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DIGITAL COPYRIGHT PROTECTION AND GRADUATED RESPONSE: A GLOBAL PERSPECTIVE

Michael Boardman

I. INTRODUCTION

Internet piracy causes copyright holders in the United States alone more than $25 billion in lost sales every year.[1] While some have challenged figures like this as misrepresenting the actual effects of piracy,[2] newer studies with less controversial methodologies have come to similar conclusions.[3] These losses impact not only wealthy artists and content owners, but also many other unknown workers and a broad segment of the global economy.[4] A 2007 study by the Institute for Policy Innovation reported that as a result of Internet copyright violations, the U.S. economy loses $58 billion and U.S. workers lose 373,375 jobs each year.[5] Additionally, U.S. workers lose $16.3 billion in earnings, including $7.2 billion in earnings from workers in the copyright industry or "downstream" retail industries.[6] These private losses have a significant broader impact as well, as federal, state, and local governments in the United States lose at least $2.6 billion in tax

1. Press Release, Senator Sheldon Whitehouse, International Anti-Piracy Caucus Unveils "2009 International Piracy Watch List" (May 20, 2009), *available at* http://whitehouse.senate.gov/newsroom/press/release/?id=eaa3f1b7-8146-4ab4-bad1-5eb599215e10.

2. *See, e.g.*, WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 30, 169 (2009).

3. *See, e.g.*, *Frequently Asked Questions*, MOTION PICTURE ASS'N OF AM., http://www.mpaa.org/contentprotection_faq (last visited Sept. 6, 2011) (noting how piracy hurts the movie industry); Richard Verrier, *Piracy Cost Studios $6 Billion in '05, Study Says*, L.A. TIMES, May 3, 2006, at C2.

4. The MPAA estimates that 2.4 million workers in the United States are employed by the motion picture industry. *Content Protection*, MOTION PICTURE ASS'N OF AM., http://www.mpaa.org/contentprotection (last visited Sept. 6, 2011).

5. STEPHEN E. SIWEK, THE TRUE COST OF COPYRIGHT INDUSTRY PIRACY TO THE U.S. ECONOMY i (2007), *available at* http://www.ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/02DA0B4B44F2AE9286257369005ACB57/$File/CopyrightPiracy.pdf?OpenElement.

6. *Id.*

revenues each year, including $1.8 billion in personal income tax and $800 million in lost corporate income and production taxes.[7] Although the United States suffers disproportionately since it produces the majority of content pirated online, such losses are not exclusive to the United States.[8] The Motion Picture Association of America (MPAA) estimates that in 2005 alone, the global film and television industry lost $18.2 billion as a result of piracy.[9]

While new forms of unauthorized distribution continue to grow, the majority of copyright infringement on the Internet still occurs through peer-to-peer (P2P) file-sharing.[10] Although P2P activity is not infringing by definition, a large portion of it involves the transfer of copyrighted material without the owner's permission or knowledge.[11] Courts have limited or shut down many of the original P2P file-sharing applications,[12] but others still operate and new technology has developed to accelerate the ease and effectiveness of transfers.[13] For example, BitTorrent is a protocol that breaks up files into small pieces and allows a website to host "trackers," which link to the individual pieces of files on multiple users' computers.[14] BitTorrent has increased the ease with which users can download large amounts of content and has eliminated many of the problems associated with direct P2P networks.[15] Other ostensibly legitimate websites offer illegally pirated content for sale through subscription models without the permission of

7. *Id.* at i.

8. *Id.* at i, 1.

9. Interview by Bob Garfield with Greg Sandoval, CNET, *How Bad is Piracy? No One Knows*, ON THE MEDIA (Apr. 23, 2010), http://www.onthemedia.org/transcripts/2010/04/23/04.

10. *See* INT'L FED'N OF THE PHONOGRAPHIC INDUS., IFPI DIGITAL MUSIC REP. 19 (2010), *available at* http://www.ifpi.org/content/library/DMR2010.pdf [hereinafter DIGITAL MUSIC REP.].

11. *Peer-to-Peer (P2P) File Sharing and Copyright Infringement*, UNIV. OF MD. BALTIMORE, http://www.umaryland.edu/HEOA/P2P_Document (last visited Sept. 6, 2011).

12. *See, e.g.*, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

13. *See, e.g.*, THE PIRATE BAY, http://thepiratebay.org (last visited Sept. 6, 2011); MININOVA, http://www.mininova.org (last visited Sept. 6, 2011); EMULE PROJECT, http://www.emule-project.net (last visited Sept. 6, 2011).

14. *See* Adam Pash, *A Beginner's Guide to BitTorrent*, LIFEHACKER (Aug. 3, 2007), http://lifehacker.com/285489/a-beginners-guide-to-bittorrent.

15. *See* Paul Gil, *How BitTorrents Work: A Non-Technical Explanation*, ABOUT.COM, http://netforbeginners.about.com/od/peersharing/a/torrenthandbook_2.htm (last visited Sept. 6, 2011). BitTorrent is extremely popular: fifty-seven percent of all Internet traffic in Eastern Europe is made up of BitTorrent transfers. IPOQUE, INTERNET STUDY 2008/2009 4 (2009), http://www.ipoque.com/resources/internet-studies/internet-study-2008_2009.

copyright holders.[16] The huge financial losses associated with Internet piracy have prompted a number of legal responses with varying degrees of success.[17] This Note seeks to analyze the newest attempt at curbing online piracy, the so-called "graduated response" strategy.[18]

Part II identifies and briefly explains the international obligations with regard to copyright enforcement. Part III discusses controversial new domestic laws being considered which require Internet service providers (ISPs) to monitor the use of their subscribers and terminate a user's Internet access after three "strikes" of large-scale copyright infringement. This section will assess these laws' relationship to international copyright obligations, the applicability of any challenges to such laws under international human rights standards, and the policy effects of the laws' implementation. Part IV addresses the major arguments against adopting graduated response laws and concludes that contrary to dissenting opinion, well-drafted graduated response laws best serve the international community's interest in curbing piracy and maintaining copyright protections. This Note ultimately concludes that while domestic laws, such as the "HADOPI" law in France,[19] can be effective tools at curbing piracy and maintaining copyright protections, Internet piracy is fundamentally an international problem and should be managed and adjudicated through the creation of an international agency with global jurisdiction and enforcement powers.

II. GLOBAL TREATIES AND INTERNATIONAL COPYRIGHT OBLIGATIONS

Copyright as a legal protection is not defined by international laws.[20] Instead, treaties and other international agreements attempt to create a framework for organizing and establishing domestic copyright

16. *See, e.g.*, *Coming Soon: The Internet Could Be a Boon for Hollywood—But Only If It Can Conquer Its Fears*, ECONOMIST.COM (Feb. 21, 2008), http://www.economist.com/displaystory.cfm?story_id=10723360 (describing the pirate site for movies called ZML.com).

17. The Recording Industry Association of America (RIAA), for example, filed a series of lawsuits against individual users for illegally sharing files, and while the legal outcome has been largely positive for the RIAA, the lawsuits have been a public relations nightmare and have been discontinued. *See* Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. DIGITAL NETWORK (Dec. 19, 2008), http://online.wsj.com/article/SB122966038836021137.html.

18. The name comes from the fact that pressure on infringers will be gradually increased should they disregard notices sent identifying illegal behavior. *See* DIGITAL MUSIC REP., *supra* note 10, at 7.

19. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], p. 9675 (Fr.).

20. *See* Andreas P. Reindl, *Choosing Law in Cyberspace: Copyright Conflicts on Global Networks*, 19 MICH. J. INT'L L. 799, 800 (1998).

laws.[21] The first major attempts to create international standards for copyright protection were the Paris Convention of 1883[22] and the Berne Convention adopted in 1886.[23] These treaties established the concept of national treatment, which provides that as long as work is protected in one of the member states, other member states must provide equal or greater protection of the work.[24] A work may be protected based on a sufficient point of attachment (Berne Articles 3 and 4),[25] national origin of the creator (Berne Article 5),[26] and retroactivity (Berne Article 18, which protects works that were protected prior to the enactment of the treaty).[27] Thus, the standard for the existence of intellectual property in member countries is defined by the lowest common denominator among them.[28]

The Berne Convention, while still in effect, had very little "teeth" in terms of its enforcement mechanisms. To remedy this, the World Trade Organization (WTO) incorporated the entire convention into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[29] The TRIPS Agreement was developed in the Uruguay negotiations on the formation of the WTO and became part of its

21. *See id.*

22. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1983.

23. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1 B.D.I.E.L. 715.

24. Joined Cases C-92/92 & C-326/92, Phil Collins v. Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v. EMI Electrola GmbH., 1993 E.C.R. I-05145, Summary ¶ 2 ("In prohibiting 'any discrimination on the grounds of nationality' Article 7 requires each Member State to ensure that persons in a situation governed by Community law be placed on a completely equal footing with its own nationals and therefore precludes a Member State from making the grant of an exclusive right subject to the requirement that the person concerned be a national of that State.").

25. Berne Convention for the Protection of Literary and Artistic Works, *supra* note 23, arts. 3–4.

26. *Id.* art. 5.

27. *Id.* art. 18 (ensuring protection for works that were protected prior to the enactment of the treaty).

28. Other international instruments, such as the treaty forming the World Intellectual Property Organization (WIPO) and the Treaty of Rome, can determine applicable international standards for international copyright protection, but are largely outside the scope of this Note. Those treaties deal with specific types of rights and terms of protection, not the enforcement of violations. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Sept. 6, 2011).

29. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization arts. 1–2, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS].

membership obligations in 1995.[30] As of July 23, 2008, there were 153 member states of the WTO,[31] all of which, by definition, had to subscribe to the terms of the TRIPS agreement.[32] Under TRIPS, rights-holders can take disputes to the WTO judicial body in Geneva, which has compulsory jurisdiction over members.[33] Such a move dramatically increased the force of law with respect to international copyright violations, since WTO disputes can carry far-reaching implications for global trade and political relations.[34]

Before delving into the legal arguments surrounding new law proposals, it is important to understand the controversies surrounding them. In the European Union, policy governing the member states comes in two forms: regulations and directives.[35] Regulations are immediately binding on all member states.[36] Directives are binding on member states to which they are addressed, but "shall leave to the national authorities the choice of form and methods."[37] That is, member states must enact their own legislation in compliance with the parameters of the community directive. In 2004, the European Parliament passed Directive 2004/48/EC on the enforcement of intellectual property (IP) rights, commonly referred to as "IPRED."[38] Acknowledging weaknesses in the current laws protecting intellectual property rights, this directive was intended to resolve disparities in member states' enforcement of their obligations under TRIPS and other international treaties.[39]

A. Graduated Response in Practice

Sweden, the first country to implement its own IPRED law in compliance with the Directive, has been harshly criticized by opponents who argue that the law does not do enough to protect user privacy.[40]

30. *Overview: The TRIPS Agreement*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Sept. 6, 2011).

31. *Understanding the WTO: Members and Observers*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Sept. 6, 2011).

32. TRIPS, *supra* note 29, art. 1.

33. *Id.* art. 64.

34. *See* Claude Barfield, *WTO Dispute Settlement System in Need of Change*, 37 INTERECONOMICS 131, 132 (2002).

35. EC Treaty art. 249 (as in effect 1992) (now TFEU art. 288).

36. *Id.*

37. *Id.*

38. Council Directive 2004/48, 2004 O.J. (L 157) 1 (EC).

39. *See id.* ¶¶ 5–11.

40. *See* Peter Vinthagen Simpson, *"File Sharing Law Goes Too Far": Swedish EU Election Candidates*, LOCAL: SWEDEN'S NEWS IN ENGLISH (May 4, 2009, 10:50 AM), http://www.thelocal.se/19226/20090504/.

Under the Swedish law, rights-holders are permitted to seek a court order that would force ISPs to reveal the account details of users who illegally share files.[41] Swedish Internet traffic decreased by almost one-third the day the law was announced, suggesting that a significant portion of Internet use is dedicated to file-sharing.[42] In addition, Swedish ISPs began purging their files of the names of customers in anticipation of being served with such orders.[43] Even if ISPs and the public find ways to escape liability and continue to share files or purge records in the name of privacy, the dramatic drop in activity—and presumably file-sharing—suggests that the Swedish IPRED law has already achieved a major secondary goal: to change the public's perception of file-sharing.[44]

True to form, the French process of developing laws corresponding to the Directive has been somewhat more dramatic. President Sarkozy has favored strong intellectual property rights protection,[45] and even went so far as to force an initial draft of his three-strikes law through the French Parliament on a midnight vote with only sixteen out of 577 representatives present.[46] The high court struck down this initial proposal as unconstitutional[47] in creating an executive body that would oversee Internet activity and require ISPs to shut off Internet access to infringers after three strikes, declaring that Internet access is a

41. *See Piracy Law Cuts Internet Traffic*, BBC NEWS (Apr. 2, 2009, 1:10 PM), http://news.bbc.co.uk/2/hi/technology/7978853.stm.

42. *Id.*

43. Rick Hodgin, *Swedish ISP Announces It Will Delete User-Identifiable IP Data*, GEEK.COM (Apr. 27, 2009, 4:16 PM), http://www.geek.com/articles/news/swedish-isp-announces-it-will-delete-user-identifiable-ip-data-20090427.

44. *See generally* Patrick Smith, *EC Survey: Third of Young People Won't Pay for Online Content*, PAIDCONTENT: UK (Aug. 4, 2009, 10:48 AM), http://paidcontent.co.uk/article/419-ec-survey-third-of-young-people-wont-pay-for-online-content/ (reporting that one-third of Europeans aged sixteen to twenty-four have no intention whatsoever of paying for online content such as video and music).

45. Sarkozy became the first French President to address Parliament in 150 years when he spoke to promote the proposed three-strikes law. Enigmax, *Sarkozy Says He Will Go "All the Way" with 3 Strikes*, TORRENTFREAK (June 23, 2009), http://torrentfreak.com/sarkozy-says-he-will-go-all-the-way-with-3-strikes-090623 [hereinafter *Sarkozy Says He Will Go "All the Way" with 3 Strikes*].

46. Guillaume Champeau, La loi Hadopi votée à la sauvette par 16 députés! [*The Web Laws Passed in Haste by 16 Members!*], NUMERAMA (Apr. 3, 2009), http://www.numerama.com/magazine/12527-La-loi-Hadopi-votee-a-la-sauvette-par-une-poignee-de-deputes.html.

47. *See* CC decision No. 2009-580DC, *supra* note 19. The French Constitutional Council required judicial, not executive, oversight of a body with the ability to terminate Internet access. *See id.* ¶ 28.

"fundamental human right" in the process.[48] The Media Commissioner of the European Commission, Viviane Reding, and other European states have echoed this idea of Internet access as a fundamental right.[49] Not to be outdone, the French Parliament quickly modified the law to include judicial oversight and the new Creation and Internet Law, dubbed "HADOPI II."[50] The French Constitutional Commission approved this version on October 22, 2009.[51]

B. A Global Consideration

South Korea, Taiwan, and the United Kingdom have also passed graduated response laws that have the potential to shut off Internet access to copyright violators intending to profit from their violations.[52] Ireland, Spain, and New Zealand are also currently considering similar proposals to establish graduated response laws.[53] Although no such

48. Marshall Kirkpatrick, *Is Internet Access a Fundamental Human Right? France's High Court Says Yes*, READWRITEWEB (June 11, 2009, 9:29 AM), http://www.readwriteweb.com/archives/is_internet_access_a_fundamental_human_right_franc.php.

49. Matt Asay, *Is Internet Access a "Fundamental Right"?*, CNET NEWS (May 6, 2009, 9:32 AM), http://news.cnet.com/8301-13505_3-10234555-16.html. For example, Finland passed a law in October 2009 making access to broadband a right of all citizens starting in July 2010. *See* Don Reisinger, *Finland Makes 1Mb Broadband Access a Legal Right*, CNET NEWS (Oct. 14, 2009, 10:26 AM), http://news.cnet.com/8301-17939_109-10374831-2.html.

50. *Hadopi 2 Passes French Senate*, INTELL. PROP. WATCH (July 9, 2009), http://www.ip-watch.org/weblog/2009/07/09/hadopi-2-passes-french-senate/. HADOPI is the name of the agency created to oversee the law. It stands for "Haute autorité pour la diffusion des oeuvres et de la protection des droits sur l'internet." HOGAN & HARTSON LLP, TELECOMMUNICATIONS, MEDIA & ENTERTAINMENT UPDATE: FRENCH ONLINE COPYRIGHT INFRINGEMENT LAW FACES CHALLENGES BUT MAY CREATE BUSINESS OPPORTUNITIES 1 n.1 (2009), *available at* http://www.hoganlovells.com/files/Publication/b3773467-7d3c-4d28-8546-be4e4952fba9/Presentation/PublicationAttachment/51918c8f-410b-4d7c-89c1-c40a85947978/TME_May2109.pdf.

51. *See* Leigh Phillips, *France Passes Tough Internet Piracy Bill*, BLOOMBERG BUSINESSWEEK (Sept. 17, 2009, 12:28 PM), http://www.businessweek.com/globalbiz/content/sep2009/gb20090917_225687.htm; Eric Pfanner, *France Approves Wide Crackdown on Net Piracy*, N.Y. TIMES (Oct. 22, 2009), http://www.nytimes.com/2009/10/23/technology/23net.html.

52. *See* Jared Moya, *South Korea's "Three-Strikes" Law Takes Effect*, ZEROPAID (July 23, 2009), http://zeropaid.com/news/86703/south-koreas-three-strikes-law-takes-effect/; *Net Service Providers Now Can "Strike Out" Pirating Surfers*, CHINA POST (Apr. 22, 2009, 9:28 AM), http://www.chinapost.com.tw/taiwan/local/taipei/2009/04/22/205160/Net-service.htm; Michael Carroll, *Controversial UK Law Finally Passed*, TELECOMSEUROPE (Apr. 9, 2010), http://www.telecomseurope.net/content/controversial-uk-anti-piracy-law-finally-passed.

53. *See, e.g.*, Austin Modine, *Irish ISP Eircom in "Three Strike" Filesharer Crackdown*, THE REGISTER (Feb. 3, 2009, 5:10 PM), http://www.theregister.co.uk/2009/02/03/eircom_agrees_to_three_strikes_enforcement/; Ernesto, *Spain Rejects Proposed Legislation to Shutdown P2P Sites*, TORRENTFREAK (Dec. 22, 2010), http://torrentfreak.com/spain-rejects-proposed-legislation-to-shutdown-p2p-sites-101222/; *Section 92A Review Policy Proposal Document*, MINISTRY OF ECON. DEV., http://www.med.govt.nz/templates/MultipageDocument TOC____41169.aspx (last updated July 14, 2009).

legislation has been discussed in the United States,[54] it has still been active in attempting to enforce TRIPS obligations against one of the biggest infringing states, China.[55] The first action brought against China fell well below U.S. expectations in that China was successful at avoiding heightened customs obligations.[56] A more recent strategy has put pressure on China to reform its rampant piracy by defining digitally transmitted audio-visual works as "goods" and thus subject to the general requirements of the General Agreement on Tariffs and Trade.[57] These actions highlight the difficulties associated with relying on domestic law to enforce international copyrights.

III. ANALYSIS OF DOMESTIC ENFORCEMENT MECHANISMS

While the cries of ISPs will likely be heard in court for years to come (to the extent that the law interferes with their businesses and the privacy of their customers), the French graduated response law appears to comply with TRIPS copyright enforcement obligations.

On October 28, 2009, the French National Assembly and the Senate passed Law No. 2009-1311, entitled "*Relative à la protection pénale de la propriété littéraire et artistique sur Internet*" (on criminal protection of literary and artistic property on the Internet).[58] This law modifies the original draft, which the Constitutional Council struck down for failure to include judicial oversight.[59] Whether the original draft would abridge the provisions of TRIPS is questionable, since TRIPS Articles 42 through 48 provide for "judicial authorities" to implement any enforcement laws;[60] however, the law's current form nonetheless complies with TRIPS in a number of ways.

54. Jacqueline Klosek, *Combating Piracy and Protecting Privacy: A European Prospective*, INTELL. PROP. ADVISOR (Oct. 1, 2008), http://www.goodwinprocter.com/Publications/Newsletter-Articles/IP-Articles/2008_10/01_01.aspx.

55. *See* Donald P. Harris, *The Honeymoon is Over: The U.S.–China WTO Intellectual Property Complaint*, 32 FORDHAM INT'L L.J. 96, 97 (2008).

56. Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R ¶ 3.1 (Jan. 26, 2009).

57. Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009).

58. Loi 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet [Law 2009-1311 of October 28, 2009 on the Criminal Protection of Literary and Artistic Property on the Internet], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 28, 2009, p. 18290 [hereinafter HADOPI II].

59. *See* CC decision No. 2009-580DC, *supra* note 19.

60. TRIPS, *supra* note 29, arts. 42–48.

For example, the penalties fall within the scope of TRIPS Article 61. Article 61 provides for criminal penalties "at least" in cases of willful copyright piracy on a commercial scale.[61] This would imply that a state is free to enact laws that are more restrictive, but must at a minimum provide criminal liability for "commercial scale" violations. To that end, Article 1 of TRIPS states, "Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement."[62] The French law requires a subscriber to online communication services to ensure that his access is not used for reproducing, showing, making available, or communicating to the public works or property protected by copyright without authorization from rights-holders.[63] This duty, while short of a commercial scale requirement, nevertheless falls within the parameters of punishable behavior under Article 61.

The question then becomes whether temporary suspension from Internet access is a valid form of penalty. After suitable notification, the French law allows for suspension of access to the Internet for a period of between two months and one year accompanied by the impossibility for the subscriber to enter into any other contract with any other operator for access to online public communication services.[64] TRIPS also requires remedies in the form of "imprisonment and/or monetary fines sufficient to provide a deterrent."[65] While this may seem narrow, Internet access suspension appears to fall within the guidelines when looking at the Article in full. In "appropriate cases," available remedies include: "seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence."[66] An infringer clearly uses his Internet account in the commission of the offense and a state may legally seize, forfeit, or destroy the account if it finds that the account is used predominantly for the offense. Termination could reasonably fall under any one of those actions.

Moreover, another question arises as to whether the infringer's Internet access was predominantly used for infringing a copyright. On its face, the French law does not limit its liabilities to commercial scale

61. *Id.* art. 61.
62. *Id.* art. 1.
63. *See* HADOPI II, *supra* note 58, art. 5(1).
64. *See id.* art. 5(3).
65. TRIPS, *supra* note 29, art. 61.
66. *Id.*

violations, but, as noted above, such a limitation is not necessary.[67] To the extent that the law is overbroad, it incorporates safeguards to ensure that casual infringers and those who clearly do not use their accounts predominantly to infringe copyrights will not be prosecuted.[68] Paragraphs 2 through 6 of Article L336-3 provide exceptions to these penalties if the access holder has installed one of the security devices referred to in the second paragraph of Article L331-32 or if the infringement is the result of fraudulent Internet access.[69]

Further, suspected violators must be given receipt of a recommendation addressed by the Committee for the protection of copyright accompanied by a signed acknowledgement of receipt or any other means likely to prove the date of the sending of said recommendation and its receipt by the subscriber.[70] Following such notice, the Committee shall hold a full hearing to determine the seriousness of the violation.[71] Under French law, a user can insulate himself from liability completely by installing an adequate security device, and if he is suspected of infringement, he is entitled to a judicial hearing where the burden of proof is on the government.[72] As a result, France's law does not offend Article 61 of TRIPS and complies with international copyright obligations.

IV. LEGAL CHALLENGES TO GRADUATED RESPONSE

A. Internet Access as a Fundamental Right

In November 2009, the European Parliament agreed to add language to the European Union (EU) Telecoms Package that may affect the nature and scope of any graduated response proposals.[73] A closely watched and lobbied text,[74] Amendment 138 requires that EU Member states "respect the fundamental rights and freedoms of natural

67. *See* HADOPI II, *supra* note 58, art. 5(2).

68. *See id.* art. 11.

69. *Id.*

70. *Id.* art. 5(3).

71. *Id.*

72. *Id.* The French Constitutional Council ruled that shifting the burden of proof to the user was in violation of Article 9 of the Declaration of the Rights of Man. CC decision No. 2009-580DC, *supra* note 19, ¶ 18.

73. *Compromise on Amendment 138 Telecom Package Finalised*, EUR. DIGITAL RTS. (Nov. 5, 2009), http://www.edri.org/edrigram/number7.21/amendment138-replaced-consiliation [hereinafter *Amendment 138*].

74. The Internet rights group La Quadrature du Net has an entire forum dedicated to opposing the passage of Amendment 138. LA QUADRATURE, http://www.laquadrature.net/en/Telecoms_Package (last visited Sept. 6, 2011).

persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law." Furthermore, restrictive measures must be "appropriate, proportionate and necessary within a democratic society," and include the presumption of innocence, the right to judicial review, and the opportunity to be heard.[75] As the final step of sanctions in graduated response proposes to disable "end-users' access to or use of services and applications through electronic communications networks,"[76] such laws would fall squarely within these guidelines.

Amendment 138 is clear in its requirements of the presumption of innocence and judicial review that have been adopted in the French system,[77] but leaves room for ambiguities in the ideas of "appropriate, proportionate and necessary," as well as its definition of "fundamental rights and freedoms of natural persons."[78] Viviane Reding, the European Commissioner for Information Society and Media, declared that graduated response, or three-strikes laws, will not be implemented in the EU under the new Telecom Package,[79] but the language of the Amendment may not be so clear. Rather than eliminating graduated response proposals, the language in Amendment 138 may instead provide guidelines for compliance.

The first issue with regard to Amendment 138 is where Internet access falls on the list of rights protected. While France has declared Internet access to be a fundamental right,[80] not all member states of the EU agree.[81] For instance, an amendment proposing this view nearly derailed the passage of the Telecom Package and was dropped in favor of the text agreed to in Amendment 138.[82] As a result, the Amendment's language does not include Internet access in its definition of fundamental rights protected, and instead defines fundamental rights "as

75. *Amendment 138*, *supra* note 73.

76. *Id.*

77. *See id.*

78. *See id.*

79. Press Release, EUROPA, EU Telecoms Reform: 12 Reforms to Pave Way for Stronger Consumer Rights, an Open Internet, a Single European Telecoms Market and High-speed Internet Connections for All Citizens (Dec. 18, 2009), http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/568 (quoting EU Telecoms Commissioner Viviane Reding, who stated that "'Three-strikes-laws,' which could cut off Internet access without a prior fair and impartial procedure or without effective and timely judicial review, will certainly not become part of European law.").

80. Kirkpatrick, *supra* note 48.

81. *See* Stanely Pignal, *Internet Access "Right" Plan Dropped*, FIN. TIMES (Nov. 4, 2009, 5:25 PM), http://www.ft.com/cms/s/0/87c552ba-c965-11de-a071-00144feabdc0.html.

82. Stanely Pignal, *Web Push Derails Europe Telecoms Reform*, FIN. TIMES (May 6, 2009, 7:45 PM), http://www.ft.com/cms/s/0/0d3925d4-3a69-11de-8a2d-00144feabdc0.html.

guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law."[83] Far from defining Internet access as a fundamental right,[84] the general principles of Community law embodied in the IPRED directive have been widely criticized as being overly burdensome protections of IP rights.[85] In fact, a spokesman for the EU presidency noted during the Telecom Package negotiations, "'None of the existing conventions and laws recognise Internet access as a fundamental right on its own. It is simply one of the means of access to information.'"[86]

B. Convention for the Protection of Human Rights and Fundamental Freedoms

The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) establishes two main rights that may be affected by graduated response laws: respect for privacy and freedom of expression (Articles 8 and 10, respectively).[87] As the designated judicial body for the European Convention, the European Court of Human Rights[88] has provided valuable guidance on the interpretation of these rights since 1959.[89] The court's determinations, however, do not end the inquiry. Under the Vienna Convention on the Law of Treaties, these rights should be interpreted in conjunction with subsequent agreements, subsequent practices, and other relevant international laws to determine their meanings within the intent of the parties.[90]

83. *Amendment 138*, *supra* note 73.

84. For an argument in favor of a fundamental right to access information, see generally Geoffrey A. Hoffman, *In Search of an International Human Right to Receive Information*, 25 LOY. L.A. INT'L & COMP. L. REV. 165 (2003).

85. *See* Danny O'Brien, *IPRED 2: Pausing for Thought*, ELECTRONIC FRONTIER FOUND. (Feb. 26, 2007), http://www.eff.org/deeplinks/2007/02/ipred2-pausing-thought.

86. Stanley Pignal, *Anti-Piracy Law Threatens Europe's Telecoms Revamp*, FIN. TIMES (Apr. 28, 2009, 3:00 AM), http://cachef.ft.com/cms/s/0/487d2124-338c-11de-8f1b-00144feabdc0.html.

87. European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8, 10, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

88. *Id.* art. 19.

89. Established in 1959, the Strasbourg Court has delivered over six thousand judgments. *European Court of Human Rights*, HUMAN RIGHTS ONLINE, http://www.human-rights-online.org/Human-Rights-Law/European-court-Human-Rights/index.htm (last visited Sept. 6, 2011).

90. *See* Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

1. Privacy

Article 8 of the European Convention has two prongs: Article 8(1) defines the rights at issue, while Article 8(2) provides the conditions under which interferences with those rights may be justified.[91] Article 8(1) states that "[e]veryone has the right to respect for his private and family life, his home and his correspondence."[92] In the context of a graduated response law, private life and correspondence are directly impacted, whereas the home and family are implicated tangentially, if at all.[93]

The fact that Article 8(1) guarantees only *respect* for privacy seems to reveal a willingness to allow certain interferences so long as they do not become disrespectful.[94] Indeed, not all state actions that impact these areas constitute an interference under Article 8.[95] An applicant retains the burden to show an interference but the threshold test is very low.[96] In a graduated response context, such interferences create an issue of privacy in two ways: data retention and disclosure.[97] As Professor Brian Solove has identified, surveillance with or without the knowledge of the target can cause chilling effects on that individual's welfare or activities.[98] The idea that an individual's Internet use is being tracked may hamper freedom of expression and affect the online marketplace of ideas.[99] Similarly, the disclosure of private information can compromise an individual's safety and freedom to develop his individuality.[100]

In Europe, collecting information about a person will generally interfere with the right to private life and will need justification.[101] The

91. ECHR, *supra* note 87, art. 8.

92. *Id.*

93. DAVID HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 381 (2d ed. 2009). Because monitoring or interception of email is not contemplated as part of graduated response, this Note only discusses the right to respect for private life. In some circumstances, "'the very existence of this legislation continuously and directly affects [an applicant's] private life.'" *Id.* at 398 (quoting Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (Ser. A) at 18 (1981)).

94. ECHR, *supra* note 87, art. 8.

95. *See* HARRIS ET AL., *supra* note 93, at 381. *But see id.* at 423 (noting that the Court has tended to use the term "respect" to broaden obligations on states rather than limit them).

96. A successful applicant need not show actual interference, only a sufficient degree of likelihood of interference. *Id.* at 398.

97. Graduated response would require ISPs to maintain records of Internet usage and disclose information about illegal behavior to designated authorities. *See id.* at 397.

98. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 491–95 (2006).

99. *Id.*

100. *Id.* at 532.

101. *See* HARRIS ET AL., *supra* note 93, at 397.

European Court of Human Rights has granted a zone of privacy that surrounds the person with little regard to where the information was collected.[102] Under U.S. law, however, such an interference is not as clear. U.S. courts have held that because there is no expectation of privacy in a public place, only surveillance which destroys secrecy is legally problematic.[103] This area of U.S. law seems directly applicable to a global graduated response proposal since there is little secrecy involved with navigating the Internet,[104] and even less with P2P networks.[105] In fact, P2P networks are by definition public—users log on to a shared database and exchange files with other users.[106] BitTorrent sites go even further in this regard since users post "feeds" on a publicly searchable message board that is visible to anyone who visits the site.[107] Because there is little expectation of privacy, monitoring these types of public activities may not constitute an interference with a privacy right.

The Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data also provides useful guidance for interpreting the European Convention's privacy right. To the extent that personal data is gathered and exchanged over the Internet, Article 5 requires only that the retention of such information be proportional to the aims of the gathering.[108] In other words, collecting information is not an interference of privacy unless the information is stored and used for illegitimate purposes or excessive in relation to the purposes for which they are stored.[109] As such, data retention alone may not be enough to violate a privacy right.

102. *See id.*

103. *See* Solove, *supra* note 98, at 496, 499.

104. Internet users are already subject to many forms of usage monitoring. *See, e.g.*, Kurt Opsahl, *Google Begins Behavioral Targeting Ad Program*, ELECTRONIC FRONTIER FOUND. (Mar. 11, 2009), http://www.eff.org/deeplinks/2009/03/google-begins-behavioral-targeting-ad-program (noting that issues with behavioral advertising have been around for over a decade).

105. The U.S. Federal Trade Commission recently warned that P2P sites expose users to security risks since such networks make their personal information available to third parties. *See Widespread Data Breaches Uncovered by FTC Probe*, FED. TRADE COMM'N (Feb. 22, 2010), http://ftc.gov/opa/2010/02/p2palert.shtm.

106. MATEI RIPEANU, PEER-TO-PEER ARCHITECTURE CASE STUDY: GNUTELLA NETWORK 1 (2001), *available at* http://www.cs.uchicago.edu/files/tr_authentic/TR-2001-26.pdf.

107. *See, e.g.*, Enigmax, *Pirate Bay Torrents Spread Via Facebook*, TORRENTFREAK (Mar. 29, 2009), http://torrentfreak.com/spread-pirate-bay-torrents-via-facebook-090328 [hereinafter *Pirate Bay Torrents Spread Via Facebook*].

108. Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, art. 5, Jan. 28, 1991, E.T.S. no. 108.

109. *Id.*

Likewise, disclosure of a user's identity and Internet usage also may fall below the level of interference required to trigger Article 8 protection. Like the collection of information, the harm in dissemination of data occurs where there is an expectation of privacy.[110] The expectation of privacy disintegrates when others know the facts that an individual wants to protect.[111] In the French example of graduated response, disclosure of a user's identity will not be made until that entity and the court have decided that the user had ignored multiple warnings and the final sanction is issued.[112] Names of violators are listed on a register but are only accessible by ISPs to the extent necessary to implement the law by issuing or terminating subscription contracts.[113] These principles are not unlike existing procedures in other areas of law. A similar registry system called "WHOIS" has been implemented in the United States[114] and laws are in place that require ISPs to report illegal Internet use.[115] Under 18 U.S.C. § 2258A, ISPs are required to report transmission of child pornography by their customers, along with the personal contact information for those customers, to the National Center for Missing or Exploited Children, an agency that is federally chartered and works with federal and local law enforcement.[116] International graduated response laws would be written on a blank slate, and so long as drafters are careful to delineate the limits on disclosure, such laws could strike an adequate balance between the respect for privacy online and the goal of curbing repeated infringement.

Assuming that a petitioner can meet the burden of showing that a graduated response law interferes with his right to private life, the question then becomes the extent to which the law may so interfere. Article 8(2) permits an interference only if it is "in accordance with the law and is necessary in a democratic society in the interests of . . . the economic well-being of the country, for the prevention of disorder or

110. Solove, *supra* note 98, at 535 (noting that problematic disclosure occurs when information spreads beyond the limits of existing boundaries).

111. *Id.* at 534.

112. *See* HADOPI II, *supra* note 58, art. 5(3).

113. *Id.*

114. The Internet Corporation for Assigned Names and Numbers (ICANN) requires organizations that register domain names to include the name and contact information for all website registrants in a free, publicly searchable database called WHOIS. *Generic Names Supporting Association*, ICANN, http://gnso.icann.org/issues/whois (last visited Sept. 6, 2011).

115. ISPs are subject to fines for failing to report transmission of child pornography by their customers to the National Center for Missing or Exploited Children (NCMEC). The release of information outside of NCMEC and law enforcement is strictly regulated. 18 U.S.C. § 2258A (Supp. III 2010).

116. *Id.*

crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[117] Thus, the first issue to consider would be whether the interference is "in accordance with the law." Data collection falls squarely within a state's obligations under TRIPS Article 50(1)(b),[118] but domestic laws may be subject to more scrutiny.[119] In *Kruslin v. France*, the European Court of Human Rights assessed the "quality" of domestic law in determining whether it would qualify under Article 8(2).[120] To be a justifiable foundation, domestic laws must confer both discretion and limits on the ability of a state to interfere.[121] On this standard, the French law might be impermissibly vague,[122] and future drafters should consider the necessity of spelling out the specifics of data-gathering.[123]

Next, an interference with privacy must be "necessary in a democratic society."[124] Whether the interests of protecting copyright will be sufficient here is somewhat unclear; however, the language of the European Convention and a sister treaty, the International Convention on Civil and Political Rights (ICCPR), gives some indication that it may satisfy this requirement. Preventing illegal P2P file-sharing arguably fits under four of the six interests listed in Article 8(2): (1) the economic well-being of the country; (2) the prevention of disorder or crime; (3) the protection of morals; and (4) the protection of rights of others.[125] The first two interests may be satisfied because, as previously noted, the copyright industry makes up a significant part of western economies[126] and file-sharing is illegal without the consent of copyright owners.[127] Public morals may be implicated to the extent that

117. ECHR, *supra* note 87, art. 8.

118. TRIPS, *supra* note 29, art. 50, ¶ 1 ("The judicial authorities shall have the authority to order prompt and effective provisional measures . . . to preserve relevant evidence in regard to the alleged infringement."); *see* HARRIS ET AL., *supra* note 93, at 344 (noting that "in accordance with the law" may be satisfied by a rule of international law).

119. *See* HARRIS ET AL., *supra* note 93, at 346 (discussing Kruslin v. France, 176 Eur. Ct. H.R. (Ser. A) (1990), where the Court held that the French law at issue lacked sufficient "quality").

120. *Id.*

121. *See id.*

122. HADOPI II, *supra* note 58, art. 5(3) (providing that the measures taken by the committee are limited to those necessary to end a violation of Article L336-3).

123. A global approach might combat these "quality" issues since the court could rely solely on TRIPS.

124. ECHR, *supra* note 87, art. 8.

125. *Id.*

126. *See Content Protection*, *supra* note 4.

127. Berne Convention for the Protection of Literary and Artistic Works, *supra* note 23, art. 2.

consumers feel free to illegally share files,[128] and the rights of creators and copyright holders are significantly impacted by P2P activity.[129] Further, in defining the privacy right under the ICCPR, Article 17(1) forbids only "arbitrary or unlawful interference."[130] There, the state interest seems to be given significantly more latitude, and it is somewhat unlikely that the interests above would be considered arbitrary.

Once a sufficient state interest is found, the Court engages in a balancing test to assess the proportionality between the importance of the right at issue and the state interest in interfering with it.[131] States are granted a "margin of appreciation," but the level of deference largely depends on the classification of the right at issue.[132] If drafters are successful in crafting specific legislation that merely restricts the ability of Internet users to share files illegally, an applicant's claimed interest will fall low on the scale of importance.[133] If, instead, an applicant is able to make a case that graduated response laws curtail a wider variety of privacy rights, the importance of those rights will require a strong governmental interest.[134] Looking at the European Court of Human Rights's jurisprudence, as well as other applicable treaties, suggests that the interest of combating Internet piracy would pass muster as a sufficient state interest.

2. Freedom of Expression

Another potential conflict arises when considering the right to freedom of expression as guaranteed by Article 10 of the European Convention.[135] This right includes, "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[136] The ability to disseminate and

128. *See e.g.*, Smith, *supra* note 44.

129. *See* DIGITAL MUSIC REP., *supra* note 10, at 18; Press Release, Senator Sheldon Whitehouse, *supra* note 1; *Frequently Asked Questions*, *supra* note 3; SIWEK, *supra* note 5, at i.

130. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 17, ¶ 1, U.N. Doc. A/RES/21/2200 (Dec. 16, 1966).

131. HARRIS ET AL., *supra* note 93, at 349.

132. *Id.* at 358.

133. The court has recognized rights such as the right to private enjoyment of sexual relations, the attorney-client privilege, and the ability of a prisoner to communicate with legal advisors. *Id.* at 407–09.

134. Even though the right of a prisoner to be free from interference with his correspondence has been given high importance, the "powers to intercept, scrutinize, and prohibit correspondence" was upheld based on the state interests of national security and public safety. *Id.* at 410.

135. ECHR, *supra* note 87, art. 10, ¶ 1.

136. *Id.*

exchange ideas is indeed fundamental to the growth of society and should not be brushed aside. In some cases, political expression, which deserves the highest form of legal protection,[137] may be hampered by Internet suspension. In Europe, a Pirate Party has emerged, whose sole platform is the "radical reform of copyright legislation, [and the] abolition of the patent system."[138] While it is likely not the case for most casual P2P users, P2P file-sharing is a direct expression of Pirate Party political beliefs.

A full disconnection from the Internet will also involve an interference with the expression of myriad other, non-political opinions. Even though there are ample alternative channels to disseminate opinions outside of the Internet, graduated response laws impose a complete, albeit temporary, bar from one of them.[139] Regardless, whether the interference implicates political or other expression is not likely to cause legal problems, since courts have side-stepped the issue of freedom of expression and ruled on narrower grounds when possible.[140] A court could easily conclude that graduated response laws, even as applied to the Pirate Party, are not aimed at quashing political beliefs, but instead are enacted to comply with international copyright obligations under TRIPS.

Like Article 8, Article 10 of the European Convention requires justification for any interferences.[141] A well-drafted graduated response law is proportional to any interference with Article 10, in that it does not seek to chill the expression of ideas; rather, it merely seeks to quell unauthorized copying.[142] Termination of Internet access is limited and only contemplated as a last resort for repeat infringement.[143] Warning notices themselves may have a chilling effect on Internet behavior,[144] yet with an adequate judicial process in place to protect users who do

137. *See* HARRIS ET AL., *supra* note 93, at 455.

138. David Kravets, *Pirate Party Wins EU Parliament Seat*, WIRED (June 8, 2009, 10:09 AM), http://www.wired.com/threatlevel/2009/06/pirate-party-wins-eu-parliament-seat.

139. *See* HADOPI II, *supra* note 58, art. 5(3).

140. *See* HARRIS ET AL., *supra* note 93, at 445 (noting that in Glasenapp v. Germany, 104 Eur. Ct. H.R. (Ser. A) (1986), and Kosiek v. Germany, 105 Eur. Ct. H.R. (Ser. A) (1986), the European Court of Human Rights decided that Article 10 was not implicated by a refusal to hire a candidate for a job that was at odds with his political beliefs); *see also* United States v. O'Brien, 391 U.S. 367 (1968) (the seminal freedom of speech case, which outlines the test to determine whether a regulation is aimed at content or conduct).

141. ECHR, *supra* note 87, art. 10, ¶ 2. Article 10 carries the identical requirement that the interference be "necessary in a democratic society." *Id.*

142. *See* HADOPI II, *supra* note 58, art. 5(3).

143. *See id.*

144. *See* CHILLING EFFECTS, http://www.chillingeffects.org (last visited Sept. 6, 2011).

not qualify for disconnection, such a chilling effect will likely be incidental.[145]

Further, when applied to intellectual property protection, the right to freedom of expression carries with it special limitations. For instance, Article 10(1) of the European Convention states that "[t]his article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."[146] Protection for intellectual property has been specifically carved out in the creation of the right to freedom of expression. In addition, such limitations are highlighted in other treaties' definitions of the right, as well.[147] Article 19 of the ICCPR acknowledges that the exercise of freedom of expression carries "special duties and responsibilities," which may require certain restrictions, such as "respect of the rights or reputations of others."[148] Likewise, Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) combines the right to "take part in cultural life" in the same provision as the right to "benefit from the protection of the moral and material interests" in those creations.[149] Looking at these treaties together reveals a specific intent on behalf of the international community to permit laws which protect intellectual property.

C. Incorporating Fair Use

Because copyright protection is at least in part dedicated to promoting the public's ability to enjoy the benefits of cultural progress, copyright law aims to strike a balance between the rights of the creator and those of the user.[150] To that end, the ability of an individual citizen to enjoy content and copy it for personal use has been protected in international law.[151] This principle of "fair use" was established in the United States in the *Betamax* case, where the Supreme Court held that consumers were permitted to record content from television via a "time shifting" device, such as a VHS recorder, and watch it later in their

145. Lea Shaver & Caterina Sganga, *The Right to Take Part in Cultural Life: On Copyright and Human Rights*, 27 WIS. INT'L L.J. 637, 656 (2010).

146. ECHR, *supra* note 87, art. 10, ¶ 1.

147. G.A. Res. 2200A (XXI), *supra* note 130, art. 19.

148. *Id.* art. 19, ¶ 3.

149. G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, art. 15, U.N. Doc. A/6316 (Dec. 19, 1966).

150. *See* TRIPS, *supra* note 29, art. 7.

151. *See* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 23, art. 9.

homes.[152] Statutes in the United States have also incorporated the idea of fair use, which permits certain uses of content without obtaining the permission of the owner.[153]

A draconian application of graduated response laws may create a chilling effect on the principle of fair use.[154] It is important to remember, however, that the international standard for fair use is defined by a three-step test established in the Berne Convention, not U.S. law.[155] More specifically, Article 9(2) allows exceptions for the exclusive right of reproduction for (1) certain special cases (2) that do not conflict with the normal exploitation of the work and (3) do not unreasonably prejudice the legitimate interests of the author.[156] If appropriately drafted, graduated response legislation on an international level would not unduly burden these uses; a legislature must simply define the type of uses it considers "certain special cases."[157] If the requirements are clear, they may easily be incorporated into graduated response warning notices, allowing a user to challenge the notices by claiming that their activity falls within those carve-outs. Any issues concerning whether or not the use fits within those exceptions could then be adjudicated prior to termination.

Even though fair use seems inapplicable to file-sharing—which clearly conflicts with the normal exploitation of works[158]—fair use can be an essential consideration for graduated response laws. With the growth of online social networks and individual expressions of social preferences on personal web pages,[159] copyrighted content has played a large role in defining one's identity.[160] In theory, a user who posts a link to a copyrighted article or other copyrighted media would be violating

152. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984).

153. *See, e.g.*, 17 U.S.C. § 107 (2000).

154. *Cf.* Madhavi Sunder, IP: YOUTUBE, MYSPACE, OUR CULTURE (forthcoming 2011) (manuscript at 22) (on file with author) (noting that under the current legal structure, "many artists and amateur creators simply 'cease and desist' because they do not have the funds to legally discern whether theirs is a 'fair use' of intellectual property").

155. Berne Convention for the Protection of Literary and Artistic Works, *supra* note 23, art. 9, ¶ 2.

156. *Id.*

157. *Id.*

158. *See* Press Release, Senator Sheldon Whitehouse, *supra* note 1.

159. Facebook, for example, has exploded in popularity, documenting over 750 million active users as of September 2011. *Press Room*, FACEBOOK, http://www.facebook.com/press/info.php?statistics (last visited Sept. 6, 2011).

160. Professor Sunder argues that intellectual property is best used to facilitate participatory culture and explores the ways in which intellectual property helps define one's cultural identity. *See* Sunder, *supra* note 154, at 23–24.

the terms of use and would thus be subject to a warning notice.[161] To preserve the operation of these social networking sites and to not overburden any agency tasked with policing infringement, this content should fall within the fair use doctrine established in the Berne Convention as much as possible. Allowing users to post content—subject to certain restrictions—may ensure that the postings do not prejudice legitimate financial interests of the copyright holder. For instance, having the ability to merely stream music rather than download it, or to limit links to authorized websites, would be essential to minimizing administrative costs associated with graduated response monitoring and implementation.[162] As is the case today, if graduated response proposals accept some elements of fair use, it would help to serve the public's ability to use social content without a fear of civil or criminal action.[163] Instead, only repeated violations will be punished[164] and other considerations, such as the traditional justifications for copyright protection, may be maintained.

D. Graduated Response and Traditional Copyright Justifications

The principle that an individual can own a property right in an idea springs in large part from the political writings of John Locke. Copyright laws satisfy the Lockean proviso that individual ownership of property is justified only if "enough and as good"[165] is left over for society, since intellectual property is not as scarce as physical property and is thus non-rivalrous.[166] If artistic works are not protected, the incentive to create will be diminished, and so long as the incentive to

161. *See* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 23, art. 9, ¶ 1 (explaining the exclusive right to authorize reproduction of works).

162. One argument of ISPs is that it would be economically unfeasible to cooperate with graduated response effectively. Clinton Manning, *Internet Piracy Could Add £24 to Every Phone Bill*, MIRROR (Sept. 22, 2009), http://www.mirror.co.uk/news/city-news/2009/09/22/internet-piracy-policing-could-add-24-to-every-phone-bill-115875-21691017/.

163. *See* Sunder, *supra* note 154, at 22.

164. Iterations of graduated response in Korea and France have been based on a "three strikes" model, where Internet access is cut off only after multiple warnings. Moya, *supra* note 52; *Sarkozy Says He Will Go "All the Way" with 3 Strikes*, *supra* note 45.

165. Locke's famous *Treatises on Government* provide much of the foundation for the labor/reward theory of intellectual property law. A man who makes use of a piece of property may appropriate it so long as there is "enough, and as good" left over for the public. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 291 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

166. *See* Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138, 141–42 (Stephen R. Munzer ed., 2001).

create is a net gain to society, private ownership should be protected.[167] Graduated response laws help ensure this net gain by allowing users to access and use content for valid purposes, while effectively punishing repeated disrespect for the reward a copyright holder deserves.[168]

In the music business, content is generally created through a system in which artists are subsidized by record companies. Record companies then exploit the end product by releasing it to the public, providing a gain in public utility.[169] Without an ability to recoup the initial investment, record companies are limited in their ability to fund the production of new music. New artists, whose works are often the most progressive, are disproportionately affected.[170] Bands with an established fan base that do not rely on what could be analogized to start-up capital are able to make money independently by touring and playing in front of large audiences. The recording artist Bruce Springsteen, for example, earned $26 million from his 2006 tour.[171] Smaller artists around the world, on the other hand, have struggled. In France, the number of local repertoire albums released and the number of artists signed to labels slumped by sixty percent in seven years, from 2002 to 2009.[172] The decline in releases is at least in part attributable to an estimated twenty-five percent of the French Internet population illegally downloading music on a monthly basis.[173] Similar effects have been felt in Spain and Brazil.[174] If artists and their supporting record companies are not adequately protected against piracy, which would be the most direct means of providing content solely for social utility, the amount and rate of music's advancement are harmed.[175] Recent laws protecting intellectual property have attempted to remedy this problem by accepting the entertainment industry's solution and protecting digital rights management (DRM), but these laws have proven problematic.

167. *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 310 (1988).

168. *See* Opinion of the European Data Protection Supervisor on the Current Negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA), 2010 O.J. (C. 147) 1, ¶¶ 21–22.

169. *Open Letter from OK Go*, OKGO.NET (Jan. 18, 2010, 6:16 PM), http://okgo.forumsunlimited.com/index.php?showtopic=4169.

170. *See* DIGITAL MUSIC REP., *supra* note 10, at 23.

171. *Top 100 Celebrities, Bruce Springsteen*, FORBES.COM, http://www.forbes.com/lists/2006/53/Y6W8.html (last visited Sept. 6, 2011).

172. DIGITAL MUSIC REP., s*upra* note 10, at 19.

173. *Id.*

174. *See id.*

175. *See id.* at 20.

With the growth of digital files that are easily and exactly duplicated, content creation industries have turned to encryption technology aimed at curbing unauthorized copying.[176] These technologies have taken many forms, but can all fall under the umbrella of DRM, and as a whole international law has protected them.[177] The World Copyright Treaty states that parties must provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures" used to protect the exercise of authors' rights.[178] This focus on anti-circumvention has been echoed in the World Intellectual Property Organization (WIPO),[179] bilateral treaties,[180] and in the United States with the Digital Millennium Copyright Act (DMCA).[181]

The codification of the entertainment industry's DRM strategy in a legal framework has led to somewhat perverse results. First, it incentivizes record and movie producers to spend valuable resources on developing complicated encryption techniques rather than investing in the development of new content.[182] In practice, music DRM has been largely unsuccessful at controlling piracy and providing a return on content investment.[183] For example, technologically savvy digital pirates can find many ways around encryptions, and consumers have rejected products sold with burdensome DRM.[184] Because DRM restricts the abilities of software and hardware to access content, files encrypted with DRM are necessarily tied to a certain platform or

176. Antone Gonsalves, *DRM Enterprise Market Poised for Growth*, INFORMATIONWEEK.COM (July 1, 2004, 7:00 PM), http://www.informationweek.com/news/showArticle.jhtml?articleID=22103402.

177. All DVDs, for example, are encrypted with a technology called Content Scramble System, the key to which is licensed to manufacturers of DVD players. Without the key, the disks will not play. *See Content Scramble System*, DVD COPY CONTROL ASS'N, http://www.dvdcca.org/css.aspx (last visited Sept. 6, 2011).

178. World Intellectual Property Organization Copyright Treaty, art. 11, Dec. 20, 1996, 36 I.L.M. 65.

179. *Id.*

180. *See, e.g.*, Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000, 41 ILM 63.

181. 17 U.S.C. § 1201(a)–(c) (2000).

182. EMI abolished DRM on audio CDs, stating "the costs of DRM do not measure up to the results." Sander Marechal, *DRM on Audio CDs Abolished*, LXER (Jan. 9, 2007, 5:31 AM), http://lxer.com/module/newswire/view/78008/index.html. Likewise, DRM for movies is expensive: the license fee to manufacture DVD players is $15,500 per year, plus $500 for each set of technical specifications needed. *Content Scramble System*, *supra* note 177.

183. *See* Marechal, *supra* note 182; DIGITAL MUSIC REP., *supra* note 10, at 3.

184. *See* Peter Cohen, *iTunes Store Goes DRM Free*, MACWORLD (Jan. 6, 2009, 10:40 AM), http://www.macworld.com/article/137946/2009/01/itunestore.html; Marechal, *supra* note 182.

device.[185] This practice adversely affects consumers since formats for playing content can quickly become obsolete, forcing consumers to purchase the content they want in multiple forms.[186]

Second, anti-circumvention legislation effectively protects the *possibility* of infringement rather than *actual* infringement. While the DMCA outlaws circumvention of DRM,[187] this provision is incredibly hard to enforce in a digital world. As a result, lawsuits filed under 17 U.S.C. § 1201(a), which outlaws manufacturing or other "trafficking"[188] in any devices or technologies intended to circumvent DRM, provide better returns for rights holders. Under this section, rights holders can sue companies with deeper pockets than individuals, and thus ostensibly cut off circumvention at the source by limiting technical capacity for infringement.[189] This type of law only effectively controls technologies which enable infringement and does little to address unauthorized use of the content. Certain devices that would be useful to the public, such as RealDVD, a program and device which allows users to "rip" DVD content onto a hard drive and watch it later without the physical DVD in the drive, have been enjoined from production by the Ninth Circuit based on arguments that it provides the capability for users to share content with their friends, not that the users have actually done so.[190] From a theoretical perspective on punishment, outlawing a threat of potential future actions runs more afoul of the theories of "just desert" than any graduated response proposal. In fact, graduated response laws will combat these preemptive strikes by addressing only the individual

185. Farhad Manjoo, *DRM Isn't Dead*, SLATE (Jan. 12, 2009, 6:33 PM), http://www.slate.com/id/2208441/pagenum/all/ ("Buy a movie from iTunes and you're stuck playing it on stuff made by Apple—iTunes, iPods, iPhones, or Apple TV devices. Apple has even baked DRM into its computers: The video ports on new MacBooks check to see whether an external monitor obeys copy-protection standards.").

186. DRM has occasionally been inconsistent with technological developments developed by the same company. For example, Microsoft launched the Zune player without allowing it to support the encryption used by its previous services. Derek Slater, *Microsoft's Zune Won't Play Protected Windows Media*, ELECTRONIC FRONTIER FOUND. (Sept. 15, 2006), http://www.eff.org/deeplink/2006/09/microsofts-zune-wont-play-protected-windows-media.

187. 17 U.S.C. § 1201(a) (2006).

188. *Id.*

189. *See, e.g.*, Geoff Duncan, *Appeals Court Rules Against Kaleidescape's DVD Copying*, DIGITAL TRENDS (Aug. 13, 2009), http://www.digitaltrends.com/home-theater/appeals-court-rules-against-kaleidescapes-dvd-copying/.

190. *See* RealNetworks, Inc. v. DVD Copy Control Ass'n, Nos. C 08-4548 MHP & C 08-4719 MHP, 2010 WL 145098, at *5 (N.D. Cal. Jan. 8, 2010); Mark Hachman, *Kaleidescape's DVD-Ripping Appeal Denied*, PCMAG.COM (Oct. 27, 2009, 1:49 PM), http://www.pcmag.com/article2/0,2817,2354821,00.asp.

infringements and not inhibiting the creation of new technological progress.

Third, the DMCA creates an opportunity for rights holders to monitor unauthorized postings of their content online and send notices to the ISPs that host infringing content.[191] Under § 512 of the United States Copyright Act, ISPs are immune from copyright liability provided that they remove content that a copyright holder claims is infringing.[192] This system, while intended to make the enforcement process more efficient by not involving the judicial system, has been widely abused.[193] Corporate copyright holders have flouted the statute's good faith belief requirement and have hired third parties with a financial incentive to send out as many notices as possible, some of which send out over 1 million automated notices per year.[194] In addition to this blanket approach, take-down notices have been used to stifle criticism, or simply attempt to punish ISPs by flooding them with paperwork.[195] Take-down notice abuse has been prevalent enough for the Electronic Frontier Foundation, Harvard, Stanford, Berkeley, University of San Francisco, University of Maine, George Washington School of Law, and Santa Clara University School of Law to establish a clearinghouse which tracks the interplay between the DMCA and the First Amendment, collectively hosting a database of abusive notices.[196]

To solve this problem, a shift toward graduated response and away from DRM protections is necessary. DRM forces copyright holders to spend valuable resources on protecting its content rather than developing new content, and it is also fundamentally at odds with the idea that copyright protections were created for the benefit of society, not authors.[197] If operated and overseen by an independent agency, graduated response could remove some of the burden on copyright holders to protect content, as well as keep abusive take-down notices under control, since the incentive for blanketing ISPs with take-down notices will be minimized.[198] Individual rights holders could therefore

191. 17 U.S.C. § 512 (2006).
192. *Id.*
193. PATRY, *supra* note 2, at 169.
194. *Id.*
195. *Id.*
196. CHILLING EFFECTS, *supra* note 144.
197. *See Content Scramble System*, *supra* note 177; *see also supra* Part IV.B.2 (discussing the importance of freedom expression and the exchange of ideas, as set forth in the European Convention).
198. *Cf.* PATRY, *supra* note 2, at 169 (describing abuse of the takedown notice provision).

continue to report infringement and an unbiased third-party would be in place to monitor and adjudicate such claims.

V. AN INTERNATIONAL SOLUTION

While the French graduated response law is a valid and useful regulation under the TRIPS guidelines,[199] the ease with which files may be transferred across state lines (and thus jurisdictions) requires a global approach.[200] While incorporating the TRIPS Agreement as part of WTO negotiations implies an intent for universal application, the TRIPS Agreement only sets out guidelines and minimum requirements for domestic laws.[201] This nationalized approach leaves gaping holes in protection because the problems associated with file-sharing are not domestic in nature: the Internet offers access to files by users in any country with a connection.[202] To that end, an independent global body should be established under the auspices of the WTO to regulate and adjudicate claims in furtherance of the graduated response laws proposed in France and elsewhere.

A. Domestic Laws Are Ineffective at Curbing Internet Piracy

Scholars have given many explanations as to why domestic enforcement of intellectual property rights has been historically ineffective.[203] These hurdles have been especially prevalent in China,[204] even after China has submitted itself to WIPO and to TRIPS.[205] According to those obligations, China provides civil remedies for copyright infringement and criminal penalties for large-scale infringement intended for profit.[206] In January 2009, the WTO dispute

199. *See supra* Part III.

200. *See* Peter K. Yu, *Four Common Misconceptions About Copyright Piracy*, 26 LOY. L.A. INT'L & COMP. L. REV. 127, 129–30 (2003).

201. TRIPS, *supra* note 29, art. 1.

202. *See* Yu, *supra* note 200, at 131–32.

203. *See id.* at 130 (noting the existence of four theories—cultural impediments, development problems, belief that copyright piracy is a past phenomenon in developed countries, and belief that piracy is a necessary byproduct of authoritarian rule—and adding a fifth, that developing countries have no stake in protecting content).

204. *See* WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 56–57 (1995) (discussing the role of Confucianism in China's lack of copyright enforcement).

205. Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749; *Member States*, WIPO, http://www.wipo.int/members/en/ (last visited Sept. 6, 2011); *Members and Observers*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Sept. 6, 2011).

206. Christopher Beam, *Bootleg Nation: How Strict are Chinese Copyright Laws?*, SLATE (Oct. 22, 2009, 6:16 PM), http://www.slate.com/id/2233156/.

settlement panel found that China's criminal penalties were deficient with regard to Article 61 of TRIPS in that they set liability thresholds too high. The ruling, however, focuses only on the scope of what China considers commercial in nature and not on the fundamental requirement of criminalizing types of infringement.[207] On paper, Chinese copyright laws arguably provide stronger protection than the United States' since they have no fair use exceptions.[208]

Nonetheless, China's laws themselves do little to combat piracy. The International Intellectual Property Alliance reported that in 2008, ninety to ninety-five percent of the Chinese market for "OD" products (physical DVDs and CDs) were pirated.[209] Internet piracy is also a growing concern and government enforcement of laws has been notably lacking in this arena, in part because the growth of China's Internet development is closely tied to piracy.[210] By the end of 2008, China's Internet population was the largest in the world and nearly the size of the entire United States population.[211] This vast number of users is still only 22.6% of the potential population, leaving significant room for growth.[212] In addition, 608 million people in China use mobile devices, of which 117.6 million use them to access the Internet.[213] With such a vast number of users that will continue to grow, China's lack of enforcement of its intellectual property protections will only grow more problematic for rights holders.[214]

However damaging China's lack of IP enforcement has been domestically, its effects are not limited to China alone. China's largest

207. *United States Wins WTO Dispute Over Deficiencies in China's Intellectual Property Rights Laws*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Jan. 2009), http://www.ustr.gov/about-us/press-office/press-releases/2009/january/united-states-wins-wto-dispute-over-deficiencies-c (China's definition of "commercial scale" infringement was only triggered for copying of 500 DVDs or more).

208. Beam, *supra* note 206.

209. INT'L INTELL. PROP. ALLIANCE, PEOPLE'S REPUBLIC OF CHINA: 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 94 (2009), *available at* http://www.iipa.com/rbc/2009/2009SPEC301PRC.pdf [hereinafter IIPA CHINA REP.].

210. *Id.* at 88 ("[A]nnouncements with respect to the importance of spreading advanced broadband and mobile technology to all Chinese citizens can be seen as suggesting that concern about piracy is, at best, secondary given the fact that much of the current allure of broadband uptake is the ability to obtain content for free. With piracy fueling the growth of these technologies, that development has clearly taken precedence over online IPR protection and the development of legitimate commerce in the online environment.").

211. *Id.* at 86.

212. *Id.*

213. *Id.*

214. *See id.* at 84, 86.

search engine, Baidu,[215] provides unauthorized "deep links" to copyrighted content that may be accessed by users anywhere outside of China, "especially in Hong Kong, Taiwan and Chinese communities of various southeast Asian countries."[216] In fact, up to half of all content available on the top link sites around the world is estimated to be sourced in China.[217] Similarly, file-sharing sites such as the Pirate Bay, hosted in Sweden, and isoHunt, hosted in Canada, are available to users around the world.[218]

1. Even Where Enforced, Domestic Laws Have Proven Ineffective

Even in countries where domestic laws have been enforced, such laws and judicial decisions do little, if nothing, to curb infringement in other countries. Recent decisions against the BitTorrent hosts—The Pirate Bay,[219] Mininova,[220] and isoHunt[221]—only block these sites on a country-by-country basis and not worldwide.[222] Where courts have ordered ISPs in certain countries to block access to P2P sites, the sites nonetheless have remained largely accessible.[223] A United States District Court recently granted summary judgment against isoHunt, a BitTorrent site hosted in Canada, in part because of the wide accessibility of files, and thus infringement, in the United States.[224] The

215. *Global Search Market Draws More than 100 Billion Searches per Month*, COMSCORE (Aug. 31, 2009), http://www.comscore.com/index.php/Press_Events/Press_Releases/2009/8/Global_Search_Market_Draws_More_than_100_Billion_Searches_per_Month.

216. IIPA CHINA REP., *supra* note 209, at 86.

217. *Id.* at 87.

218. Anna Ringstrom, *Sweden to Charge Pirate Bay in Copyright Case*, REUTERS (Jan. 27, 2008, 10:23 AM), http://www.reuters.com/article/2008/01/27/us-sweden-piratebay-idUSL2723733820080127; Enigmax, *IsoHunt Loses U.S. Lawsuit Against Movie Studios,* TORRENTFREAK (Dec. 24, 2009), http://torrentfreak.com/isohunt-loses-us-lawsuit-against-movie-studios-091224 [hereinafter *IsoHunt Loses U.S. Lawsuit*].

219. Oscar Swartz, *The Pirate Bay Guilty*; *Jail for Filing-Sharing Foursome*, WIRED (Apr. 17, 2009, 2:28 AM), http://www.wired.com/threatlevel/2009/04/pirateverdict/.

220. *See* David Kravets, *Court Castrates Mininova, The Pirate Bay Alternative*, WIRED (Aug. 26, 2009, 10:07 AM), http://www.wired.com/threatlevel/2009/08/court-castrates-mininova-the-pirate-bay-alternative [hereinafter *Court Castrates Mininova*].

221. Order Granting Plaintiffs' Motion for Summary Judgment on Liability, Columbia Pictures Indus. v. Fung, No. CV 06-5578 SVW (JCx), 2009 WL 6355911 (C.D. Cal. Dec. 21, 2009).

222. *See* Greg Sandoval, *Pirate Bay Suffers Outage, Site Back Up*, CNET NEWS (Oct. 2, 2009, 5:04 PM), http://news.cnet.com/8301-1023_3-10366805-93.html; *IsoHunt Loses U.S. Lawsuit*, *supra* note 218; *Court Castrates Mininova*, *supra* note 220. For example, isoHunt was only taken down in the United States but remains operational in Canada. *IsoHunt Loses U.S. Lawsuit*, *supra* note 218.

223. *See* Sandoval, *supra* note 222.

224. Order Granting Plaintiffs' Motion for Summary Judgment on Liability, *supra* note 221, at 46.

Court used a de facto "activities test" and noted that while isoHunt's sites were based outside of U.S. jurisdiction, up to 2.5 million U.S. citizens have visited the P2P sites, and the sites were visited up to 50 million times from within the United States in a single month.[225] Even though U.S. courts have repeatedly held that file-sharing networks illegally induce infringement,[226] the *isoHunt* case points out the relative futility of even the most wide-reaching applications of domestic law.

2. Domestic Law Enforcement Strategies Are Ineffective at Solving the Underlying Issues

Because an Internet user can simply log on to a P2P site hosted in another country with minimal IP protections (either de facto or de jure), domestic terminations do little to combat the fundamental problem of file-sharing: that individual infringers do not recognize its illegality.[227] Attacking individual users in court has been disastrous for the Recording Industry Association of America,[228] since lawsuits create a feeling that large corporations are ganging up on helpless individuals and imposing disproportionate penalties on them.[229] While legally these proportionality arguments have largely been unsuccessful, the cases promote a "David versus Goliath" viewpoint that has been adopted by many users and reputable law professors.[230]

To counter this problem, recent litigation strategies have attacked host sites and not individual users.[231] These strategies are similarly beside the point. Given the difficulties of keeping laws up to date with the advancement of Internet technology, one of the biggest threats to copyright protection is the mindset of the individual users that file-

225. *Id.* at 40–41.

226. *See, e.g.*, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021 (9th Cir. 2001); Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 153 (S.D.N.Y. 2009).

227. *See* Jessica Litman, *Copyright Noncompliance (or Why We Can't "Just Say Yes" to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237, 238–39 (1997) (noting that most people try to follow laws they understand and believe in but they don't recognize the legitimacy of copyright in many cases).

228. *See* McBride & Smith, *supra* note 17.

229. *See, e.g.*, JOEL FIGHTS BACK, http://joelfightsback.com (last visited Sept. 6, 2011).

230. Charles Nesson, a Harvard Law professor, tried a case for a man accused of illegal file sharing. He largely relied on a proportionality argument but lost a $675,000 judgment. *See The Copyright Wars Continue in Boston*, JOEL FIGHTS BACK, http://joelfightsback.com/#/2011/03/the-copyright-wars-continue-in-boston/ (last visited Sept. 6, 2011); *Final Appeal Brief to the First Circuit*, JOEL FIGHTS BACK, http://joelfightsback.com/#/2011/02/final-appeal-brief-to-the-first-circuit/ (last visited Sept. 6, 2011).

231. *See, e.g.*, Swartz, *supra* note 219; *Court Castrates Mininova*, *supra* note 220.

sharing is acceptable.[232] Legal battles which may ban hosts from operating within a certain jurisdiction are akin to costly games of "whack-a-mole."[233] Where a site is extinguished in one jurisdiction, other sites will spring up so long as there is user demand for them.[234] Since attacks on host sites, which themselves do not infringe copyright but merely "induce" infringements,[235] will perpetually meet jurisdictional hurdles and fail to address the underlying infringing activity,[236] an international system of coordinated graduated response is needed.

B. Disputes Between States Are Ill-Suited for Internet Piracy.

Although TRIPS gave teeth to the Berne Convention's protections by sending disputes to the WTO's dispute settlement body (DSB),[237] disputes between governments provide too much latitude for effective enforcement of intellectual property protections. One fundamental objection to adjudicating digital copyright violations through the DSB is that the rate of digital technology changes far too quickly for the DSB to reach a meaningful resolution.[238] Since disputes between nations have broad consequences on political relations and global trade, bilateral diplomacy is often preferred to filing a formal complaint.[239] If a formal claim is filed and a panel requested, the DSB framework allows forty-five days for a panel to be appointed and up to six months for the panel to issue its first report.[240] In cases of urgency, the deadline is shortened to three months;[241] however, the target date for adoption by the DSB of

232. *See* Yu, *supra* note 200, at 132–33.

233. Court decisions seem to have had little effect on BitTorrent operators. *Pirate Bay Torrents Spread Via Facebook*, *supra* note 107 ("With the recent trial out of the way, it seems The Pirate Bay team have had more time for development of the site.").

234. BitTorrent sites are still widely accessible. *See* Paul Gil, *The Top 40 Torrent Sites of 2010*, ABOUT.COM (Oct. 17, 2010), http://netforbeginners.about.com/od/peersharing/a/torrent_search.htm.

235. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005).

236. *See* Yu, *supra* note 200, at 129–30.

237. TRIPS, *supra* note 29, art. 64.

238. Renowned inventor Ray Kurzweil has argued that technology is on an exponential growth curve, increasing so fast that in the near future it will be beyond human capacity to control. *See generally* RAY KURZWEIL, THE SINGULARITY IS NEAR: WHEN HUMANS TRANSCEND BIOLOGY (2005).

239. Besides the practical self-imposed incentive to negotiate, the DSB requires parties to a dispute to consult diplomatically for up to sixty days. *WTO Dispute Settlement*, INST. FOR TRADE & COM. DIPL., http://www.commercialdiplomacy.org/manuals/wto_dispute.htm (last visited Sept. 6, 2011).

240. *Id.*

241. *Id.*

a panel report without appeal is one year from the filing of the dispute.[242] In practice, disputes may take many years to resolve.[243] A uniform graduated response approach, by contrast, will reduce the time it would take to adjudicate copyright violations, since diplomatic negotiation would not be necessary. It would also eliminate the political consequences involved with a WTO dispute. Graduated response on a global level, with effective enforcement, would take copyright out of the realm of the WTO (subject to a claim as a last resort) and off of the political radar.[244]

VI. CONCLUSION

Graduated response does not have to be the debilitating, establishment-driven, and inflexible approach that is described by its critics. Instead, well-drafted laws can, and indeed must, incorporate principles of fair use and can more accurately police infringement than DRM-based laws, which focus mainly on potential violations.[245] Privacy concerns are important considerations; however, these concerns should be tempered with the necessity of an adequate response to digital copyright violations on an international scale.[246] While it is clear that too much monitoring of Internet usage will hamper the potential of the Internet for growth and development of culture,[247] it is equally clear that a lack of monitoring results in near catastrophic effects on those who create.[248] As recently recognized in an open letter from the popular band called OK Go, a group that represents the epitome of free viral marketing and content distribution,[249] promoting free access to content

242. *Id.*

243. *See WTO Appellate Body Confirms Finding Against China's Treatment of Certain Copyright-Intensive Products*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Dec. 2009), http://www.ustr.gov/about-us/press-office/press-releases/2009/december/wto-appellate-body-confirms-finding-against-china. For example, the United States initiated its most recent WTO dispute over IP rights with China in April 2007. The final panel report was issued on August 12, 2009. *Id.*

244. *See supra* Part II.A (explaining that graduated response is a domestic approach in which online copyright infringers are increasingly penalized should they continue to ignore warnings); *supra* Part V.B (discussing the undesirable political consequences of settling copyright disputes between nations via the WTO's dispute settlement body).

245. *See supra* Part IV.D.1.

246. *See supra* Part V.A (analyzing the government interest involved).

247. Solove, *supra* note 98, at 488 (explaining the chilling effects of monitoring and disclosure).

248. *See* DIGITAL MUSIC REP., *supra* note 10, at 18–19.

249. *See* CapitolMusic, *OK Go—Here It Goes Again*, YOUTUBE (Apr. 3, 2008), http://www.youtube.com/watch?v=QaRfxjcpYvM. The music video for OK Go's song "Here It Goes Again" generated over forty-nine million views on YouTube from July 2006 until it was

online might work for established bands, but not all artists are as liberal with their creations and corporate rights holders are also entitled to recoup their investments through intellectual property protections.[250] A balance between these interests must be struck to allow new content to be created. While controversial, graduated response laws that are sensitive to valid fundamental rights claims, and also provide an adequate means of adjudication, can serve the interests of artists, corporate copyright holders, and society's ability to utilize the benefits of the useful arts.

blocked by EMI, the major British record label that the band had signed with to promote its most recent album. *Id.*

250. *See Open Letter from OK Go*, *supra* note 169. Unfortunately, EMI and OK Go were not able to find a workable balance. EMI's online restrictions prompted the band to publicly cancel its contract in 2010. *See* OK Go and EMI Split, VULTURE, Mar. 10, 2010, http://nymag.com/daily/entertainment/2010/03/ok_go_and_emi_split.html.