can approximately control for that by comparing instead the total number of first notices which had been issued by February 2013, five months before the second notice figures we've been working with, thus allowing the first and second notice figures to match up more accurately. Hadopi had issued 1,599,847 first notices by February 2013.³³⁰ Applying the same model as previously, if there was no change of behavior at all, it could be anticipated that 191,982³³¹ subscribers would receive a second notice by July 2013, five months later. As noted above, a higher number, 201,288, actually did. Of course, the derivation of all of these outcomes is entirely dependent on the assumptions adopted. Hadopi hasn't released data that allows for a more accurate calculation of the time lag between notices, or to determine the precise chance of an infringer receiving a notice, and the exact data (if it was available) might significantly change these outcomes.³³² However, working from the information that has been made publicly available, this analysis demonstrates that, if you're going to take anything from the notice volume data, it's that the amount of infringement committed between the issue of first and second notices might actually have *increased*.

The difference between the number of second notices, and the number of enforcement actions, is statistically much more significant. Applying our model, if no subscriber on their second strike changed their infringing behavior, we could reasonably expect 24,155³³³ individuals to have reached the investigation or "délibération", stage.³³⁴ However, by July 2013, only 710

³²⁶ 0.12².

³²⁷ 0.12^{^3}.

³²⁸ 2,004,847*0.12.

³²⁹ I.e. 240,581 (the number of individuals who can have been expected to have received a second notice if we apply this mathematical model) minus 201,288 (the number of individuals who were actually reported as having received a second notice) which equals 39,293, or 16.33254% of 240,581.

³³⁰ *Réponse graduée – Les chiffres clés*, HADOPI (Aug. 2013)

http://www.hadopi.fr/sites/default/files/page/pdf/Chiffresreponsegraduee_aout.pdf, 1.

³³¹ 1,599,847*0.12.

³³² Nor does the model take into account fluctuations in subscriber or Hadopi agency behavior month by month, as it is impossible to do so on the existing data. For example, Hadopi did not issue any notices in August 2011 or August 2012. This is likely because the employees were taking their summer vacation, not because no infringements were occurring, but no conclusions can be drawn in the absence of further information.

³³³ 201,288*0.12.

³³⁴ Calculated as 11% of 1,839,847 (the number of first notices issued in the first 34 months of operation).

“délibérations” were actually reported.³³⁵ Even if we calculate the figures more accurately by controlling for the five month time lag, and compare the second strikes as of February 2013 to the enforcement actions of July 2013, we could still reasonably expect some 16,674³³⁶ individuals to have reached the final stage. The big difference between these figures and the actual number superficially invites a finding that a significant number of users on their second strike have changed their behavior. But again, the available data does not actually justify that conclusion. We do not know how long it takes Hadopi to commence and finalize each investigation. If it’s lengthy however, that could have a very significant impact on the numbers. We already know that Hadopi issued first notices for only a very small proportion of infringement allegations it received, presumably at least in part due to a lack of resources.³³⁷ And first notices are the easiest to deal with – they simply require an emailed notification, and relatively little human intervention. By contrast, the third phase requires a full investigation by the Commission.³³⁸ What is known is that Hadopi did not process its first “délibérations” until July 2011,³³⁹ and the first cases were not forwarded to prosecutors until February 2012, some 18 months after the scheme commenced operation.³⁴⁰ Furthermore, data published by Hadopi in August 2013 shows that it has never processed more than 64 deliberations in a month.³⁴¹ By contrast, in the same amount of time, it managed to dispatch as many as 103,989 first notices and 15,818 second notices.³⁴² The theory that enforcement actions are highly labor-intensive gains support from the fact that, while the Agency dispatched first and second notices in August 2011 and 2012, the traditional vacation month in France, no enforcement actions were reported in August of either year.³⁴³ These facts combine to strongly suggest that resourcing limitations are restricting the number of investigations that the agency can undertake at any one time. In these circumstances, the relatively small number of “délibérations” does not, in and of itself, evidence any change in user behavior. Treating it as such assumes that Hadopi has infinite resources, which is clearly not the case, as is demonstrated by the relatively few infringement allegations Hadopi has acted upon. The fact that few investigations have occurred cannot be given any weight as proof of the regime’s efficacy, without (at least) information regarding the number of allegations which are being made, the number which are being acted upon, the number of third allegations that have been made, and the number of investigations waiting to be commenced.

³³⁵ *Réponse graduée – Les chiffres clés*, HADOPI (Aug. 2013)

http://www.hadopi.fr/sites/default/files/page/pdf/Chiffresreponsegraduee_aout.pdf, 5.

³³⁶ 138,953*0.12.

³³⁷ See discussion at p 10.

³³⁸ Alain Strowel, *The ‘Graduated Response’ In France: Is it the Good Reply to Online Copyright Infringements?*, in COPYRIGHT ENFORCEMENT AND THE INTERNET (Irene A. Stamatoudi (ed., 2010), 150; *Réponse graduée*, HADOPI (undated) <http://www.hadopi.fr/usages-responsables/nouvelles-libertes-nouvelles-responsabilites/reponse-graduee>.

³³⁹ *Réponse graduée – Les chiffres clés*, HADOPI (Aug. 2013)

http://www.hadopi.fr/sites/default/files/page/pdf/Chiffresreponsegraduee_aout.pdf, 5.

³⁴⁰ Emmanuel Berretta, *EXCLUSIF - Les internautes traduits devant les parquets par la Hadopi*, LE POINT (Feb. 13, 2012) http://www.lepoint.fr/chroniqueurs-du-point/emmanuel-berretta/exclusif-les-internautes-traduits-devant-les-parquets-par-la-hadopi-13-02-2012-1430826_52.php.

³⁴¹ *Réponse graduée – Les chiffres clés*, HADOPI (Aug. 2013)

http://www.hadopi.fr/sites/default/files/page/pdf/Chiffresreponsegraduee_aout.pdf, 5.

³⁴² *Ibid.*, 1, 3.

³⁴³ *Réponse graduée – Les chiffres clés*, HADOPI (Aug. 2013)

http://www.hadopi.fr/sites/default/files/page/pdf/Chiffresreponsegraduee_aout.pdf, 1, 3, 5.

In sum, the probabilistic relationship between actual infringement and notices issued means that a large discrepancy between the various types of notices would inevitably occur even if recipient subscribers did not change their infringing behavior at all. It's impossible to calculate the precise effect of this in the absence of vital missing data such as the number of infringements occurring compared to the number of allegations made, the number of allegations made compared to the number that Hadopi actually responds to, the precise time lag in issuing them, and the number of users who received first or second notices multiple times. However, the mathematical modeling above, based on assumptions for which data *is* available, casts even more doubt on the claim that the discrepancy between the number of first and subsequent notices proves any reduction of infringement.

France has been described as “very much the gold standard for graduated response public law”.³⁴⁴ However, when the data is carefully considered, there is scant evidence that the law actually reduces infringement. Since the dearth of infringement actions in its first three years of operation cannot be explained by a reduction in infringement, the most likely remaining explanation is simply that it is not very well equipped to identify and process the most egregious repeat offenders.

B. NEW ZEALAND

IFPI has claimed that “P2P use in New Zealand fell by 16 per cent” after its graduated response law was introduced.³⁴⁵ It provided no source for this figure. Rianz cited IFPI-commissioned research to claim an 18% reduction in the use of P2P services (including legitimate services) in the seven months since the law was introduced³⁴⁶ (though it still found considerably more New Zealanders accessed online infringing services than the global average³⁴⁷). The New Zealand Federation Against Copyright Theft (**NZFACT**³⁴⁸) claimed that the number of major US films shared by New Zealand users each month effectively halved when the law came into operation, before increasing slightly and then plateauing.³⁴⁹ Again, the underlying studies and methodologies on which these claims are based are not publicly available.

A much more transparent study was conducted by researchers at Waikato University. Although drawn from very limited data points, the study suggested that P2P traffic and the number of users

³⁴⁴ David J. Brennan, *Quelling P2P infringement: private American harbours or public French graduations?* 62(4) TELECOMMUNICATIONS JOURNAL OF AUSTRALIA 55.1, 55.6 (2012).

³⁴⁵ *IFPI Digital Music Report 2013*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, 30 (2013) <http://www.ifpi.org/content/library/DMR2013.pdf>.

³⁴⁶ *Copyright (Infringing File Sharing) Regulations – Fee Review*, RECORDING INDUSTRY ASSOCIATION OF NEW ZEALAND AND INDEPENDENT MUSIC NEW ZEALAND (Apr. 30, 2012) www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/illegal-peer-to-peer-file-sharing-submissions-on-fee-review-discussion/rianz.pdf, 12.

³⁴⁷ *Ibid.*, 1-2.

³⁴⁸ This organisation was recently renamed the “New Zealand Screen Association”. See <http://www.nzfact.co.nz/>.

³⁴⁹ New Zealand Federation Against Copyright Theft, *Copyright (Infringing File Sharing) Regulations – Fee Review* (2012) MINISTRY FOR ECONOMIC DEVELOPMENT (2012) www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/illegal-peer-to-peer-file-sharing-submissions-on-fee-review-discussion/nzfact.pdf, 6-8.

engaged in P2P file sharing decreased by at least half after the law came into force.³⁵⁰ It also found the use of technologies that could be used to circumvent the scheme had jumped “significantly”, although this increase was less than the drop in overall file sharing.³⁵¹ A follow-up by the same researchers in September 2012 found that, although the amount of P2P traffic had recovered somewhat, it was still well below the levels of the year before.³⁵² However, as discussed in more detail below, it also found a massive increase in the amount of HTTPS traffic.³⁵³ HTTPS is a form of encryption which prevents traffic from being easily analyzed. The researchers theorized that this increase was caused by a shift towards non-P2P sources of infringement, which fell outside the scheme.³⁵⁴

The researchers were frank about the limitations of their study, and did not claim that the observed changes were caused by New Zealand’s graduated response law:

these results are from one New Zealand ISP only and merely indicate that there is a strong correlation between the [Copyright Amendment Act] and the behaviour that has been noted ... (not a causation!). To be able to form firmer conclusions, we would need to examine the traffic mixes for other ISPs both inside and outside New Zealand to determine whether the changes we observed are definitely related to the change in New Zealand law or simply reflect global Internet usage patterns.³⁵⁵

On balance, the Waikato research suggests some ongoing shift in user behavior, and likely some net reduction in infringement. Notably though, neither it nor any of the rightholder-funded studies appear to have controlled for the new services which were authorized by rightholders to provide legitimate content to New Zealanders around the same time as the new law. This omission could be very significant: the number of Rianz-sanctioned digital music providers operating in the NZ market doubled shortly after the graduated response legislation was introduced.³⁵⁶

Despite the limitations of the available evidence, it was one of the factors which influenced the Minister of Commerce to leave the notice fee at \$25 after the 6 month fee review, explaining: “[t]here has been a significant reduction in the volume of illegal file sharing in the first six

³⁵⁰ Shane Alcock and Richard Nelson, *Measuring the Impact of the Copyright Amendment Act on New Zealand Residential DSL Users*, WAND NETWORK RESEARCH GROUP (2012) <https://secure.wand.net.nz/sites/default/files/caa.pdf>, 2.

³⁵¹ *Ibid.*

³⁵² Shane Alcock, *The Impact of the Copyright Amendment Act: Update for September 2012* WAND NETWORK RESEARCH GROUP (Oct. 26, 2012) <http://wand.cs.waikato.ac.nz/content/impact-copyright-amendment-act-update-september-2012>.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ *Copyright (Infringing File Sharing) Regulations – Fee Review*, RECORDING INDUSTRY ASSOCIATION OF NEW ZEALAND AND INDEPENDENT MUSIC NEW ZEALAND (Apr. 30, 2012) www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/illegal-peer-to-peer-file-sharing-submissions-on-fee-review-discussion/rianz.pdf, 1.

months of the regime being in force. This suggests that the level of the fee has not initially prevented the regime from having the desired outcome”.³⁵⁷

C. SOUTH KOREA

As Hargreaves pointed out in the Digital Opportunity report, the South Korean experience is often cited by stakeholders “as an example of the success of stricter enforcement.”³⁵⁸ However, the data in support of that claim is thin. For example, after reporting results from the French HADOPI law, IFPI’s 2012 Digital Music Report simply claims that “[s]imilar positive indications come from South Korea”, providing no evidence whatsoever in support.³⁵⁹ There appear to be no attempts to prove any causal connection between the Korean graduated response and reduced infringement.

D. TAIWAN

Although the Taiwanese scheme has now been in operation for several years, there seems to be no evidence in the English language materials that any user has had their access suspended under the law, or any plausible evidence put forward to suggest it has brought about any reduction of infringement. Despite this, IFPI has cited Taiwan approvingly when reporting its successes on the graduated response front,³⁶⁰ and its efforts towards implementing graduated response were cited as a key reason for Taiwan’s removal from the USTR’s “special watch list” in 2009.³⁶¹

E. IRELAND

At the time of writing the Irish scheme has been in operation for almost three years.³⁶² Along the spectrum of all of the graduated response schemes currently in existence, the Irish scheme has the fewest user safeguards, and seems to be the most heavily tilted in favor of rightholders.³⁶³ Nonetheless, there is no evidence that the arrangement has reduced the amount of infringement.

F. THE UNITED STATES

³⁵⁷ *Copyright (Infringing File Sharing) Regulations – Review of Notice fee*, OFFICE OF THE MINISTER OF COMMERCE (2012) <http://www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/cabinet-paper.pdf>, 1.

³⁵⁸ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, UK INTELLECTUAL PROPERTY OFFICE (May 2011) www.ipo.gov.uk/ipreview-finalreport.pdf, 78.

³⁵⁹ *Digital Music Report 2012*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (2012) www.ifpi.org/content/library/dmr2012.pdf, 9.

³⁶⁰ See e.g., *IFPI Digital Music Report 2011*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, 18 (2011) <http://www.ifpi.org/content/library/DMR2011.pdf>, 19.

³⁶¹ *U.S.T.R. Announces Conclusion of the Special 301 Out-of-Cycle Review for Taiwan*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Jan. 2009) <http://www.ustr.gov/about-us/press-office/press-releases/2009/january/ustr-announces-conclusion-special-301-out-cycle-re>.

³⁶² Cían Nihill, *Illegal music downloaders face cut-off*, *Eircom Warns*, IRISH TIMES (Dec. 9, 2010) <http://www.irishtimes.com/newspaper/ireland/2010/1209/1224285100549.html> (announcing the Dec. 2010 launch).

³⁶³ Rebecca Giblin, *Was the High Court in iiNet right to be chary of a common law graduated response?* (forthcoming, MEDIA & ARTS LAW REVIEW, 2013).

At the time of writing, the US scheme has been operating for just six months, so it cannot be expected that there will be much evidence yet regarding its efficacy. Nonetheless, the Obama Administration recently tasked the USPTO with determining “whether voluntary initiatives [such as “six strikes”] have had a positive impact on reducing infringement”.³⁶⁴ Describing this as “[c]onsistent with the Administration’s policy of building a data-driven government,” the USPTO invited comment from interested stakeholders to assist them in doing so, with responses due by August 2013.³⁶⁵ One of the questions the USPTO asked was whether there was “existing data regarding efficacy of particular practices, processes or methodologies for voluntary initiatives, and if so, what is it and what does it show?”³⁶⁶

It would be reasonable to expect that the Center for Copyright Information, which runs the scheme, would be best placed to provide evidence about what the scheme has achieved in its first six months of operation. However, it simply mentioned anecdotes about various account holders being “appreciative” of receiving infringement alerts,³⁶⁷ and stated that it was:

...encouraged by the initial trends that show that its ISP participants are sending out a much larger number of first stage Alerts than later stage Alerts. If this trend continues, it may be an important signal that the Alert system is positively impacting user decisions going forward and that the CAS is helpful to consumers who receive Alerts.³⁶⁸

No numerical data was provided in support of this statement. And of course, as discussed above in the context of the French system, differences between the number of first alerts and subsequent alerts by no means signals a reduction of infringement or achievement of any other of copyright’s aims.

Other submissions in response to the USPTO’s call were similarly devoid of data. MarkMonitor, the company responsible for generating the infringement allegations, simply provided a half-page response simply advertising its detection and monitoring services without addressing the efficacy of the “six strikes” arrangement at all.³⁶⁹ The MPAA praised “major Internet service providers, via the Copyright Alert System” for having “shown admirable willingness to enter

³⁶⁴ 2013 JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT, U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR (EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES) (JUN. 2013) [HTTP://WWW.WHITEHOUSE.GOV/SITES/DEFAULT/FILES/OMB/IPEC/2013-US-IPEC-JOINT-STRATEGIC-PLAN.PDF](http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-US-IPEC-JOINT-STRATEGIC-PLAN.PDF), 37.

³⁶⁵ *Request of the United States Patent and Trademark Office for Public Comments: Voluntary Best Practices Study*, UNITED STATES PATENT AND TRADEMARK OFFICE, (JUN. 20, 2013) <https://www.federalregister.gov/articles/2013/06/20/2013-14702/request-of-the-united-states-patent-and-trademark-office-for-public-comments-voluntary-best>.

³⁶⁶ *Ibid.*

³⁶⁷ *Center for Copyright Information Response to Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study*, UNITED STATES PATENT AND TRADEMARK OFFICE, 5-6 (of the CCI response); 44-45 (of the published compilation of responses), <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf>.

³⁶⁸ *Ibid.*, 5 (of the CCI response); 45 (of the published compilation of responses), <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf>.

³⁶⁹ *MarkMonitor Response to Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study*, UNITED STATES PATENT AND TRADEMARK OFFICE, 1 (of the MarkMonitor response); 136 (of the published compilation of responses), <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf>.

into voluntary agreements and take concrete and effective anti-piracy measures”.³⁷⁰ But despite its description of those measures as “effective”, the MPAA submission later stated that it’s “too soon to comment on the efficacy of the CAS”.³⁷¹

This lack of data is not because it doesn’t exist. It’s inconceivable that records are not being kept about the number of notices being issued, the number of repeat infringers, the kind of infringements being detected and so on. The existence of such data gets some confirmation from the submission of the Independent Film & Television Alliance, which participates in the “six strikes” arrangement, to the USPTO. It stated that, “[w]hile the CAS is still in the early stages and numerical data is not yet *publicly available*, systems are in place to evaluate the effectiveness of the voluntary agreement and may be useful for future voluntary initiatives.”³⁷² This suggests that there is data, but that the controlling organizations do not wish to release it.

The RIAA expressed reluctance for the scheme to be measured at this point, suggesting instead that “[i]t may be appropriate for the government to delay measuring this program until it has been in operation for a reasonable period of time, and [the Center for Copyright Information] has had the opportunity to assess its impact.”³⁷³

These responses contain the best and most up-to-date data available at the time of writing. If there was any data suggesting that the US scheme was having the desired effect however, it’s reasonable to expect that it would have been released. It is still early days, but the responses from stakeholders seem to confirm that there is currently no evidence in support of the US scheme’s efficacy.

Interestingly, Comcast is already pushing for the development of a different variety of ISP enforcement aimed at reducing infringement in US markets. Comcast is a slightly unusual hybrid: not only is it a large ISP, but it has substantial media interests including ownership of Universal Pictures and the NBC television network.³⁷⁴ It has been reported that it wants to implement technology “that would provide offending users with transactional opportunities to access legal versions of copyright-infringing videos as they’re being downloaded.”³⁷⁵ Under the scheme, which Comcast has so far refused to confirm, infringers engaged in illegal downloading

³⁷⁰ *MPAA Response to Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study*, UNITED STATES PATENT AND TRADEMARK OFFICE, 2 (of the MPAA response); 72 (of the published compilation of responses), <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf>.

³⁷¹ *Ibid*, 3 (of the MPAA response); 73 (of the published compilation of responses), <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf>.

³⁷² *Independent Film & Television Alliance Response to Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study*, UNITED STATES PATENT AND TRADEMARK OFFICE, 4 (of the IFTA response); 10 (of the published compilation of responses), <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf>. Emphasis added.

³⁷³ *RIAA Response to Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study*, UNITED STATES PATENT AND TRADEMARK OFFICE, 3 (of the RIAA response); 17 (of the published compilation of responses), <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf>.

³⁷⁴ Emma Woollacott, *Comcast To Send Its Own Copyright Alerts*, FORBES (Aug. 6, 2013) <http://www.forbes.com/sites/emmawoollacott/2013/08/06/comcast-to-send-its-own-copyright-alerts>.

³⁷⁵ Andrew Wallenstein, *Comcast Developing Anti-Piracy Alternative to ‘Six Strikes’ (Exclusive)*, VARIETY (Aug. 5, 2013) <http://variety.com/2013/digital/news/comcast-developing-anti-piracy-alternative-to-six-strikes-exclusive-1200572790>.

would apparently “be quickly pushed a pop-up message with links to purchase or rent the same content, whether the title in question exists on the [video on demand] library of a participating distributor’s own broadband network or on a third-party seller like Amazon.”³⁷⁶ In the absence of confirmation from Comcast, or any official details, it is difficult to gauge the feasibility of such a scheme. However, it does seem that this kind of approach would be much more directly focused on increasing the size of the legitimate market rather than simply reducing infringement.

Does the evidence suggest that graduated response reduces infringement?

When engaging in this kind of cross-jurisdictional, multi-language research, it is impossible to be sure that every quality relevant resource has been identified. Some may have been overlooked. However, this bias is not likely to result in the omission of positive evidence of graduated response’s efficacy: given the resources that organizations such as IFPI have put into advocating for graduated response, and the publicity they give to studies suggesting that it is achieving positive results, it is reasonable to expect that any such evidence would be widely published in English language materials and thus captured as part of this research project. Despite this, as the above analysis demonstrates, the evidence that graduated response actually reduces infringement is extraordinarily thin.

II. TO WHAT EXTENT DO GRADUATED RESPONSES MAXIMIZE AUTHORIZED USES?

The analysis now turns to the second aim of copyright law as identified in the introduction to this paper – maximizing the size of the legitimate market. Again, the paper takes no position as to whether increasing the sales of industry incumbents is (or should be) one of copyright’s aims. It simply evaluates the available evidence to gauge the extent to which graduated response does in fact increase the size of the legitimate market.

The Danaher study

The most prominent evidence in support of this proposition is an academic study which found Hadopi has had a positive impact on sales via Apple’s iTunes service in France.³⁷⁷ This claim was made despite the fact that overall revenues in the French video and recorded music markets fell by 2.7%³⁷⁸ and 3.7%³⁷⁹ respectively in 2011, HADOPI’s first full year of operation. This study has been widely cited as evidence of the efficacy of graduated response laws.³⁸⁰ IFPI

³⁷⁶ *Ibid.*

³⁷⁷ Brett Danaher, Michael D. Smith, Rahul Telang and Siwen Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France (version as at March 2012)* SOCIAL SCIENCES RESEARCH NETWORK (Mar. 2012) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989240.

³⁷⁸ *France’s 2011 physical media sales down 9%; VOD shot up 50%*, DVD AND BEYOND (Feb. 13, 2012) <http://www.dvd-and-beyond.com/display-article.php?article=1676> (reporting figures attributed to domestic video publishers body, Syndicat de l’Edition Vidéo Numérique and market researcher GFK).

³⁷⁹ *Recording Industry in Numbers: The Recorded Music Market in 2011*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (2012) (on file with author), 8.

³⁸⁰ See e.g., David J. Brennan, *Quelling P2P infringement: private American harbours or public French graduations?* 62(4) TELECOMMUNICATIONS JOURNAL OF AUSTRALIA 55.1, 55.10-55.11 (2012); Eric Pfanner, *Copyright Cheats Face the Music in France*, THE NEW YORK TIMES (Feb. 19, 2012) <http://www.nytimes.com/2012/02/20/technology/20iht-piracy20.html?pagewanted=all>; John Hopewell and Elsa

prominently highlighted the study's results in its 2012 Digital Music Report, describing the sales increase as the "HADOPI effect".³⁸¹

Released in March 2012, the Danaher study found that "HADOPI awareness caused a 22.5% increase in iTunes song unit sales in France ... as well as a 25% increase in iTunes album unit sales".³⁸² The study was based on weekly iTunes sales data (split into singles and albums) for six European countries, including France, spanning the period between July 2008 and May 2011.³⁸³ France was the target of the study, and the other countries represented the control group. The researchers then used Google Trends data to measure the percentage of all French searches that were for the term "HADOPI" over the same period, and graphed that data against the sales timeline.³⁸⁴ The graph, extracted below, demonstrates that French sales diverge from and remain above those of the control group.³⁸⁵ As you can see, it also shows several sales spikes which roughly correspond to spikes in searches for "HADOPI". The divergence of French sales from those of the control group begins soon before the bulk of the queries.³⁸⁶

Keslassy, *France weighs change in piracy law*, VARIETY (Jul. 21, 2012) <http://www.variety.com/article/VR1118056840>; Joshua P. Friedlander, *The Evidence of Anti-Piracy's Impact Continues to Mount*, RECORDING INDUSTRY ASSOCIATION OF AMERICA (Apr. 12, 2012) http://www.riaa.com/blog.php?content_selector=riaa-news-blog&blog_selector=Mount&news_month_filter=4&news_year_filter=2012.

³⁸¹ *Digital Music Report 2012*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (2012) www.ifpi.org/content/library/dmr2012.pdf, 18.

³⁸² Brett Danaher, Michael D. Smith, Rahul Telang and Siwen Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France (version as at March 2012)* SOCIAL SCIENCES RESEARCH NETWORK (Mar. 2012) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989240, 2.

³⁸³ *Ibid.*, 8.

³⁸⁴ *Ibid.*, 9-10.

³⁸⁵ Glyn Moody, *iPhone Data Debunks Recording Industry's Report on How French Three Strikes Law Increased Sales*, TECHDIRT (Feb. 1, 2012) <http://www.techdirt.com/articles/20120131/06152417600/iphone-data-debunks-recording-industrys-report-how-french-three-strikes-law-increased-sales.shtml>.

³⁸⁶ Brett Danaher, Michael D. Smith, Rahul Telang and Siwen Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France (version as at March 2012)* SOCIAL SCIENCES RESEARCH NETWORK (Mar. 2012) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989240, 13.

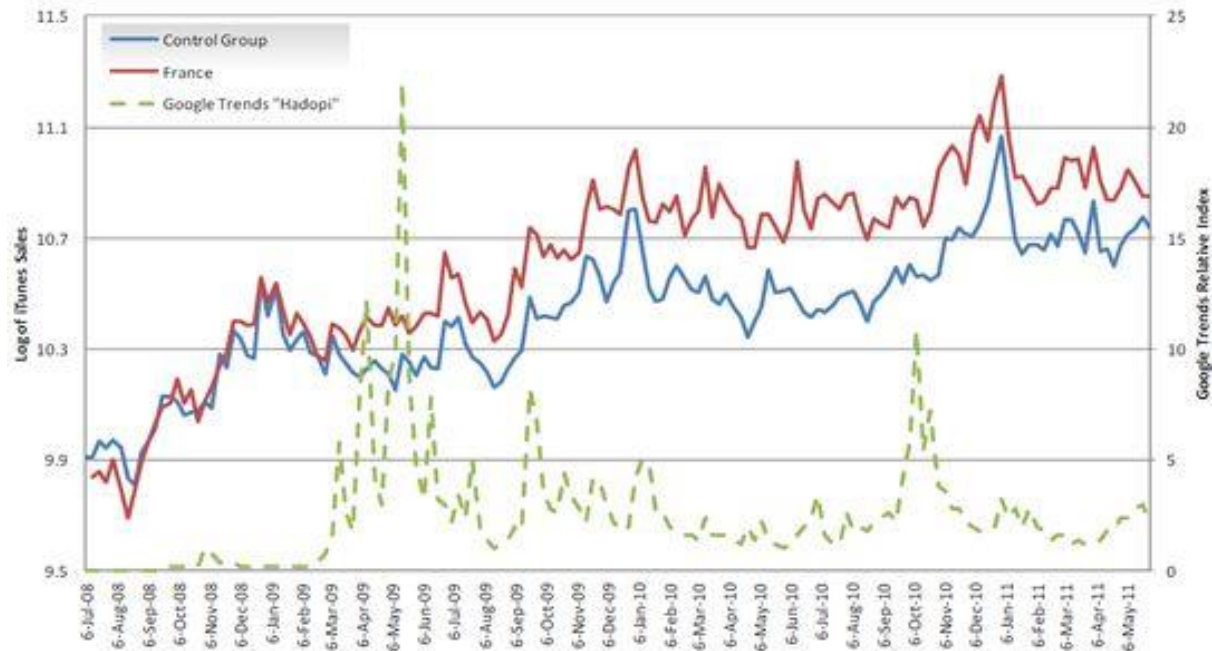


Diagram 1. Source: *Le Monde*.³⁸⁷ Originally published in the Danaher study.³⁸⁸

The study notes that iTunes track sales “rose about 25.5% in the control group after March 1, 2009 but by 48% in France”. Album sales “rose by 42% in the control group but 67% in France”.³⁸⁹ From this, the researchers conclude that “French iTunes track sales were 22.5% higher than they would have been in the absence of HADOPI” and that “HADOPI increased iTunes album sales an average 25% per week in France”.³⁹⁰

However, the study’s methodology and results have been criticized. French newspaper *Le Monde* replicated the methodology of the Danaher study, but, in recognition of the fact that iTunes is the dominant source of legitimate content for iPhone devices, it replaced the word “HADOPI” with the word “iPhone”. It then compared the album sales in France and the control countries against Google search data for “iPhone” in France, “iPhone” in the control group, and “HADOPI” in France.

³⁸⁷ Damien Leloup et Jérémie Baruch, *Hadopi, source de la croissance d'iTunes?*, LE MONDE (Jan. 24, 2012) http://www.lemonde.fr/technologies/article/2012/01/24/hadopi-source-de-la-croissance-d-itunes_1633919_651865.html.

³⁸⁸ Brett Danaher, Michael D. Smith, Rahul Telang and Siwen Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France (version as at March 2012)* SOCIAL SCIENCES RESEARCH NETWORK (Mar. 2012) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989240, 13.

³⁸⁹ *Ibid.*, 14.

³⁹⁰ *Ibid.*

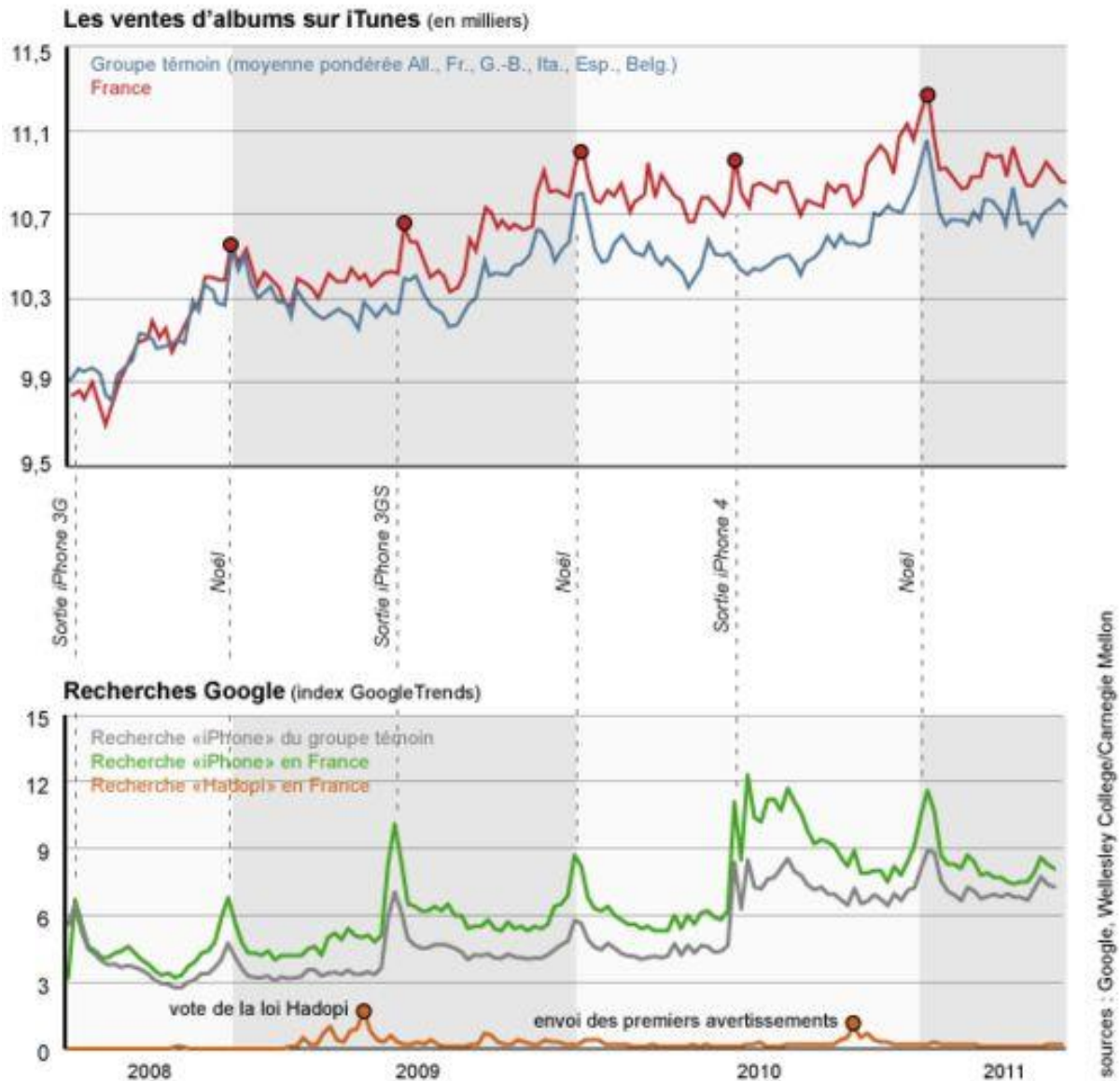


Diagram 2. Source: *Le Monde*.³⁹¹

French user searches for “iPhone” also diverged from those of the control group. Indeed, the resulting graph demonstrates a far more powerful correlation between the iTunes sales and French users’ Google searches for “iPhone” than for searches for “HADOPI”. This provides an alternative explanation for the increased sales: i.e., that iTunes sales increased more strongly in France because user interest in iPhones increased more strongly in France. Of course, correlation \neq causation, and of course this does not mean that increased French interest in iPhones was necessarily the driver of the increased sales. But the same rider applies to the suggestion that HADOPI was the reason for the increase. Indeed, that latter is less likely the cause given the

³⁹¹ Damien Leloup et Jérémie Baruch, *Hadopi, source de la croissance d'iTunes?*, LE MONDE (Jan. 24, 2012) http://www.lemonde.fr/technologies/article/2012/01/24/hadopi-source-de-la-croissance-d-itunes_1633919_651865.html.

considerably weaker correlation exhibited by the Danaher data. The original Danaher study was subsequently amended to incorporate a new Appendix which, while not expressly referring to the Le Monde critique, used a different methodology in an attempt to suggest that iOS device penetration in France did not in fact drive the sales increase.³⁹²

Putting methodological issues aside, it's notable that the study's results do not appear to be reflected within the wider French recorded music industry. The French recorded music market fell 3.1% in 2010, and 3.7% in 2011.³⁹³ Even in 2012, a watershed year which marked a return of global growth in the recorded music market for the first time since 1999, the French portion shrank by 2.9%.³⁹⁴ There was however growth in nine other of the top 20 markets over the same period.³⁹⁵ In the audio-visual context, data for the first quarter 2013 revealed DVD and Blu-Ray sales declines of 10.3% by value, and a decline in video-on-demand for the first time since reporting on it began in 2005.³⁹⁶ Even if there *was* some "Hadopi effect" as suggested by the Danaher study, there is no evidence of its replication or sustainment in the recorded music or audio-visual environments.

The Korean Experience

Organizations such as IFPI have sometimes linked graduated response in Korea to increases in legitimate markets. For example, in the 2013 Digital Music Report, it claimed:

The enforcement programme has, over a period of years, helped the licensed digital marketplace in South Korea significantly. The country's music market grew by 65 per cent between 2007, when the measures were introduced, and 2011, while Korean repertoire has exploded in the region and abroad. The country has advanced from being 23rd largest market in the world in 2007 to the 11th in 2012.³⁹⁷

³⁹² See Brett Danaher, Michael D. Smith, Rahul Telang and Siwen Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France (version as at March 2012)* SOCIAL SCIENCES RESEARCH NETWORK (Mar. 2012) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989240, 25-27. By contrast see original version of the report (sans Appendix), on file with author (previously published at <http://electronlibre.info/IMG/pdf/HADOPI-IFPI-FINAL.pdf> but no longer online at time of writing). The methodology and conclusions relating to a second aspect of the study have separately been criticised. See e.g., Glyn Moody, *iPhone Data Debunks Recording Industry's Report on How French Three Strikes Law Increased Sales*, TECHDIRT (Feb. 1, 2012) <http://www.techdirt.com/articles/20120131/06152417600/iphone-data-debunks-recording-industrys-report-how-french-three-strikes-law-increased-sales.shtml> (commencing from "The researchers do offer one other piece of evidence for the uplift in sales being due to the crackdown on piracy".)

³⁹³ *Recording Industry in Numbers: The Recorded Music Market in 2011*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (2012) (on file with author), 8.

³⁹⁴ Richard Smirke, *IFPI 2013 Recording Industry in Numbers: Global Revenue, Emerging Markets Rise; U.S., U.K., Germany Drop*, BILLBOARD (Apr. 8, 2013) <http://www.billboard.com/biz/articles/news/digital-and-mobile/1556590/ifpi-2013-recording-industry-in-numbers-global-revenue>.

³⁹⁵ IFPI's Recording Industry in Numbers 2013 - the must-read of global music - published today, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (Apr. 8, 2013) http://www.ifpi.org/content/section_news/20130408.html.

³⁹⁶ Pascal Lechevallier, *VOD et DVD France : en attendant Lescure, le marché plonge!*, ZDNET FRANCE (May 6, 2013) <http://www.zdnet.fr/actualites/vod-et-dvd-france-en-attendant-lescure-le-marche-plonge-39790104.htm#xtor=123456>.

³⁹⁷ *IFPI Digital Music Report 2013*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, 5 (2013) <http://www.ifpi.org/content/library/DMR2013.pdf>, 30.

It is certainly the case that music revenues have increased and music and film piracy have decreased within Korea.³⁹⁸ However, there's no evidence that either outcome has been caused by Korea's graduated response law. There are other possible explanations, including the impact of other anti-piracy policies. As Hargreaves pointed out, South Korea introduced a variety of reforms seeking to reduce infringement – not just graduated response,³⁹⁹ and he found that “[f]urther study would be needed to understand the relative merits of the different aspects of the programme.”⁴⁰⁰ The increased availability of legitimate options might also explain the piracy decrease.⁴⁰¹ Yet another possible explanation is the huge rise in the popularity of the “K-Pop” genre.⁴⁰² Notably, IFPI responded to the calls to repeal the Korean graduated response by suggesting that the legislative environment, including the graduated response law and an extension of copyright terms to 70 years, actually “triggered the rejuvenation of ‘K-pop’ music in South Korea and other Asian markets.”⁴⁰³ However, it provided no evidence of any causal link in support of this claim.

To what extent does changed behavior reflect transitions to other sources of infringement?

To the extent, if any, that graduated response results in reduced infringement, it's necessary to ask: to what extent does it merely reflect a shift to other infringing sources? As noted above, switches to sources of infringement that fall outside the various graduated responses is another possible explanation for apparent reductions of infringement.

Hadopi is aware of this possibility, and its report on the law's first 18 months of operation claimed that there had been no “substantial transfer” to illicit streaming and direct download services over the relevant period.⁴⁰⁴ However, considerable data contradicts that claim. For example, France was identified as the fifth fastest growing BitTorrent market in a study tracking BitTorrent usage data for the first half of 2012.⁴⁰⁵ While BitTorrent has significant and growing non-infringing uses, it's often used as a proxy for measuring infringement. In addition, France Telecom reportedly noticed “a dramatic increase in streaming traffic” and “a marked increase in

³⁹⁸ See e.g., Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, UK INTELLECTUAL PROPERTY OFFICE (May 2011) www.ipo.gov.uk/ipreview-finalreport.pdf, 78.

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

⁴⁰¹ IFPI discusses the increase in legitimate services in its response to a proposal to repeal the South Korean graduated response. See *IFPI Comments on the Amendment of the Copyright Act in relation to the Graduated Response Regime in the Republic of Korea*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (Mar. 2013) <http://opennet.or.kr/wp-content/uploads/2013/04/IFPI-South-Korean-Music-Market-Case-Study-March-2011.pdf>, 3-4.

⁴⁰² *South Korea continues to develop as a model for future recorded-music markets*, INFORMA TELECOMS & MEDIA (Mar. 10, 2011) <http://musicandcopyright.wordpress.com/2011/03/10/south-korea-continues-to-develop-as-a-model-for-future-recorded-music-markets/>.

⁴⁰³ *IFPI Comments on the Amendment of the Copyright Act in relation to the Graduated Response Regime in the Republic of Korea*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (Mar. 2013) <http://opennet.or.kr/wp-content/uploads/2013/04/IFPI-South-Korean-Music-Market-Case-Study-March-2011.pdf>, 2.

⁴⁰⁴ *Hadopi, 1 ½ year after the launch*, HADOPI (March 2012) http://www.hadopi.fr/sites/default/files/page/pdf/note17_en.pdf, 7.

⁴⁰⁵ *Digital Music Index*, MUSICMETRIC (September 2012), 36. See also 4 (explaining the scope of the study).

levels of encrypted traffic” shortly after HADOPI came into effect.⁴⁰⁶ An independent study conducted by researchers at the University of Rennes carried out soon before Hadopi began issuing notices found that the law was redirecting infringement to non-P2P technologies like streaming sites and cyberlockers.⁴⁰⁷ Conducted via a phone poll of 2000 participants between November and December 2009, the survey found an overall 3% increase in the amount of infringing behavior.⁴⁰⁸ Survey data has obvious limitations, especially with small sample sizes. However, it further suggests that users were engaging in anti-regulatory behavior to fall outside the operation of the law whilst facilitating exactly the same end result. After considering the available evidence, the Lescure report also found that even if HADOPI had brought about some reduction in P2P infringement, traffic had been diverted to other infringing sources rather than to the legitimate market.⁴⁰⁹ This finding significantly drove Lescure’s conclusion that HADOPI had not achieved the aim, identified in the Olivennes report, of increasing the size of the legitimate market.⁴¹⁰

There is also evidence that the law is driving anti-regulatory activity in New Zealand. Because the NZ scheme applies only to file-sharing via P2P networks, it can be simply bypassed by switching to other tools for infringement.⁴¹¹ These include distributed online discussion systems like Usenet, and “cyberlockers”, or online file hosting sites. Both of these technologies enable the storage and transfer of large files via a client-server rather than “peer-to-peer” network architecture. Users may also use technologies such as VPNs, remote access protocols and “seedboxes” to distance themselves from P2P infringement. Seedboxes are high-speed remote servers, typically hosted in jurisdictions with less stringent copyright laws than the subscriber’s home jurisdiction. Users can download desired content directly to the seedbox via BitTorrent, and then transfer it to their own computer via a http or (more securely) a https connection.⁴¹² In exchange for a small monthly fee, this enables users to obtain content via P2P networks while falling outside the graduated response law.

Discussions on public online fora indicate that New Zealanders are very aware of what they need to do to fall outside the law while achieving the same infringing results. Some typical comments include, “[p]eople I know appear to have switched to other means of obtaining the things they were interested in. They are still getting it. Just not via Bittorrent”,⁴¹³ and “with that new law in

⁴⁰⁶ Monica Horten, *Hadopi – has it massaged the numbers?*, IPTEGITY (Mar. 31, 2012)

<http://www.iptegrity.com/index.php/france/755-hadopi-has-it-massaged-the-numbers>.

⁴⁰⁷ Sylvain Dejean, Thierry Pénard and Raphaël Suire, *Une première évaluation des effets de la loi Hadopi sur les pratiques des Internautes français*, M@rsouin CREM et Université de Rennes (Mar. 2010) <http://recherche.telecom-bretagne.eu/marsouin/IMG/pdf/NoteHadopix.pdf>, 11-12.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Pierre Lescure, *Mission « Acte II de l’exception culturelle » Contribution aux politiques culturelles à l’ère numérique*, MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION (May 2013)

www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescur/index.htm#/1, 371.

⁴¹⁰ *Ibid.*

⁴¹¹ See more comprehensive discussion in Rebecca Giblin, *On the (new) New Zealand graduated response law (and why it’s unlikely to achieve its aims)* 62(4) TELECOMMUNICATIONS JOURNAL OF AUSTRALIA 54.6 (2012).

⁴¹² For an introduction to seedbox technology, see Sharky, *Speed Up Your Torrent Downloads, Get a Seedbox*, TorrentFreak (Jul. 15, 2008) <http://torrentfreak.com/10-reasons-why-you-need-a-seedbox-080715/>.

⁴¹³ LinuxLover, Comment to *Keen to hear from anyone that receives a copyright infringement notice*, GEEKZONE (Sep. 5, 2011) <http://www.geekzone.co.nz/forums.asp?forumid=49&topicid=89556>.

place, http downloads are the way to go if you want to stay below the radar”.⁴¹⁴ Indeed, the level of awareness is such that a newspaper article reporting the first decision under the New Zealand ridiculed the individual concerned, suggesting that it was simply “digital Darwinism in action”.⁴¹⁵

The Waikato study referenced above found a significant jump in the use of technologies that could be used to circumvent the “three strikes” law (although that increase was less than the drop observed in the amount of file sharing).⁴¹⁶ The follow-up study found an enormous increase in the amount of HTTPS traffic, which the researchers theorized was probably:

indicative of illegal file sharing moving to foreign seedboxes where the user can transfer the files back to their home computer using HTTPs. The corresponding increase in VPN and remote access protocols appear to corroborate this, as these protocols would be used to access and configure seedboxes.⁴¹⁷

Of course, anything that makes it more difficult to commit infringement has the potential to stop people from engaging in it – but that doesn’t mean that it’s driving infringers to the legitimate market. As this analysis has demonstrated, there’s little persuasive evidence showing a causal link between graduated response and increased legitimate usage.

III. TO WHAT EXTENT DO GRADUATED RESPONSES PROMOTE LEARNING AND CULTURE BY ENCOURAGING THE CREATION AND DISSEMINATION OF A WIDE VARIETY OF CREATIVE MATERIALS?

The central tenet of the utilitarian rationale for copyright is that it’s necessary to promote broad public interest aims such as the spread of knowledge and culture by encouraging the creation and dissemination for a wide variety of creative materials.⁴¹⁸ Thus, “[a] marketable right is conferred to ensure a sufficient supply of disseminated knowledge and information”,⁴¹⁹ and “[c]opyright protection can only be justified and is only to be conceded insofar as it can be deemed beneficial for society as a whole.”⁴²⁰ In the words of the US Supreme Court, copyright “reflects a balance

⁴¹⁴ Paulfknwalsh, Comment to *Netflix rules out New Zealand launch - Broadband too slow, can't get content rights*, REDDIT (Nov. 28, 2011)

www.reddit.com/r/newzealand/comments/msrsj/netflix_rules_out_new_zealand_launch_broadband/.

⁴¹⁵ Pat Pilcher, *Is Skynet really digital Darwinism in action?*, THE NEW ZEALAND HERALD (Feb. 4, 2013) http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10863328.

⁴¹⁶ Shane Alcock and Richard Nelson, *Measuring the Impact of the Copyright Amendment Act on New Zealand Residential DSL Users*, WAND NETWORK RESEARCH GROUP (2012) <https://secure.wand.net.nz/sites/default/files/caa.pdf>, 2.

⁴¹⁷ Shane Alcock, *The Impact of the Copyright Amendment Act: Update for September 2012* WAND NETWORK RESEARCH GROUP (Oct. 26, 2012) <http://wand.cs.waikato.ac.nz/content/impact-copyright-amendment-act-update-september-2012>.

⁴¹⁸ See e.g., H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909) (“The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings... but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.”); MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST 7, 13 (2004); Paul Goldstein, Goldstein on Copyright §1.13.2 (2005).

⁴¹⁹ MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST 7 (2004).

⁴²⁰ *Ibid*, 13.

of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”⁴²¹ Even in France, despite its strong natural rights tradition, the Government has made it clear that the role of culture in the personal development of individuals means that it’s “too important to leave cultural productions fully subject to the law of the market. The intervention of the public authorities is necessary to ensure the survival of a rich cultural offer, varied and accessible to the greatest number.”⁴²²

This section seeks to evaluate the extent to which existing graduated response regimes promote the spread of learning and culture by asking:

1. To what extent do graduated response regimes promote the creation of a wide variety of creative works?
2. To what extent do they actively encourage widespread dissemination of content?

To what extent do graduated response regimes promote the creation of a wide variety of creative works?

The above analysis has concluded that there’s little evidence that graduated response laws reduce infringement or increase the size of the legitimate market. If that is the case, it may well be that graduated response plays no role in encouraging the creation of new works. However, if such laws *do* have a positive effect on content creation, it appears that they are likely to disproportionately encourage the development of a certain kind of content and production model.

An under-recognized feature of many existing graduated responses is that their design ensures that not all content (or content owners) are treated equally. When copyright policy is being formulated, many copyright owners don’t claim a seat at the negotiating table. There are many possible reasons for this, including because their interests are too diverse, because they lack organization and resources or because they are not concerned enough by copyright to get involved. By contrast, “Big Content”, the movie and music conglomerates largely spearheaded by the MPAA and RIAA, have shared interests, are highly organized, and have copyright at the core of their businesses. It’s unsurprising then that they play a disproportionately large role in international copyright policymaking. Their influence permeates many of the graduated response regimes which are operating today.

For example, the only content owners who are entitled to issue notices under the Irish scheme are the parties to the settlement, i.e. the Irish branches of EMI Records, Sony BG Music Entertainment, Universal Music and Warner Music. The private scheme operating in the US is rather more inclusive: it not only permits the MPAA and RIAA to protect their members’ interests, but also the Independent Film and Television Alliance (whose members produce more

⁴²¹ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (internal notes omitted).

⁴²² *Culture-acte 2 : 80 propositions sur les contenus culturels numériques*, MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION (May 10, 2013) <http://www.culturecommunication.gouv.fr/Actualites/A-la-une/Culture-acte-2-80-propositions-sur-les-contenus-culturels-numeriques> (wording of quotation via google translate).

than 400 films per year⁴²³) and the American Association of Independent Music (which currently represents over 200 independent labels⁴²⁴). However, creators and rightholders outside these organizations are unable to take advantage of these mechanisms to protect their content.

A number of the statutory schemes also exhibit structural biases in favor of the biggest rightholders.

The New Zealand scheme is one example. As explained above, the New Zealand law only permits enforcement action to be instituted against an account holder once three complying infringement notices relating to the same rightholder have been issued. This means that an account holder could theoretically receive dozens of infringement notices from multiple rightholders without any one of them accruing the right to take enforcement action. However, the law also provides for rightholders to “pool” infringements, by defining a “rights owner” as being either “a copyright owner” or “a person acting as agent for 1 or more copyright owners”.⁴²⁵ This broad definition of “rights owner” was advocated by the Select Committee tasked with reviewing the legislation. The Committee explained that it would permit “enforcement action [to] be taken against an account holder who had received three notices recording infringements relating to three sound recordings by three different copyright owners, provided that those owners had previously decided to be represented as a group in enforcing their rights.”⁴²⁶

That pooling arrangement makes it disproportionately more difficult for smaller, less-established or independent rightholders to reach the enforcement stage. This may at least partly explain why none appear to have done so. Instead, in almost two years of operation, Rianz appears to be the only organization that has issued any notices at all under the NZ law. As of August 2013, thirteen cases have been decided. In each, Rianz has acted as agent for major labels such as Universal, Sony and EMI. Every case has involved infringements of music performed by international artists such as Beyoncé, Coldplay and Elton John. Not a single local New Zealand artist has featured. This can be at least partly explained by the fact that the biggest international artists are most likely to attract the most interest from illegal downloaders, and thus have a greater chance of detection. However, the clear message is that infringers are only at risk if they step on the toes of powerful international rightholders. Other content owners and creators, who may also be facing serious challenges from widespread infringement, effectively receive less protection than the majors.

The UK regime has also been designed in a way that risks disproportionately benefiting the largest rightholders. As noted above, only those copyright owners who have provided written estimates of the number of notifications they are likely to make in the following year, well in

⁴²³ *Independent Film & Television Alliance Response to Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study*, UNITED STATES PATENT AND TRADEMARK OFFICE, 1 (of the IFTA response); 7 (of the published compilation of responses), <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf>.

⁴²⁴ *Label Members*, AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (as at Sep. 4, 2013) http://a2im.org/contents/?taxonomy=c_sitewide_group&term=label.

⁴²⁵ Copyright Act 1994 (N.Z.), s 122A.

⁴²⁶ *Copyright (Infringing File Sharing) Amendment Bill, Government Bill, As reported from the Commerce Committee*, COMMERCE COMMITTEE (2010) <http://www.legislation.govt.nz/bill/government/2010/0119/latest/096be8ed8063b81d.pdf>, 3-4.

advance, to each qualifying ISP and to Ofcom, will be permitted to utilize the system.⁴²⁷ Additionally, those copyright owners must obtain pre-approval of its evidence-gathering procedures from Ofcom. In practice these requirements are likely to limit the scheme's operation to the largest music, movie and publishing houses, and not to smaller content providers who are also impacted by large-scale infringement. Ofcom noted that this argument had been raised during the consultative process: "[s]ome copyright owners ... suggested that the requirement for up-front estimates ... could mean that some copyright owners, notably SMEs [small to medium enterprises], could be prevented from participation in the notification regime for administrative and financial reasons."⁴²⁸ Recognizing the merits of this argument, Ofcom responded by suggesting that:

it may be possible for SME operators to engage with trade bodies which indicate they are likely to make commitments to CIR [copyright infringement report] volumes, and either join them at the beginning of a notification period, or even assume responsibility for some of their CIR estimates during a notification period. By aggregating uncertain demand across participants, such agencies may be able to make up-front commitments which make it easier for SME members to participate.⁴²⁹

In reality however, since smaller operators lack the organizational and financial resources of organizations such as the MPAA and RIAA, it is doubtful whether this will occur in practice.

Although there is less evidence of structural bias in other jurisdictions, there *is* evidence of heavy involvement on behalf of powerful US-based rightholders in each. Taiwan's implementation of a graduated response was cited as a key reason for its removal from the US Trade Representative's "special watch list" in 2009, in an unusual "out of cycle" review.⁴³⁰ Korea was also removed from the list the same year – the first time in the list's history in which it did not feature.⁴³¹ Korea's approach may also have been influenced by obligations under its "free trade" agreement with the US.⁴³² The agreement included a notable side letter which imposed unilateral obligations on South Korea to "provide[] for more effective enforcement of intellectual property rights on the Internet, including in particular with regard to peer-to-peer (P2P) services", followed by a promise to "strengthen enforcement of intellectual property rights in Korea, and work to prevent, investigate, and prosecute Internet piracy."⁴³³ In France, it's notable that two of the three convictions related to artists signed to US labels (Universal and Warner Music)⁴³⁴. On

⁴²⁷ *Notice of Ofcom's proposal to make by order a code for regulating the initial obligations*, OFCOM (Jun. 26, 2012) <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, 18.

⁴²⁸ *Ibid.*, 19.

⁴²⁹ *Ibid.*

⁴³⁰ *U.S.T.R. Announces Conclusion of the Special 301 Out-of-Cycle Review for Taiwan*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Jan. 2009) <http://www.ustr.gov/about-us/press-office/press-releases/2009/january/ustr-announces-conclusion-special-301-out-cycle-re>.

⁴³¹ *2009 Special 301 Report*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Apr. 30, 2009) *available at* <http://www.ustr.gov/sites/default/files/Full%20Version%20of%20the%202009%20SPECIAL%20301%20REPORT.pdf>, 10.

⁴³² The full text of the KORUS free trade agreement is *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>.

⁴³³ The side letter on online piracy prevention is *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file939_12739.pdf.

⁴³⁴ See discussion at p 11.

this point it's also worth mentioning some Australian history. Australia does not currently have a graduated response, but an attempt was made to introduce one via the common law.⁴³⁵ Although the effort was ostensibly headlined by a local organization, leaked diplomatic cables demonstrated that the MPAA was the real driving force behind the litigation.⁴³⁶

As this paper has demonstrated, there's little evidence that graduated response does anything to reduce infringement or increase the size of the legitimate market. However, if it did achieve those things, the structural biases identified within various of the regimes suggest that they would disproportionately favor a particular kind of content – that created by the largest and most powerful rightholders. Regulators ought to give careful consideration to whether this is the kind of content creation they most wish to incentivize, and if they really want to do so at the expense of less established and independent creators. In the digital world, is the most desirable creativity still necessarily the one that costs the most to produce?

To what extent do graduated response laws actively encourage widespread dissemination of content?

A number of jurisdictions have made it explicitly clear that they intended their graduated response laws to encourage legitimate uptake. For example, the NZ scheme seeks to ensure that creative industries “adapt to changing technologies and the changing market place for creative works”.⁴³⁷ In the UK legislation's second reading speech, the moving Minister stated that the Act was intended to provide “a proper legal framework to tackle unlawful downloading” in order to achieve the aim of “developing legitimate paid-for downloading models”, and anticipated that, in response to receiving notices, the “vast majority of subscribers will seek legal alternatives.”⁴³⁸ A statement welcoming the agreement that paved the way for the US' private graduated response stated that “[t]he Administration is committed to reducing infringement of American intellectual property as part of our ongoing commitment to support jobs, increase exports and maintain our global competitiveness.”⁴³⁹ In France, the report that provided the HADOPI framework emphasized that the intent was not simply to reduce infringement, but to translate that reduction into increased legitimate consumption.⁴⁴⁰

⁴³⁵ Rebecca Giblin, *Was the High Court in iiNet right to be chary of a common law graduated response?* (forthcoming, MEDIA & ARTS LAW REVIEW, 2013)

⁴³⁶ See e.g., Cable attributed to Robert D. McCallum, *Cable 08CANBERRA1197, FILM/TV INDUSTRY FILES COPYRIGHT CASE AGAINST*, WIKILEAKS (Nov. 30, 2008)

<http://wikileaks.org/cable/2008/11/08CANBERRA1197.html> (stating that the Australian Federation Against Copyright Theft was acting “on behalf of the Motion Picture Association of America (MPAA) and its international affiliate, the Motion Picture Association (MPA), but d[id] not want that fact to be broadcasted.”)

⁴³⁷ *Parliamentary Debates*, NEW ZEALAND HOUSE OF REPRESENTATIVES (Apr. 12, 2011), 18083 (Dr Wayne Mapp).

⁴³⁸ *Second Reading Speech, Digital Economy Bill*, Official Report of the UK House of Commons (Hansard), available at <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100406/debtext/100406-0007.htm#1004069000626>.

⁴³⁹ Victoria Espinel, *Working Together to Stop Internet Piracy*, THE WHITE HOUSE (Jul. 7, 2011) <http://www.whitehouse.gov/blog/2011/07/07/working-together-stop-internet-piracy>.

⁴⁴⁰ Denis Olivennes, *Le Développement et la Protection des Oeuvres Culturelles sur les Nouveaux Réseaux*, MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION, part 2 (2007) <http://www.culture.gouv.fr/culture/actualites/conferen/albanel/rapportolivennes231107.pdf>.

Sometimes, the introduction of graduated response seems to have led, if not to increased legitimate consumption, then at least to an increase in the amount of legitimate offerings available. For example, in Ireland, Eircom's introduction of the suspension scheme occurred simultaneously with its launch of a legal music service,⁴⁴¹ suggesting that the latter was enabled and driven by the former.⁴⁴² And the number of legitimate music services quickly doubled in the months after NZ rolled out its graduated response,⁴⁴³ with Rianz claiming that "[m]any had been encouraged to launch because of the crackdown on piracy".⁴⁴⁴ So it does appear that introducing graduated response *can* lead to an increase of legitimate offerings. But to what extent are the various schemes structurally designed to require or encourage an increase in the number of services or available, or to improve their attractiveness to consumers?

The French scheme is the clearest example of an attempt to entice rightholders to offer better access in exchange for more enforcement. As noted above, the Olivennes Report provided the framework and rationales for the HADOPI legislation.⁴⁴⁵ The Report subsequently evolved into a formal agreement between the Government and some 45 stakeholders representing the largest content interests ("the Olivennes Agreement").⁴⁴⁶ The agreement provided for the Government to enact the three strikes enforcement program as envisaged in the Olivennes Report, in exchange for a range of concessions from content providers, including obligations to:

1. Shorten release windows for audio-visual content, and align "video on demand" releases with the physical (i.e. DVD) releases;
2. Work towards faster online film releases;
3. Make "best efforts" to make video content available online after broadcast;
4. Make French music available without technical protection measures within a year of the agreement.⁴⁴⁷

Although some of these targets were aspirational rather than binding, they all share the same focus on encouraging the widest possible dissemination of legitimate content. More recently, the

⁴⁴¹ *Statement on Illegal File Sharing*, EIRCOM (Dec. 8, 2010)

http://pressroom.eircom.net/press_releases/article/eircom_Statement_on_Illegal_File_Sharing/.

⁴⁴² *Perspectives on Policy Responses to Online Copyright Infringement*, INTERNET SOCIETY (Feb. 20, 2011)

http://www.wipo.int/edocs/mdocs/copyright/en/wipo_isoc_ge_11/wipo_isoc_ge_11_ref_00_runnegar.pdf, 23.

⁴⁴³ *Copyright (Infringing File Sharing) Regulations – Fee Review*, RECORDING INDUSTRY ASSOCIATION OF NEW ZEALAND AND INDEPENDENT MUSIC NEW ZEALAND (Apr. 30, 2012) www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/illegal-peer-to-peer-file-sharing-submissions-on-fee-review-discussion/rianz.pdf, [5].

⁴⁴⁴ Tom Pullar-Strecker, *Four in 10 Kiwis still flout piracy laws*, STUFF (Jul. 23, 2012)

<http://www.stuff.co.nz/technology/digital-living/7318453/Four-in-10-Kiwis-still-flout-piracy-laws>.

⁴⁴⁵ See p 5. Denis Olivennes, *Le Développement et la Protection des Oeuvres Culturelles sur les Nouveaux Réseaux*, MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION (2007)

<http://www.culture.gouv.fr/culture/actualites/conferen/albanel/rapportolivennes231107.pdf>.

⁴⁴⁶ *Accord pour le développement et la protection des œuvres et programmes culturels sur les nouveaux réseaux*, MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION (Nov. 23, 2007)

<http://www.culture.gouv.fr/culture/actualites/conferen/albanel/accordolivennes.htm>. The signatories to the agreement are published at www.culture.gouv.fr/culture/actualites/conferen/albanel/organisationssignataires.pdf.

⁴⁴⁷ Denis Olivennes, *Le Développement et la Protection des Oeuvres Culturelles sur les Nouveaux Réseaux*, MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION, part 2 (2007)

<http://www.culture.gouv.fr/culture/actualites/conferen/albanel/rapportolivennes231107.pdf>.

Lescure report recommended shortening release windows even further.⁴⁴⁸ Notably, these windows are set by law in France, rather than left as a matter of private agreement.⁴⁴⁹ Since 2009, under the deal struck as part of the Olivennes agreement, movies were required to be released on physical media and video-on-demand four months after theatrical release.⁴⁵⁰ The Lescure report recommends a further reduction to three months.⁴⁵¹

No other jurisdiction has so expressly encouraged broader dissemination or more attractive offerings by extracting it as a price to be paid in exchange for greater enforcement rights. However, various stakeholders argued strongly in favor of doing so in New Zealand. For example, Greens MP Gareth Hughes argued for “a zero-dollar penalty for infringing against international products that are not available in New Zealand” on the basis that it “may have encouraged rights-holders to provide digital content sooner to Kiwis”.⁴⁵² InternetNZ proposed linking availability of content to availability of substantial damages. If a work was not available for sale in NZ at the time of the infringement, it proposed that the copyright owner should only be entitled to its reasonable costs of enforcement.⁴⁵³ However, none of these proposals were adopted. If the aim of the legislation is to promote the broadest dissemination of content, this can be seen as an opportunity lost. New Zealand is “at the end of US or European-based supply chains ... [and] can wait months or sometimes years to get access to content that is freely available overseas.”⁴⁵⁴ Prices paid by New Zealanders for digital content can also be considerably higher than for identical content purchased overseas.⁴⁵⁵ And in an additional blow, popular US-based video streamer Netflix ruled out a New Zealand launch partly because it was unable to clear the necessary rights.⁴⁵⁶ As designed, the NZ law appears to do little to expressly promote its stated aim of ensuring creative industries “adapt to changing technologies and the changing market place for creative works”.⁴⁵⁷ Instead, rightholders are left to provide content in the manner they see fit, without consideration of whether their motivations align with the broader public interest.

It may be that the regulators tasked with designing the existing graduated responses assumed that they would reduce infringement, and that, once that occurred, it would lead inevitably to the fulfillment of copyright’s broader aim of encouraging the creation and dissemination of a wide variety of cultural artifacts. This would explain why, with the exception of the French law, the

⁴⁴⁸ Pierre Lescure, *Mission « Acte II de l’exception culturelle » Contribution aux politiques culturelles à l’ère numérique*, MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION (May 2013)

www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescure/index.htm#/1, section 3.1.1.

⁴⁴⁹ See *ibid*, sections 1.3, 2.3, 3.

⁴⁵⁰ *Ibid*, section 3.1.1.

⁴⁵¹ *Ibid*.

⁴⁵² *Parliamentary Debates*, NEW ZEALAND HOUSE OF REPRESENTATIVES (Apr. 12, 2011), 18083 (Gareth Hughes).

⁴⁵³ *Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations 2011 Discussion Document*, INTERNETNZ (May 27, 2011)

http://internetnz.net.nz/system/files/submissions/submission_to_the_med_on_the_copyright_infringing_file_sharing_regulations_2011_discussion_document.pdf, 31.3.

⁴⁵⁴ *Parliamentary Debates*, NEW ZEALAND HOUSE OF REPRESENTATIVES (Apr. 12, 2011), 18083 (Gareth Hughes).

⁴⁵⁵ Claire Rogers, *Online purchases ‘a rip-off’*, STUFF (Sep. 26, 2011) <http://www.stuff.co.nz/technology/digital-living/5681610/Online-purchases-a-rip-off>.

⁴⁵⁶ Natalie Apostolou, *Netflix rules out Kiwi launch*, THE REGISTER (Nov. 28, 2011) http://www.theregister.co.uk/2011/11/28/netflix_says_no_to_nz.

⁴⁵⁷ *Parliamentary Debates*, NEW ZEALAND HOUSE OF REPRESENTATIVES (Apr. 12, 2011), 18083 (Dr Wayne Mapp).

structural design of the various regimes provide so little in the way of express incentives to make content more broadly available. However, the above analysis has demonstrated that graduated response actually does little to incentivize the widest possible creation and dissemination of content. In many cases they encourage the creation of Big Content over other forms, which suggests they are not designed to motivate the widest possible creative production. However, given the lack of evidence that graduated response does anything to reduce infringement or increase legitimate markets, these structural biases in favor of Big Content may have little or no effect in practice.

PART 4: CONCLUSIONS: IS GRADUATED RESPONSE ACHIEVING ITS AIMS?

Graduated response schemes have been variously criticized for impinging on the human right to freedom of expression, for breaching privacy, and for a failure to comply with key tenets of the rule of law.⁴⁵⁸ But quite separate to those criticisms, their legitimacy is seriously thrown into question by the startling lack of evidence that graduated response helps achieve any the copyright law's underlying aims.

Powerful rightholders have repeatedly claimed that graduated response is “effective” and “successful”.⁴⁵⁹ By using headlines like “The Evidence of Anti-Piracy’s Impact Continues to Mount”,⁴⁶⁰ and loudly applauding “the HADOPI effect”, they continually send messages that graduated response laws work as promised. Evaluating the “success” or “effectiveness” of graduated response is undoubtedly a difficult exercise. Not only is there fundamental disagreement about the measures that they should be judged against, but, as Hargreaves has pointed out, although “online infringement of copyright and the measures used to combat it are well established phenomena, there is relatively little research evaluating the impact of specific approaches.”⁴⁶¹ Despite those difficulties, this analysis has demonstrated that the claims made about the success of the global graduated response are not supported by the available evidence.

There is no evidence demonstrating a causal connection between graduated response and reduced infringement. If “effectiveness” means reducing infringement, then it is not effective. Furthermore, there is no convincing proof that any variety of graduated response increases the size of the legitimate market. If “effectiveness” means increasing the market, then it is not effective. What about the third aim? Do graduated responses encourage the widest possible production and dissemination of a variety of cultural content? *Some* graduated responses might have an impact on this. France at least has required rightholders to provide some content carrots in exchange for their new enforcement sticks, though as there do not appear to have been any attempts to measure the practical effect of this policy, there is no proof that it has worked as intended. Overwhelmingly however, graduated responses do very little to actively require or

⁴⁵⁸ See footnote 290.

⁴⁵⁹ See p 2.

⁴⁶⁰ Joshua P. Friedlander, *The Evidence of Anti-Piracy’s Impact Continues to Mount*, RECORDING INDUSTRY ASSOCIATION OF AMERICA (Apr. 12, 2012) http://www.riaa.com/blog.php?content_selector=riaa-news-blog&blog_selector=Mount&news_month_filter=4&news_year_filter=2012.

⁴⁶¹ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, UK INTELLECTUAL PROPERTY OFFICE (May 2011) www.ipo.gov.uk/ipreview-finalreport.pdf, 77.

even encourage beneficiaries to make more content than they otherwise would, or to distribute it more widely. Regulators have left rightholders almost unfettered discretion as to how they distribute their works – and it’s not surprising that they do so in ways that best maximize their profits, rather than in pursuit of copyright’s wider public interest aims. Furthermore, existing graduated response regimes don’t necessarily emphasize the production and dissemination of a “wide variety” of content. As demonstrated, a number of schemes disproportionately incentivize the creation and dissemination of “Big Content” over independent and smaller-budgeted forms of creation. However, in the absence of evidence that graduated response reduces infringement or increases legitimate markets, it’s highly unlikely that it is incentivizing more of even this kind of content than would otherwise be created. In sum, there is precious little evidence that graduated response is effective on any measure.

There is a lot of good news in content markets worldwide. IFPI recently reported that the global music industry “has achieved its best year-on-year performance since 1998.”⁴⁶² The movie industry has broken its record for worldwide box office receipts for the last *seven* years straight.⁴⁶³ A recent study found copyright-intensive industries to be significantly more profitable than their equivalents in the construction, transportation, mining and metals sectors.⁴⁶⁴ And there’s growing evidence that new business models based on providing reasonable access to legitimate content are both reducing infringement and substantially increasing legitimate markets.⁴⁶⁵ However, there is no evidence that any of these outcomes have been caused by the introduction of graduated responses. International regulators considering implementation of new graduated responses must be surer than ever to carefully consider the policy aims they wish to achieve, and to evaluate whether the proposals on the table would actually help to do so. And regulators who have already enacted graduated response laws should take a close look at the evidence and consider whether it is desirable to maintain them in their current forms. If not, perhaps they should follow the French lead and rollback or repeal. Much can be done to design copyright law in ways that will help achieve desired aims. But the graduated responses in place right now overwhelmingly fail to do so.

⁴⁶² *IFPI Digital Music Report 2013*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, 5 (2013) <http://www.ifpi.org/content/library/DMR2013.pdf>.

⁴⁶³ See e.g., Nate Anderson, *Piracy once again fails to get in way of record box office*, ARS TECHNICA (Feb. 23, 2011) <http://arstechnica.com/tech-policy/2011/02/piracy-once-again-fails-to-get-in-way-of-record-box-office/> (providing the numbers for the period spanning 2006-2010); *Theatrical Market Statistics 2011*, MOTION PICTURE ASSOCIATION OF AMERICA (2012) www.mpa.org/resources/5bec4ac9-a95e-443b-987b-bff6fb5455a9.pdf, 2 (providing the 2011 data); *Global Box Office Reaches Record High in 2012*, MOTION PICTURE ASSOCIATION OF AMERICA (Mar. 21, 2013) www.mpa.org/resources/43a3b102-6703-45f4-a15c-ac75573f4352.pdf, 1 (providing the 2012 data, the most recent available at time of writing).

⁴⁶⁴ Jonathan Band and Jonathan Gerafi, *Profitability of Copyright Intensive Industries*, POLICYBANDWIDTH (Jun. 2013) <http://infojustice.org/wp-content/uploads/2013/06/Profitability-of-Copyright-Industries.pdf>.

⁴⁶⁵ A comprehensive examination of this phenomenon has been undertaken in Rebecca Giblin, *Beyond Graduated Response*, in *THE EVOLUTION AND EQUILIBRIUM OF COPYRIGHT IN THE DIGITAL AGE* (Susy Frankel & Daniel Gervais, eds., forthcoming Cambridge University Press 2014). See also *TV and Media*, ERICSSON CONSUMERLAB (Aug. 2013) www.ericsson.com/res/docs/2013/consumerlab/tv-and-media-consumerlab2013.pdf, 15.