

The French Revolution 2.0: Copyright and the Three Strikes Policy

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ABSTRACT

Internet file-sharing of copyrighted materials created a struggle between right holders, Internet Service Providers (ISPs), and file-sharers. After several different attempts to resolve the struggle, many countries began to debate the possibility of a *Three Strikes Policy* (3SP), which includes, *inter alia*, providing for the termination of subscriptions and accounts of repeat infringers in appropriate circumstances. This policy has thus far been implemented by way of legislation in Taiwan (2009), South Korea (2009), France (2010), the United Kingdom (2010) and New Zealand (2011), and by means of private ordering in Ireland (2010). It is still under consideration elsewhere. The 3SP is portrayed as a panacea for Internet-related infringements.

This article examines the legal, social, and economic implications of implementing the 3SP as a solution to copyright infringements through file-sharing. I discuss the potential impact on the right to privacy, due process rights and free speech. I locate the 3SP within the emerging framework of Users' Rights and criticize it. I argue that the 3SP is an inappropriate attempt to strengthen right holders' power over users and might reshuffle and jeopardize the balance set in the copyright regime between the interests of authors and those of the public. I therefore propose an alternative version of the 3SP. Furthermore, I argue that the 3SP is yet another link in a chain of a criminal paradigm set in copyrights, meaning that some copyright law

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policies will probably continue to shape in accordance with criminal law, despite copyright's civil law rationales. I claim that this paradigm shift in copyright law will continue through global legislation. Finally, I conclude that the 3SP is not the proper means for resolving illegal file-sharing issues. Rather, it is an inappropriate attempt to fight copyright infringements and should not be implemented anywhere, at least not yet.

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I. INTRODUCTION

The emergence of the Internet opened a gateway to many intellectual property infringements. As technology has evolved, the Internet has become more accessible to users around the globe. Technology holds many advantages. Among other things, it allows for the sharing of files between users, which promotes freedom of speech and information. On the other hand, file-sharing may pose a real problem for the business models of some industrial copyright holders. Accordingly, Internet file-sharing of copyrighted materials has caused a struggle among right holders, Internet Service Providers (ISPs), and file-sharers. After several diverse attempts to resolve the struggle, many countries are now considering implementing the

so-called Graduated Response, or *Three Strikes Policy* (3SP),¹ which provides for the termination of repeat infringers' Internet subscriptions and accounts. In a nutshell, the 3SP means that each time a user is caught infringing copyrighted material over the Internet, he or she receives a notice. If that user receives three notices within a defined time period, the user might be suspended from all domestic Internet access providers for a certain period of time. Such a policy has thus far been implemented by way of legislation in Taiwan (2009),² South Korea (2009),³ France (2010)⁴ and New Zealand (2011),⁵ is in a pilot stage in the United Kingdom (2010),⁶ has been implemented by means of private ordering in Ireland (2010),⁷ and is being considered elsewhere.

In this Article, I examine the legal, social, and economic implications of implementing the 3SP as an enforcement solution to copyright infringements through file-sharing. I discuss the potential impact of the 3SP on the right to privacy, due process rights and free speech. I locate the 3SP within the emerging theoretical framework of Users' Rights within copyright law. This framework demonstrates that the 3SP is an inappropriate attempt to strengthen right holders' power over users in a way that might reshuffle and jeopardize the balance set in the copyright law regime between the interests of authors and those of the public.⁸ Furthermore, I claim that the 3SP is yet another link in a chain of a growing

¹ The graduated response policy has also been dubbed the "Digital Guillotine." WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 11–14 (2009). It seems that the industry prefers the term "graduated response" to 3SP, probably because it sounds less dramatic than a three strikes policy. The fact that the name of the tool is contested reveals the struggle. I will deliberately use the 3SP terminology as an illustration of my own point of view.

² 著作權法 [Copyright Act], art. 90quinquies (2007) (Taiwan), translated in WIPO, www.wipo.int/wipolex/en/text.jsp?file_id=187795#None (2009).

³ 저작권법 [Copyright Act of Korea] art. 133bis (2007) (S. Korea).

⁴ Projet de loi favorisant la diffusion et la protection de la création sur Internet [Bill supporting the diffusion and the protection of creation on Internet] (2009) (Fr.), translated in La Quadrature du Net, www.laquadrature.net/wiki/HADOPI_full_translation (2010) [hereinafter *Projet de Loi*].

⁵ Copyright (Infringing File Sharing) Amendment Act, 2011 No. 11 § 92A (N.Z.). Although the act includes a power for a district court to suspend an internet account for up to six months under § 122O, it is only intended to be used if the notice process and actions by the Copyright Tribunal prove ineffective.

⁶ Digital Economy Act, §§ 124A–124N (2003) (U.K.).

⁷ See *EMI Records & Ors v. Eircom Ltd*, [2010] IEHC 108 available at www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/7e52f4a2660d8840802577070035082f?OpenDocument.

⁸ For more on Users' Rights, see generally LYMAN R. PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* (1991); Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347 (2005).

criminal paradigm in copyright law, and argue that a paradigm shift in copyright will continue as different legislative proposals are enacted around the globe, meaning that copyright law will continue to shape some of its policies in accordance with criminal law despite its civil law rationales. Finally, I will argue that the 3SP is impractical and is likely to harm rights holders over time.

Part II describes the 3SP in general and its implementation in France in particular. Part III suggests an economic analysis of the 3SP. Part IV points out the main pros and cons of the 3SP in order to determine whether it is an appropriate policy to deal with illegal file-sharing. Part V discusses enforcement issues that are likely to arise in the implementation of the 3SP. Part VI examines the possible success of 3SP and highlights further implementation issues. Part VII outlines a revised and more proportionate 3SP model. Part VIII locates the 3SP within a paradigm change in copyrights towards criminal-based legislation, criticizing it as an inappropriate method. The last Part summarizes the discussion and concludes that the 3SP is not the proper tool to resolve illegal file-sharing issues; rather, it is an inappropriate attempt to fight copyright infringements and should not be implemented anywhere, at least not yet.

II. THE THREE STRIKES POLICY (3SP)

After more than a decade during which copyright holders around the globe tried many different methods to enforce their rights and stop Internet illegal file-sharing,⁹ the 3SP emerged as a possible panacea for dealing with copyright infringements.¹⁰ The policy received its name from an analogy to baseball, where each batter receives three strikes before the end of his or her at-bat.¹¹ The concept of a 3SP – albeit in a different context – was first implemented in several U.S. states, including California, as an attempt to

⁹ As I will demonstrate, at first the right holders filed lawsuits against ISPs alleging direct liability and/or secondary liability (contributory infringement or vicarious infringement). Later the right holders turned to prosecuting the end users themselves, alleging direct liability. *See infra* Part III.

¹⁰ However, it has been suggested that in the majority of cases, there is no solution for illegal file-sharing over the Internet. *See* Jeremy Phillips, *Three Strikes...and Then?*, 4 J. INTELL. PROP. L. & PRAC. 521 (2009).

¹¹ The baseball metaphor is inaccurate. The third strike of the 3SP might disconnect the user from the Internet completely as opposed to the third strike in baseball, in which the player can still play the field. A better metaphor should be soccer, as the referee usually warns a player orally at the first serious foul he commits; later he receives a yellow card as a further warning, and if he continues to commit fouls, he will receive a red card, which will suspend him for at least another game, along with the game played. Electronic Frontier Foundation, *European ACTA Negotiators Reject "Three Strikes" Moniker* (2010), <http://www.eff.org/deeplinks/2010/04/european-acta-negotiators-reject-three-strikes>.

deter crimes.¹² The California law states that each person convicted of a third offense (by certain classifications of different felonies), will receive a minimum 25-year penalty regardless of the nature of the crime. In the intellectual property context, the 3SP has been thus far implemented in Taiwan,¹³ South Korea,¹⁴ France,¹⁵ UK¹⁶ and New Zealand.¹⁷ However, many countries, including Germany, Hong Kong, Spain, and Sweden, have rejected the 3SP.¹⁸

Some countries are making use of similar methods without direct legislation. For example, in Australia¹⁹ and Singapore,²⁰ a user can be disconnected from the Internet in a judicial procedure if he or she is adjudged to have infringed copyrights online. In the U.S., ISPs can disconnect users from the Internet by relying on the DMCA's safe-harbor provisions,²¹ which instruct that the service provider can enjoy immunity only if it "adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."²² However, the implementation of this DMCA

¹² CAL. PENAL CODE § 667 (2011).

¹³ 著作權法 [Copyright Act], art. 90quinquies (2007) (Taiwan), *translated in* WIPO, www.wipo.int/wipolex/en/text.jsp?file_id=187795#None (2009).

¹⁴ 저작권법 [Copyright Act of Korea] art. 133bis (2007) (S. Korea).

¹⁵ Projet de loi, *supra* note 4.

¹⁶ Digital Economy Act, §§ 124A–124N (2003) (U.K.).

¹⁷ Copyright (Infringing File Sharing) Amendment Act, 2011 No. 11 § 92A (N.Z.).

¹⁸ At first, a district court in Sweden indicated that the 3SP would be appropriate to resolve file-sharing. However, shortly thereafter, the Swedish Ministers of Justice and Culture published "a public opinion piece setting out their forthcoming policy that explicitly excluded the three strikes model." Michael Geist, "Three Strikes and You're Out" Policy Strikes Out (2008), www.michaelgeist.ca/content/view/2851/135.

¹⁹ Copyright Act, 1968, § 116AH(1)(1) (Austl.).

²⁰ Copyright Act, 1987, c. 63, § 193DB(1)(b) (Sing.).

²¹ 17 U.S.C. § 512(i) (2010).

²² 17 U.S.C. § 512(i)(1)(A). One American ISP, Comcast, has a stipulation in their terms of use indicating that "[i]t is Comcast's policy in accordance with the DMCA and other applicable laws to reserve the right to terminate the Service provided to any customer or user who is either found to infringe third party copyright or other intellectual property rights, including repeat infringers, or who Comcast, in its sole discretion, believes is infringing these rights. Comcast may terminate the Service at any time with or without notice for any affected customer or user." COMCAST ACCEPTABLE USE POLICY FOR HIGH-SPEED INTERNET, <http://www.comcast.com/Corporate/Customers/Policies/HighSpeedInternetAUP.html> (last visited Apr. 9, 2011). For this matter, some ISPs, such as AT&T and Verizon, choose to include such paragraphs in their license agreements, while other ISPs avoid this sort of private ordering. See Chloe Albanesius, *Comcast, Others Deny "Three Strikes" Piracy Plan*, PCMag (Mar. 27, 2009), available at

requirement has thus far been problematic because it is quite vague. Therefore, although the DMCA clause usually exists in Terms of Use (TOU) or End Users' Licensing Agreements (EULAs), ISPs have rarely used it.²³

Ireland currently implements the 3SP through private ordering as part of a settlement agreement between Eircom, the largest Irish ISP, and the music industry. The settlement agreement requires Eircom to provide the identities of alleged illegal file-sharers to the Irish Recorded Music Association (IRMA), while applying a 3SP against those file-sharers.²⁴

Beyond these legislative and private efforts, there are signs of an attempt to globalize the 3SP by requiring countries to implement a 3SP in domestic legislation.²⁵ In 2008, an unofficial text of the Anti-

www.pcmag.com/article2/0,2817,2343977,00.asp. See also Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81 (2010).

²³ See Michael Murtagh, *The FCC, the DMCA, and Why Takedown Notices are Not Enough*, 61 HASTINGS L.J. 233, 259 (2009) (interpreting Nimmer to mean that “one is not an ‘infringer’ for purposes of the repeat infringers policy unless one has either been adjudicated to have committed copyright infringement or the ISP has actual knowledge that one has committed infringement”); see also MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.10(A)(2) (2001); Andres Sawicki, *Repeat Infringement in the Digital Millennium Copyright Act*, 73 U. CHI. L. REV. 1455, 1455 (2006). In the U.S., there is also another specific avenue of disconnecting users from the Internet due to illegal file-sharing through the Higher Education Opportunity Act of 2008 (HEOA), which conditions federal funding for higher education facilities in part on certification that the participating institution has developed plans to effectively combat the unauthorized distribution of copyrighted materials. 20 U.S.C. §1092(a)(1)(P) (2008). It seems that the HEOA was enacted based on research indicating that college students comprise one of the main groups that infringe copyrights over the Internet. A study conducted by the Motion Picture Association of America (MPAA) claimed that 44% of the of the industry's domestic losses were a result of illegal downloading by college students. Later, the MPAA admitted that the numbers were vastly inflated. See Zack Whittaker, *College students face file sharing penalties under new rules*, ZDNET (July 2, 2010), available at: www.zdnet.com/blog/igeneration/college-students-face-file-sharing-penalties-under-new-rules/5470; See also Chris Hogg, *The Movie Industry That Cried Wolf: MPAA Admits Piracy Numbers Vastly Inflated*, DIGITAL JOURNAL (2008), www.digitaljournal.com/article/249246/The_Movie_Industry_That_Cried_Wolf_MPAA_Admits_Piracy_Numbers_Vastly_Inflated (last visited April 11, 2011).

²⁴ The Irish court dismissed claims made by the Irish Data Protection Commissioner regarding the possible impact on users’ rights to privacy. However, the Irish High Court also ruled that laws to identify and cut off internet users illegally copying music files were not enforceable in Ireland. See *EMI Records & Ors v. Eircom Ltd*, [2010] IEHC 108 available at www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/7e52f4a2660d8840802577070035082f?OpenDocument.

²⁵ The plurilateral agreement on counterfeiting is currently being negotiated by Australia, Canada, the European Union, Japan, Mexico, Morocco, New Zealand, the Republic of

Counterfeiting Trade Agreement (ACTA) deliberation was leaked.²⁶ While this version of the ACTA did not propose to force countries to implement a 3SP, it encouraged them to do so in order to qualify for a safe-harbor provision.²⁷ However, no such example appeared in an official ACTA draft published in April 2010. Instead, the draft stated that at least one delegation of the ACTA (the text does not indicate which one) proposes to include language regarding “policy,” meaning that an implemented policy will have a clear definition in the ACTA, in order to provide greater certainty that its existing national law complies with this requirement.²⁸

The latest leaked version of the ACTA²⁹ suggests in Article 2.x that “[p]arties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.” Also, Article 2.18 states

Korea, Singapore, Switzerland and the United States. See trade.ec.europa.eu/doclib/docs/2010/february/tradoc_145774.pdf.

²⁶ Anti-Counterfeiting Trade Agreement, informal draft (2010), available at https://2974639497112273069-a-1802744773732722657-s-sites.googlegroups.com/site/iipenforcement/201001_acta.pdf?attachauth=ANoY7cpAtT2TOyyRQtbnbyX-QqmlY18u6_ovqidxT0ivIpg1aPe6RXTXYKhrm0PfDS_C6HxgytcYaGimFCgMH04m9J_kwSOOTene_4AdjBGMaEtUbTWivPP54yI2hee2fc20B1Qmoz3ZqEWaJbLkZoxmhyEkOBqEiihUnrxP7hRcSX5TnV3ThFAQC2AYAsCsSaS7ytHpjD6xjkgvX9qGbj87G_pbl0ivRQ%3D%3D&attredirects=0 (last visited April 19, 2011).

²⁷ “[A]n online service provider adopting and reasonably implementing a policy to address the unauthorized storage or transmission of materials protected by copyright or related rights except that no Party may condition the limitations in subparagraph (a) on the online service provider’s monitoring its services or affirmatively seeking facts indicating that infringing activity is occurring.” The term policy was addressed as a footnote in the following language: “An example of such a policy is providing for the termination in appropriate circumstances of subscriptions and accounts in the service provider’s system or network of repeat infringers.” Anti-Counterfeiting Trade Agreement, informal draft (2010); see also Michael Geist, *ACTA Internet Chapter Leaks: Renegotiates WIPO, Sets 3 Strikes as Model* (2010), www.michaelgeist.ca/content/view/4808/125 (last visited April 19, 2011).

²⁸ Anti-Counterfeiting Trade Agreement, consolidated text prepared for public release (2010), available at www.wcl.american.edu/pijip/go/acta04212010.

²⁹ Anti-Counterfeiting Trade Agreement, Informal Predecisional/Deliberative Draft (25 August 2010), available at https://2974639497112273069-a-1802744773732722657-s-sites.googlegroups.com/site/iipenforcement/acta/text08252010.pdf?attachauth=ANoY7crvVhIqw53AN006X0X-zE0wB-U5949IKiKYuYL6SyZHoRyUAiLZNpm6-nD-Hy1-evSaMAZk42Wvg3qGLRix0Rqrp0JeLCKEaH4I4KY2XKLIKznBH90ghexJ9eP1qpbAbRFywLCrnG-K3qaE6XZpfZMCUe-WfolGrV6uYIceY0B8weQo8wAFDGu8FafRq57tjfJHQIfIIhMAN0eF9yotyOTX_LPdzQ%3D%3D&attredirects=0 (last visited April 19, 2011).

that “[e]ach Party's enforcement procedures shall provide the means to address the infringement of (copyright or related rights/intellectual property Rights) in the digital environment, including infringement that occurs via technologies (or services) that can be used to facilitate widespread infringement.”

It seems that the ACTA in its current form allows flexibility and a wide margin for each future member of ACTA to implement its own policies. However, a second possible interpretation of Articles 2.x and 2.18 is less generous: that the drafters do indeed intend to implement the 3SP, and that the rather vague and general language is a deliberate strategy. Will the 3SP be a part of ACTA or any other international agreement? It is still too early to tell. Although some parties, such as the European Union, stated that they would not support a mandatory 3SP,³⁰ the EU does not rule out a 3SP either. In sum, these drafts of the ACTA emphasize the critical condition in which the policy makers found themselves. While thus far global conventions usually dealt with vast copyright infringements related to possible negative global financial trade impacts, the ACTA might affect many *individuals* around the globe because it targets small, in addition to vast, copyright infringements.

Next, I focus on the French 3SP as a leading example of how the 3SP can be implemented and enforced if legislated globally. Of the five countries that have implemented the policy, France is the best example because it sets the clearest blueprint of how the policy would be implemented.³¹

France was one of the first countries that began searching for a legislative solution to Internet illegal file-sharing.³² In 2007, France formed a Regulatory Authority for Technical Measures entitled ARMT (*l'Autorité de Régulation des Mesures Techniques*), charged with promoting the interoperability of digital media distributed in France with embedded

³⁰ “[The European Parliament considers that in order to respect fundamental rights such as freedom of expression and the right to privacy, with full respect for subsidiarity, the proposed Agreement must refrain from imposing any so called ‘three strikes’ procedures.]” *Motion for a Common Resolution: on Transparency and State of Play of ACTA Negotiations*, EUROPEAN PARLIAMENT (2010), available at christianengstrom.files.wordpress.com/2010/03/common-resolution-acta-final-8-march-2010.doc. See also David Meyer, *Europe “Will Not Accept” Three Strikes in ACTA Treaty*, ZDNET (Feb. 26, 2010), news.zdnet.co.uk/communications/0,1000000085,40057434,00.htm (last visited April 19, 2011).

³¹ Although France is only an example of a country that implemented the 3SP, it seems that their 3SP is the least vague policy implemented out of the five countries, as I will elaborate.

³² See *Projet de loi*, *supra* note 4.

Digital Rights Management (DRM).³³ The new law, entitled *Loi sur le Droit d'Auteur et les Droits Voisins dans la Société de l'Information (DADVSI)*, indicates that ISPs should utilize Internet filtering to prevent illegal file-sharing. A direct infringement of copyrighted material is subject to a fine of up to €300,000 and up to 3 years of imprisonment. But policy-makers did not stop there. In November 2007, after much deliberation, the French government, the copyright industry, and French ISPs signed the *Elysée Agreement*.³⁴ This agreement committed the French government to enacting anti-piracy legislation instituting the 3SP, and it did so soon after.

The French government proposed a new law entitled *A Law Promoting the Distribution and Protection of Creative Works on the Internet (Creation and Internet Act)*,³⁵ which implements the 3SP. The French National Assembly passed the law on May 12, 2009 and the French Senate approved it the day after.³⁶ However, on June 10, 2009, the Constitutional Council declared the law void, since the French Constitution lists freedom of communication and expression as a basic human right and the presumption of innocence prevails; thus, the sanctions under the law can only be imposed in a judicial procedure.³⁷ On October 22, 2009, the Constitutional Council of France approved a revised version of the Creation and Internet Act, which came into force on January 1, 2010.³⁸

The Creation and Internet Act formed a regulatory authority named

³³ Digital Rights Management (DRM) technologies attempt to control what users can and cannot do with the media and hardware they have purchased. See Electronic Frontier Foundation, DIGITAL RIGHTS MANAGEMENT, <http://www.eff.org/issues/drm> (last visited Apr. 19, 2011). See generally Jane K. Winn & Nicolas Jondet, *A New Deal for End Users? Lessons From a French Innovation in the Regulation of Interoperability*, 51 *WM & MARY L. REV.* 547 (2009).

³⁴ Winn & Jondet, *supra* note 33, at 562.

³⁵ Law No. 2009-669 of June 12, 2009, *Journal Officiel de la République Française [J.O] [Official Gazette of France]*, June 13, 2009.

³⁶ See Nate Anderson, *France set for showdown with EU after passing 3 strikes law*, ARSTECHNICA (2009), arstechnica.com/tech-policy/news/2009/05/france-set-for-showdown-with-eu-after-passing-3-strikes-law.ars (last visited April 11, 2011).

³⁷ See *CC decision no. 2009-580DC*, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE (June 10, 2009), available at www.conseil-constitutionnel.fr/decision.42666.html [French].

³⁸ See *CC decision no. 2009-590DC*, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE (October 22, 2009), available at www.conseil-constitutionnel.fr/decision//2009/2009-590-dc/decision-n-2009-590-dc-du-22-octobre-2009.45986.html [French]. During the attempt to pass the first law, a petition supporting the cause was signed by 10,000 French artists. Later on, it was discovered that many of the signatures were forged and that some names on the petition were fictitious. See Julie Saulnier, *Hadopi: couacs autour de la pétition des 10 000 artistes*, L'EXPRESS (2009), www.lexpress.fr/actualite/high-tech/HADOPI-couacs-autour-de-la-petition-des-10-000-artistes_754193.html [French] (last visited April 11, 2011).

HADOPI,³⁹ which replaced the ARMT and was vested with the authority to search for copyright infringements over the Internet while supervising the implementation of the 3SP by the ISPs. The French 3SP operates in the following manner: a right holder who has actual knowledge of infringement of his or her copyright over the Internet can notify HADOPI, supplying it with the infringing user's IP address and details of the alleged infringement, including the protected work that was allegedly infringed. HADOPI then notifies the user's ISP. The ISP sends a first notice to the user by e-mail suggesting that the user cease any illegal activity, and indicating the exact time and date of the alleged infringement. If HADOPI receives a second notice of infringements made by the same IP address within a six month period following the first notification, it will notify the ISP, which will send a second notification to the user, this time by regular mail, indicating the second alleged infringement. In the case of a third notice referring to the same IP address within a one-year period following the second notice, authorities will file charges against the user in a special judicial procedure held by a single judge.⁴⁰ The judge has the authority to fine the user and to suspend his or her Internet access for two months to a year.⁴¹

There are as yet no reported cases of disconnecting users under the French policy or any other 3SP.⁴² Accordingly, there is no evidence to judge whether the global implementation of the 3SP will succeed in its mission to eliminate illegal file-sharing over the Internet.

III. ECONOMIC ANALYSIS OF THE 3SP

Some media industries are affected by illegal file-sharing. However, the

³⁹ In French: Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet (High Authority of Diffusion of the Art Works and Protection of Copyrights on the Internet).

⁴⁰ The special judicial procedure is entitled "Ordonnance penale." Although the procedure is made without the presence of the user, the user can file a request to be present. *See* Projet de loi, *supra* note 4.

⁴¹ The user will be blacklisted by the ISPs in France and therefore will not be able to reconnect to the Internet through French ISPs during the period of suspension that was set by the court. The user will keep paying his or her ISP for the period of the Internet access suspension and also will be held liable for any administrative costs that will be imposed on the ISP due to the suspension. *See* Projet de loi, *supra* note 4.

⁴² *See, e.g.,* Eric Pfanner, *France's Three-Strikes Law for Internet Piracy Hasn't Brought Any Penalties*, N.Y. TIMES (July 18, 2010), available at www.nytimes.com/2010/07/19/technology/internet/19iht-CACHE.html?_r=1&ref=music. *See* Heesob Nam, *Three Strikes Rule: Sleeping for Seven Months*, HEESOB'S IP BLOG (Mar. 9, 2010), hurips.blogspot.com/2010/03/three-strikes-rule-sleeping-for-seven.html (last visited April 11, 2011).

extent of the effect is debated⁴³ and uncertain.⁴⁴ One of the main arguments in favor of file-sharing over the Internet is a sampling effect: potential customers can download music in order to gather more information that may increase their willingness to purchase a copy of the CD. However, the availability of free copies for download might decrease the legal copies sold by the companies, thus providing the user with a relatively free copy.⁴⁵

The strategies the right holders use to prevent illegal file-sharing over the Internet should be examined to determine which strategy leads to optimal cost reduction.⁴⁶ One strategy that right holders employ is to sue ISPs for direct liability. This approach, however, has not been successful in the courts.⁴⁷ Another strategy, used in *Religious Technology Center v. Netcom On-Line Communications, Inc.*,⁴⁸ is to sue the ISPs for secondary

⁴³ Many researchers found a negative impact on the music industries due to illegal file-sharing. See, e.g., Norbert J. Michel, *Digital File Sharing and the Music Industry: Was There a Substitution Effect?*, 2 REV. OF ECON. RES. ON COPYRIGHT ISSUES 41, 50 (2005) (arguing that there appears to be mounting evidence that digital copying negatively impacted music sales); Martin Peitz & Patrick Waelbroeck, *The Effect of Internet Piracy on Music Sales: Cross-Section Evidence*, 1 REV. ECON. RES. ON COPYRIGHT ISSUES 71 (2004) (finding that music downloading could have caused a 20% reduction in music sales worldwide between 1998 and 2002); Alejandro Zentner, *File Sharing and International Sales of Copyrighted Music: An Empirical Analysis with a Panel of Countries*, 5 TOPICS ECON. ANALYSIS & POL'Y 1 (2005) (finding a direct link between illegal file-sharing and decreasing CD sales). On the other hand, some researchers stated that it is difficult to argue that weaker copyright protection has had a negative impact on artists' incentives to be creative. See Felix Oberholzer-Gee & Koleman Strumpf, *File-Sharing and Copyright* (HARVARD BUSINESS SCHOOL, Working Paper No. 09-133, May 2009), available at www.hbs.edu/research/pdf/09-132.pdf.

⁴⁴ See Patrick Mooney, Subarna Samanta & Ali H.M. Zadeh, *Napster and Its Effects on the Music Industry: An Empirical Analysis*, 6 J. SOC. SCI. 303, 308 (2010) (concluding that testing for illegal downloading's actual effects on CD sales is a near impossibility because data about what has been downloaded is largely unavailable. However, the researchers indicate that the decrease in CD sales makes illegal downloading a very likely suspect.).

⁴⁵ See Eitan Altman, Sulan Wong & Julio Rojas-Mora, *P2P business and legal models for increasing accessibility to popular culture*, 21 LECTURE NOTES IN COMP. SCI. 130 (2009); see also *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004, 1015 (9th Cir. 2001); *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000); Peitz & Waelbroeck, *supra* note 43, at 71.

⁴⁶ See Guido Calabresi & Jon Hirschoff, *Toward a Test for Strict Liability in Tort*, 81 YALE L.J. 1055 (1972); Dieter Schmidtchen et. al., *The Internalization of External Costs in Transport: From the Polluter Pays to the Cheapest Cost Avoider Principle*, 2008 GERMAN WORKING PAPERS IN LAW AND ECON. 1, 43 (2008).

⁴⁷ *Religious Tech. Ctr. v. Netcom On-Line Commc'ns Serv., Inc.*, 907 F. Supp. 1361 (1995) (finding that an Internet access provider for a Bulletin Board System (BBS) operator was not directly liable for copyright infringement committed by a subscriber to the BBS, where the access provider took no affirmative action to copy work and received no direct financial benefit from the infringement).

⁴⁸ *Id.* at 1373.

liability (contributory infringement or vicarious infringement), perhaps because ISPs seem to be the cheapest cost avoiders.⁴⁹ The right holders may estimate that, if file-sharing networks were outlawed, Internet users would cease their unlawful behavior. Although it might be appropriate to impose liability in certain cases in which the intermediary is directly involved in the misconduct, as was the case in *Napster*,⁵⁰ or the intermediary knowingly induced infringement, as in *Grokster*,⁵¹ new P2P technologies make it difficult to detect and prevent the misconduct, and therefore intermediaries will probably not be held directly liable in these matters.⁵²

The third strategy is to sue the end users themselves.⁵³ Although civil litigation against file-sharing users succeeded in many cases, the overarching problem for the right holders has not been resolved; illegal file-sharing continues.⁵⁴

The online file-sharing problem is basically “the conflict between the free-riders and the copyright owners, and the balance between access to information and the incentive to create information.”⁵⁵ From an economic

⁴⁹ See *MGM, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *In re Aimster Copyright Litigation*, 334 F.3d 643, 649 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001); *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000).

⁵⁰ See *Napster*, 239 F. 3d 1004.

⁵¹ See *Grokster*, 545 U.S. 913.

⁵² A proper determination requires not only that the gatekeepers be able to detect offenses, but they also be able to prevent them economically. See Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 259 (2005). Also, as mentioned, in the U.S., ISPs can rely on the DMCA’s safe-harbor provisions (17 U.S.C. § 512(i) (2010)), which instruct that the service provider can enjoy immunity only if it “adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.”

⁵³ In September 2003, the Recording Industry Association of America (RIAA) began to file lawsuits against end users. See, e.g., *Maverick Recording Co. v. Harper*, 598 F.3d 193 (5th Cir. 2010); *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008); *Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. 2008). This continued until December 2008, when the RIAA announced that, after filing more than 35,000 lawsuits, it would cease to file new lawsuits against users at that time. Although the RIAA has stopped, other right holders have continued to file lawsuits. See, e.g., *Voltage Pictures, LLC v. Does*, 1:10-cv-00873-RMU (D.D.C., filed May 24, 2010); Greg Sandoval, ‘*Hurt Locker*’ Downloaders, You’ve Been Sued, CNET NEWS (May 28, 2010), news.cnet.com/8301-31001_3-20006314-261.html.

⁵⁴ For a full analysis on illegal file-sharing and its economic effect, see Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. OF POL. ECON. 1 (2007).

⁵⁵ Charn Wing Wan, *Three Strikes Law: A Least Cost Solution to Rampant Online Piracy*,

point of view, the legal institution of copyright appears to be an internalization means, whose social benefits should offset its social costs.⁵⁶ In other words, copyright in the economic sense is mainly a property right or a form of private ownership that fosters the internalization of costs and benefits.⁵⁷ The digital environment led to an adoption of a new set of laws targeted towards fighting copyright infringements.⁵⁸ However, these laws do not appear to consider the user's perceived cost of infringing. These costs mainly rely on two factors: the probability of getting caught and the expected fine.⁵⁹ This leads to the economic assumption that the behavior of the internet user regarding this matter is determined by those two linked factors: "the perceived probability of getting caught multiplied by the amount of the fine."⁶⁰ However, until recently, the different attempts made by right holders and legislators around the world usually focused only on the amount of the fine, to the exclusion of the probability of its imposition.⁶¹ The 3SP, however, seems like a more economically efficient tool, whereby users' behavior might change due to a higher perceived probability of being caught multiplied by a large penalty such as an internet suspension.

Optimal cost reduction is integral to achieving economic efficiency. Optimal cost reduction generally results in imposing liability on the cheapest cost avoider. According to the Coase Theorem, the key element should be the examination of which party should bear the transaction costs of copyright enforcement.⁶² The 3SP is an enforcement model that treats the imposition of certain rules on the ISPs as an optimal cost reduction factor and suggests that infringers should bear the transaction costs of

5 J. OF INTELLECTUAL PROPERTY L. & PRACT. 232, 233 (2010).

⁵⁶ These costs consist partly of enforcement costs, which include the costs related to the exclusion of unauthorized users. See Olivier Bomsel & Heritiana Ranaivoson, *Decreasing Copyright Enforcement Costs: The Scope of a Graduated Response*, 6 REV. OF ECON. RES. ON COPYRIGHT ISSUES 13 (2009).

⁵⁷ *Id.* at 16.

⁵⁸ See 17 U.S.C. § 1201(a)(1); Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10. The legislation led to higher fines for counterfeiters and prohibited circumvention of technological measures for the protection of works. Bomsel & Ranaivoson, *supra* note 56, at 24.

⁵⁹ Bomsel & Ranaivoson, *supra* note 56, at 24.

⁶⁰ *Id.*

⁶¹ *Id.* at 24. Also, see the attempt made by the RIAA to prosecute individual users, which led the RIAA to file relatively few lawsuits against users (although more than 35,000 filed lawsuits, as mention *supra* note 53, might sound like a large amount, it is clearly but a small fraction of infringing users). See also Wing Wan, *supra* note 55, at 239 (arguing that due to prohibitive costs of copyright enforcement, civil action alone against the online infringers will not be enough).

⁶² See Ronald H. Coase, *The Problem of Social Cost*, 3 J. OF L. AND ECON. 1 (1960); Wing Wan, *supra* note 55, at 242.

copyright infringements.⁶³ However, liability rules may not be enough. For the model to succeed, users must be deterred from illegal file-sharing. The 3SP may be the optimal cost reduction method, at least in the long run, if users' behavior changes without the use of massive lawsuits. However, a model which seeks optimal cost reduction might be more effective against the ISPs than against users, and stricter liability rules applied to ISPs might actually achieve right holders' goals, but at a cost to society.⁶⁴ In some cases misconduct can be sanctioned most effectively through the indirect imposition of liability on intermediaries.⁶⁵ Hence, the 3SP does not require active monitoring by the ISPs and therefore it could be cheaper for ISPs to implement than schemes that would require the ISP to monitor the conduct of its customers to identify unlawful file-sharing.⁶⁶

To achieve actual success of the 3SP, policy-makers need to take several short-term costs into account. These costs include judicial time spent on this matter and the securing of full cooperation from the ISPs.⁶⁷ The 3SP could also create a market for technical solutions, such as filtering or monitoring, in order to prevent the user from being sued.⁶⁸ Moreover, the 3SP might result in disconnecting significant numbers of users from the Internet. Although this may aid some right holders, as illegal downloading would be reduced, network operators might suffer from a revenue loss,⁶⁹

⁶³ Wing Wan, *supra* note 55, at 242.

⁶⁴ As intermediaries stand in the best position to prevent illegal file-sharing, imposing stricter liability rules could be the optimal cost reduction solution. However, imposing such rules on intermediaries may affect network architecture and involve long-term ramifications that go far beyond the immediate interests of copyright owners and ISPs. See generally, Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 15 (2006).

⁶⁵ See Mann & Belzley, *supra* note 52, at 266. See generally Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984).

⁶⁶ Cf. Mann & Belzley, *supra* note 52, at 285-86 (arguing that law enforcement organizations are better equipped to actively enforce anti-gambling laws than ISPs).

⁶⁷ Cooperation from ISPs may vary between different judicial systems due to a difference in right holders' identities. In the U.S., for example, there is a larger concentration of broadband services providers and studios than in France, where the right holders are highly scattered. As a result, it is more difficult for ISPs in France to cooperate with right holders, leading to a different cooperation approach. See Bomsel & Ranaivoson, *supra* note 56, at 25.

⁶⁸ *Id.* at 27.

⁶⁹ For example, a report from the management consultancy firm Booz & Company indicates that "[a] high-level sensitivity calculation, for the UK as an example, estimates 'three strikes' to result in the disconnection of 500,000 users and a revenue loss of €180 million for the network operators (Exhibit 56). In comparison, the music industry assesses an upside of only €33 million in revenue—this total revenue loss of about €150 million is

aside from a potential economic loss from depriving a large amount of citizens of access to the Internet in an internet-based society.⁷⁰ However, these costs could be rolled over to consumers, forcing infringers to bear the transaction costs of copyright infringements, as the Coase Theorem posits they should. In the long run, piracy-proof incentives, operating like the "polluter pays" principle,⁷¹ would reduce enforcement costs.⁷²

To conclude, it seems that, in the long run, a full implementation of the 3SP might be economically efficient and fair to right holders. Given the prohibitively high costs of enforcing copyrights on the Internet, the 3SP makes sense, as copyright holders cannot afford to incur substantial litigation costs to enforce their rights.⁷³ However, as I will illustrate, the 3SP has many drawbacks that might change this equation.

IV. PROS AND CONS

To assess whether the 3SP should be implemented as a global solution to illegal file-sharing, I examine its main pros and cons.⁷⁴ I begin by describing the benefits and drawbacks that the 3SP might have for right holders, ISPs, and users. I then examine whether the current 3SPs deal with these drawbacks in a satisfactory manner.

A. Pros

The 3SP is an attempt to deter Internet users who download copyrighted materials without permission. Given the critical role the Internet plays in

likely to be only a minor share of the downside for other stakeholders, for example, through the reduction of e-Commerce volume." Booz & Company, *Digital Confidence: Securing the Next Wave of Digital Growth*, 69 (2008), www.lgi.com/pdf/LG%20DC_english.pdf (last visited May 8, 2011).

⁷⁰ Users will be deprived from using the Internet will not be able to engage in a large number of activities, including e-commerce. This could negatively impact the global economy and international commerce.

⁷¹ The principle first appeared in a document (in a legal context) by the international Organization for Economic Cooperation and Development (OECD). It means that the polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the costs of goods and services that cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment. See Environment and Economics: Guiding Principles Concerning International Economic Aspects of Environmental Policies, Annex 1, OECD Doc. C(72)128, (May 26, 1972).

⁷² See Bomsel & Ranaivoson, *supra* note 56, at 27.

⁷³ See Wing Wan, *supra* note 55, at 239.

⁷⁴ For a general discussion of the benefits and drawbacks of the 3SP, see Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373 (2010).

modern life, threatening to disconnect users might be an effective method of intimidation.

From the right holder's point of view, the 3SP might reduce and even eliminate file-sharing of copyright materials, and therefore increase profits. If the 3SP is extensively implemented and enforced, users might be concerned about being disconnected from the Internet and cease infringing activities. Unlike regular litigation against individual file-sharing users, which had been in use for several years in the U.S. and did not seem to achieve its purpose,⁷⁵ the 3SP litigation is a relatively faster and cheaper method, which could achieve its purpose by locating the infringement and sending a simple e-mail to the ISP.

The 3SP might be perceived as beneficial for the ISPs as well. ISPs, which often act as intermediaries between their subscribers and right holders, might be held liable under secondary infringement rules, such as contributory infringement, for facilitating copyright infringements made by their subscribers.⁷⁶ Although Internet access providers usually serve as mere conduits and therefore generally enjoy immunity for their subscribers' actions,⁷⁷ the 3SP offers them full immunity if they comply with the law by using safe harbor provisions. This is an important matter in countries that do not provide immunity or safe harbor provisions for ISPs, such as those set by the DMCA.⁷⁸ Therefore, ISPs might be able to allocate more funds to improve services and infrastructure or reduce fees.⁷⁹

There are also potential financial benefits. The number of users who

⁷⁵ Although there had been a certain drop in illegal file-sharing due to civil litigation against individual users, it seems that it did not achieve its goal as the RIAA announced that they will cease filing new lawsuits. See the cases discussed *supra* note 53. See also Memorandum from Lee Rainie & Mary Madden, *The Impact of Recording Industry Suits Against Music File Swappers* (Jan. 2004), available at www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Society_and_the_Internet/pew_Internet_music_downloads_010504.pdf; Megan Richardson, *Downloading Music Off the Internet: Copyright and Privacy in Conflict?*, 13 J. L. & INFO. SCI. 90 (2002). For the RIAA's announcement, see Greg Sandoval, *RIAA drops lawsuits; ISPs to battle file sharing*, CNET NEWS (December 19, 2008, 9:05 AM), news.cnet.com/8301-1023_3-10126914-93.html.

⁷⁶ See, e.g., *A&M Records Inc. v. Napster Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Playboy Enterprises Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

⁷⁷ In the U.S., see 17 U.S.C. § 512(k)(1)(A); in Europe, see Council Directive 2000/31, art. 12-13, 2000 (EC) (discussing certain legal aspects of information society services, in particular electronic commerce, in the Internal Market).

⁷⁸ Yu, *supra* note 74, at 1384 (arguing that to some extent, the 3SP serves the same purpose as that of the Internet safe harbor provided by § 512 of the Copyright Act).

⁷⁹ Although the mentioned funds will not necessarily be directed for these purposes. See also Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1887-88 (2000).

download copyrighted material over the Internet might become a financial burden on the ISPs. This is partly due to the fact that ISPs sometimes receive notice letters from right holders regarding the activities of those users, requiring them to allocate funds and labor as part of the civil litigation process against those users.⁸⁰ Hence, the 3SP process will aid the ISPs, as the procedure will likely be easier and require less labor. Although usually the ISPs can disconnect users from the Internet without a statutory 3SP by applying contractual stipulations, disconnecting users under a statutory scheme is more likely to be perceived as legitimate.⁸¹ In other words, ISPs could benefit financially from the 3SP in two different ways: first, they might be able to reduce civil litigation costs and labor, and second, they will have the opportunity to cut off problematic users without the possible outcome of being portrayed as the “bad guys.” This is so because ISPs could benefit from problematic users being cut off for what seems a legitimate reason.

At first glance it seems that the 3SP does not benefit users, as it increases enforcement and limits their ability to share copyrighted material.⁸² However, adopting the 3SP might improve Internet services and infrastructure or reduce fees allocated to deal with illegal file-sharing such as some other enforcement methods used in the past.⁸³ Consider, for example, civil litigation against individual file-sharers in the U.S., which started soon after right holders realized that filing lawsuits against file sharing companies – Napster, for instance – became more difficult due to new technologies that allow substantial non-infringing uses of that software, like person-to-person networking.⁸⁴ The industry's policy of suing

⁸⁰ For an example of a notice letter sent from the RIAA to ISPs to inform them one of their customers is accused of file sharing, see Greg Sandoval, *Copy of RIAA's new enforcement notice to ISPs*, CNET NEWS (2008), http://news.cnet.com/8301-1023_3-10127050-93.html (last visited May 8, 2011).

⁸¹ For general discussion see NIMMER & NIMMER, *supra* note 23, at § 12B.10[B][3][b].

⁸² This matter poses a crucial drawback for users sharing non-copyrighted materials.

⁸³ See Fred von Lohmann, *RIAA v. The People Turns from Lawsuits to 3 Strikes*, ELECTRONIC FRONTIER FOUNDATION (Dec. 19, 2008), www.eff.org/deeplinks/2008/12/riaa-v-people-turns-lawsuits-3-strikes (last visited May 8, 2011). See also Yu, *supra* note 74, at 1384 (arguing that the graduated response system (3SP) helps ensure that ISPs can continue to develop and improve their service without worrying about the constant need to respond to lawsuits and the high costs of legal defense).

⁸⁴ After several different lawsuits involving file-sharing technologies such as Napster, KaZaA and Grokster, new technologies such as the BitTorrent protocol emerged and made prosecution more difficult. For the principle of substantial non-infringing use, see *Sony Corp. of Am. v. Universal City Studios Inc.*, 464 U.S. 417, 442 (1984) (“[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable

individual file-sharers was harmful to users for two reasons: first, many users were falsely accused of infringement;⁸⁵ second, some users were asked to pay huge amounts of money, while others settled for less.⁸⁶ For the industry, suing its own past, present, or future customers might be a public relations nightmare.

However, unlike regular civil lawsuits filed against users globally, the 3SP does not catch users unaware: disconnecting a user is the last resort, after two warnings, which gives users time to consider the possible consequences of their actions. This is important to the discussion of the 3SP's proportionality.⁸⁷ Despite the fact that several litigation processes in the past began with a warning letter, it seems that the warning letter might not be perceived as a "fair" warning. The 3SP seems to avoid such difficulties, as it warns the user prior to any actual sanction and promotes global intellectual property awareness – at least in the industry's view. Moreover, the user's identity is not revealed to the right holder, unlike in prior methods of civil litigation. This might enhance the users' anonymity and privacy, at least as long as the users' information is revealed only to the ISPs (and in France, to HADOPI), and is not misused.

purposes. Indeed, it need merely be capable of substantial noninfringing uses.”). The landmark cases involving file sharing companies in the U.S. are *MGM, Inc. v. Grokster Inc.*, 545 U.S. 913 (2005); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003); *A&M Records Inc. v. Napster Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, 239 F. 3d 1004 (9th Cir. 2001).

⁸⁵ See Greg Sandoval, *Grandma endures wrongful ISP piracy suspension*, CNET, Feb. 1, 2010, news.cnet.com/8301-31001_3-10444879-261.html?tag=newsLeadStoriesArea.1 (last visited May 8, 2011); John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either.*, THE N.Y. TIMES, Sept. 25, 2003; Jared Moya, *UK P2P Game Crackdown Catches Non-Gaming Elderly Couple*, ZEROPAID, Oct. 30, 2008, www.zeropaid.com/news/9826/uk_p2p_game_crackdown_catches_nongaming_elderly_couple (last visited May 8, 2011).

⁸⁶ See, e.g., *Maverick Recording Co v. Harper*, 598 F.3d. 193, 199 (5th Cir. 2010) (awarding statutory damages); *Capitol Records Inc. v. Thomas*, 579 F.Supp.2d 1210, 1228 (D. Minn. 2009) (vacating jury verdict and award of "hundreds of thousands of dollars in damages"); *Sony BMG Music Entm't v. Tenenbaum*, 721 F.Supp.2d 85, 121 (D. Mass. 2010) (deeming jury's \$675,000 damage award grossly excessive and therefore unconstitutional). For a settlement example, see *The Economist Global Agenda, Not-so-Jolly Rogers*, ECONOMIST.COM, Sept. 10, 2003, www.economist.com/agenda/PrinterFriendly.cfm?Story_ID=2050467 (describing the case of "pre-teen file-swapper" Brianna Lahara, who settled with the RIAA for \$2,000 and an apology) (last visited May 8, 2011).

⁸⁷ Proportionality is an important principle in the European Union and other countries around the world. In the U.S., for instance, when a law or policy threatens a fundamental constitutional right or involves a suspect classification, that law/policy may only stand if it is justified by a compelling governmental interest and is narrowly tailored to achieve that goal or interest, i.e., if it is proportionate. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

Moreover, from a legitimate user's point of view, the 3SP may enhance and improve Internet connectivity. Downloading large files over the Internet – an action taken many times by illegal file-sharers – might slow down Internet traffic for all users of the same ISP. If the 3SP dramatically reduced illegal file-sharing, it may also reduce network congestion for all users.⁸⁸

The 3SP has many pros. First, it could actually resolve a real problem for the right holders who struggle to find a solution to Internet illegal file-sharing. Second, the 3SP might actually prove to be the lowest cost solution to online piracy, making it the most economically efficient tool available. Third, it may assist the ISPs in establishing clearer legal boundaries where they do not exist, and aid them in allocating more funds to enhance and improve Internet services and infrastructures. Also, the 3SP may benefit Internet users, who would be better warned before any actual sanction is taken. Finally, it could reduce network congestion, providing faster and better connections for all users.

B. Cons

The 3SP may serve its purpose and reduce illegal file-sharing over the Internet. Important though this may be, the 3SP might also take a heavy toll on society as a whole and on individual users. I now turn to examine the 3SP's cons from two perspectives: the ISPs' perspective and the users'.

I begin with a general comment regarding a possible drawback for the right holders. From some right holders' and artists' points of view, the 3SP could harm their business models, much like any policy that eliminates file-sharing. Although right holders are generally against file-sharing, some of them actually spot the benefits that arise using these methods. Through file-sharing, many artists can easily and fairly cheaply promote their works. Due to file-sharing, artists can achieve broader exposure, expand their audience, and thereby increase sales of concert tickets and other merchandise.⁸⁹ While it seems that the 3SP will not affect those artists who

⁸⁸ Cf. Yu, *supra* note 74, at 1385 (arguing that “the graduated response system can help ISPs direct traffic and reduce network congestion”).

⁸⁹ For example, rock band Radiohead released their 7th album "In Rainbows" through their own website (www.inrainbows.com - no longer available for downloading the album), which allowed users to download the album for free, and decide later whether they would like to pay the band for the record. See Mike Masnick, *Radiohead Tells Fans To Name Their Own Price For Latest Album Downloads; Gives Them A Reason To Pay*, TECHDIRT, Oct. 1, 2007, www.techdirt.com/articles/20070930/214524.shtml; see also *Radiohead Publishers Reveal "In Rainbows" Numbers*, ROLLING STONE, Oct. 15, 2008. More artists posted their opinions regarding the benefits of file-sharing to artists, usually relying on the fact that many artists do not possess their intellectual property rights, and therefore usually

will simply not complain to HADOPI for infringements, a possible chilling effect on file-sharing networks and users might still occur. Specifically, users will be afraid to use file-sharing networks at all, regardless of the legal status of the shared materials.⁹⁰ Therefore, the 3SP might endanger the usage of such networks, which contribute to some right holders and artists' livelihood. However, this might be proven to be false if artists primarily provide their music through legitimate channels of distribution over the Internet, because users would not be deterred from downloading files from legal sources. If this were the case, the 3SP might not negatively affect artists.

From the ISPs' point of view, the model surely has some drawbacks. To comply with the 3SP, the ISPs will have to undertake structural and financial changes, while allocating human resources to deal with right holders' claims. The French law tries to reduce the financial burden laid on ISPs by charging the suspended subscriber fully for the duration of suspension. Although this action might compensate ISPs for their costs, I am uncertain that it will be enough. The ISPs' expenses will probably be much higher than users' subscription payments, because ISPs will be obliged to retain users' data for longer periods of time and will have to allocate human resources and invest in different technologies that will assist with the implementation of the new policy. The intermediary tasks that the law imposes – searching and matching IP addresses to users, and sending notices, for example – also have administrative costs. The ISPs might choose to pass those costs onto the users by increasing subscription fees, which might harm both the ISPs and users.⁹¹

Some ISPs might also stand in an ambivalent position. In many cases, ISPs act as Internet access providers as well as providers of other services, such as cable and telephone services. While a user barred from using the internet under the 3SP will be forced to pay the ISP for the duration of suspension from the Internet, he or she will not be obliged to continue acquiring other services. This, of course, has financial ramifications for ISPs acting as providers of other services, and might reduce their incentives to take part in this policy.

From the user's point of view, the 3SP might have dramatic impacts on

receive only a small percentage of the profits. *See, e.g., Courtney Love, Courtney Love does the math, SALON, June 14, 2000, www.salon.com/technology/feature/2000/06/14/love/index.html.*

⁹⁰ This could be resolved, at least partly, if artists that seek to utilize file-sharing networks differentiate their shared files by using certain symbols or naming legal files differently. However, users might still be deterred, due to the uncertainty of the content and legal status of the files.

⁹¹ Although ISPs might choose to roll over costs onto users, they might consider alternative ways to be compensated for their losses, mostly due to competition between the ISPs.

different rights, including the right to privacy, due process rights, free speech, and users' rights in the copyright regime.

A negative impact on the right to privacy, in countries where privacy is protected,⁹² might occur because the implementation of the 3SP requires some sort of monitoring of user activities to locate illegal file-sharing. Up until now, in civil file-sharing litigation, the right holders usually discovered the alleged infringements over the Internet by searching for their copyrighted works on file-sharing networks. After locating the alleged infringements, they would usually apply for a subpoena to reveal the identity of the file-sharer to file a civil lawsuit against him or her.⁹³ Similarly, in the French model, a right holder locates its material in the same way and then contacts HADOPI with details, such as the user's IP address and the alleged nature of the infringement. HADOPI then contacts the ISP to unmask the user's identity and send him or her proper notice.

If the 3SP only uses this method to locate infringing uses, it seems legitimate. Its implementation appears proportionate, it creates a situation similar to the situation that existed before the 3SP, and it might even be better than regular civil litigation, since the right holder has no knowledge of the user's identity.⁹⁴ In particular, it seems that the right to privacy

⁹² The right to privacy has different global definitions. For example, in the U.S., certain aspects of the right to privacy are protected by the U.S. Constitution, *see* *Griswold v. Connecticut*, 381 U.S. 479, 481-86 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985); *Lawrence v. Texas*, 539 U.S. 558, 594 (2003), and by specific statutes, such as the Children's Online Privacy Protection Act of 1998 (COPPA), 15 U.S.C. §§ 6501-650 (1998). However, in the U.S. there is no constitutional right to privacy in the sense of the internet. The right to privacy is also part of many European constitutions and several human rights conventions. *See, e.g.*, Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération suisse [Cst] [Constitution], April 18, 1999, SR 101, RO 101, art. 13 (Switz.); Grundgesetz für die Bundesrepublik Deutschland [GG] [Constitution], art. 10 (F.R.G.); Regeringsformen [RF] [Constitution] 2:3, 2:6 (Swed.); Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, art. 8, Nov. 4, 1950, ETS no. 005; Universal Declaration of Human Rights, United Nations General Assembly, art. 12, Dec. 10, 1948; Council Directive 95/46/EC, 1995 O.J. (L 281), 31 (EC) (regarding "the protection of individuals with regard to the processing of personal data and on the free movement of such data"); Directive 2002/58/EC, 2002 O.J. (L 201), 37 (EC) (regarding privacy and electronic communications).

⁹³ *See* 17 U.S.C. § 512(h). Note that this matter is not always easy for courts to decide, because fundamental human rights, such as free speech and the right to privacy, are at risk. *See* Michael Birnhack, *Unmasking Anonymous Online Users in Israel*, 2 HUKIM 51, 82 (2010) [Hebrew]; *see generally* Lyriisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537 (2007).

⁹⁴ In other words, under the 3SP, a user's identity could be held secret from the right holder, unlike in civil litigation.

would not be jeopardized.⁹⁵ The impact on privacy is not very strong and might qualify as a necessary measure to protect the rights of the holders.⁹⁶ However, this is only true for the current methods which are used to locate illegal file-sharing. If the right holders take those methods a step further and require ISPs to monitor their users' actions on their behalf, the privacy implications might change. Furthermore, if HADOPI makes further use of retrieved information regarding those users, their right to privacy might be jeopardized, because such information-monitoring might implicate the general right to preserve our surroundings, i.e. our thoughts, our secrets, our feelings and our identity.⁹⁷

I carefully claim that the 3SP might also negatively impact due process rights. The 3SP marks a shift in the copyright law regime from civil litigation to criminal enforcement; though criminal enforcement existed prior to the 3SP, the 3SP marks a crucial shift in this paradigm change. Whereas, thus far, right holders usually file lawsuits against users to receive remedies and perhaps deter other users, the 3SP provides the state with a legitimate authority to prosecute users and curtail liberty, raising the bar on public intimidation. This is somewhat troublesome. If legislators seek to criminalize copyright law, as some have already done,⁹⁸ they ought to preserve the basic rights that defendants receive in criminal litigation. Hence, if the 3SP is implemented, every user should enjoy due process rights. Due process rights vary among countries,⁹⁹ but they usually protect

⁹⁵ IP addresses could perhaps be defined as personal data and therefore could be protected by different legislation. Even so, it seems that the right to privacy in this matter will not be jeopardized. *See, e.g.*, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and On the Free Movement of Such Data, art. 2, 1995 O.J. (L 281) 31, 38.

⁹⁶ On the other hand, the European Data Protection Supervisor (EDPS) holds that a three strikes Internet disconnection policy constitutes a disproportionate measure and can therefore not be considered a necessary measure. *See* Peter Hustinx, *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, available at www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2010/10-02-22_ACTA_EN.pdf. The EDPS is furthermore convinced that alternative, less intrusive solutions exist, or that the envisaged policies can be performed in a less intrusive manner or with a more limited scope. *Id.*

⁹⁷ This statement does not apply to the U.S., since there is no general constitutional right to privacy in this manner. *See supra* note 92.

⁹⁸ *See, e.g.*, No Electronic Theft ("NET") Act of 1997, 17 U.S.C. §§ 101, 506, 507; 18 U.S.C. §§ 2319(a)–(c), 2320 (2006).

⁹⁹ For example, in the United States, due process rights are provided in the Fifth and Fourteenth Amendments to the United States Constitution. *See* *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). In Europe, the European Parliament has stated that every access termination to the Internet may only be imposed if they are appropriate, proportionate and necessary within a democratic society. Directive 2002/21/EC of the European Parliament and of the

rights such as adequate notice, receiving full details about the charged offense, being heard in a proceeding by a neutral arbiter, and ensuring that his or her claims are taken into consideration in court proceedings. Moreover, the 3SP must respect the presumption of innocence.

Under the 3SP, these rights might be at risk. In France for example, the 3SP provides the user with an opportunity to “be heard” in front of HADOPI, but that does not necessarily mean that the right to be heard is completely fulfilled in this matter, as HADOPI may not count as a judicial process in some contexts.¹⁰⁰ Moreover, the fast-track judicial process in France is not necessarily adequate and does not necessarily comply with the presumption of innocence,¹⁰¹ since under some 3SP regimes, the user is considered guilty unless proven otherwise; this might prove to be a real burden for users and might lead to false accusations and therefore might not be proportionate in its implementation in France. However, if implemented in the U.S., HADOPI proceedings may satisfy procedural due process requirements and therefore be justified.¹⁰²

Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services, 2002 O.J. (L 108) 33. Furthermore, their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of community law, including effective judicial protection and due process. *Id.*

¹⁰⁰ Although HADOPI might consist of judicial authorities, it cannot count as a proper judicial process primarily because it does not hold the same judicial power.

¹⁰¹ Though the presumption of innocence is considered a constitutional right in the United States, for example, it is regarded as one that is implicitly – —and not explicitly – — guaranteed by courts’ interpretation of the U.S. Constitution. *See Coffin v. United States*, 156 U.S. 432, 453 (1895).

¹⁰² Yu, *supra* note 74, at 1401 (arguing that “taking away an individual’s Internet access as a penalty for *alleged* copyright infringement is even worse than introducing criminal sanctions for downloading and peer-to-peer file sharing. While the criminal court system will determine whether sanctions will attach under the ‘beyond a reasonable doubt’ standard, a graduated response system may involve *mere* allegations of infringement by copyright holders or their industry group.”) (emphasis added). Note that the presumption of innocence, like any other right, can be legitimately curtailed when it is proportionate to achieve an important goal. Take, for example, criminal enforcement of traffic violations that rely on camera systems to detect the violations, including speeding, running a red traffic light, unauthorized use of a bus lane, etc. The vehicle owner receives a fine notice, meaning that he was found guilty, and must pay all such fines regardless of whether he was driving at the time of the offense. *See* in Canada, for example, the Motor Vehicle Act, RSBC 1996, c. 318, in Section 83.1: “The owner of a motor vehicle is liable for the contravention of section 140, 146 (1), (3), (5) or (7), 147 or 148 (1) if evidence of the contravention was gathered through the use of a prescribed speed monitoring device.” Much like the traffic enforcement controversy, the burden on users to prove their innocence is not an easy task. Take, for example, a French user who allegedly was file-sharing illegally. That user might have to prove that the downloadable file, if such even

The 3SP also endangers freedom of speech. Due to the important role the Internet plays in daily life,¹⁰³ suspending access to the Internet might be a real burden on users. The right of acquiring Internet access is sometimes considered an independent legal right, or at least an important one.¹⁰⁴ Moreover, even if Internet connection does not enjoy the status of a legal right, freedom of speech usually does.¹⁰⁵ Because the Internet serves as a somewhat anonymous forum where users can exchange opinions without the fear of being detected by others, Internet suspension might limit opportunities for expression, inhibit individuals' ability to fulfill themselves, and impact free speech and access to knowledge, and be perceived as a disproportionate penalty for their crime.¹⁰⁶ Furthermore, the

exists, was lawfully downloaded. There could be many different scenarios that will impact this task differently. A user that never downloaded materials over file sharing network will have an easier task than one who does. This of course could be proven by a technical expert, analyzing the user actions on her computer, but it seems that the short judicial procedure set in will not provide the user with the proper tools handling this task.

¹⁰³ For instance, a global poll conducted by GlobeScan for the BBC found that four in five adults regard Internet access as their fundamental right. The poll of more than 27,000 adults found that 87 percent of those who used the Internet felt that Internet access should be "the fundamental right of all people." *Four in Five Regard Internet Access as a Fundamental Right: Global Poll*, BBC WORLD SERVICE, Aug. 3, 2010, news.bbc.co.uk/2/shared/bsp/hi/pdfs/08_03_10_BBC_internet_poll.pdf (last visited May 8, 2011).

¹⁰⁴ See, e.g., Council Directive 2002/21, amend. 128/46, 2002 O.J. (L.108) 3 (EC) ("Measures taken by Member States regarding end-users' access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law."). In the U.S., although Internet access has never been formally declared as a (fundamental) legal right, Congress has allocated funds for broadband expansion across America. See U.S. Dept. of Commerce Nat'l Telecomms. & Info. Admin., Broadband Tech. Opportunities Program (BTOP), *available at* www.ntia.doc.gov/broadbandgrants. Furthermore, the government of Finland has officially made the possession of an Internet connection a legal right for Finnish citizens. See Gordon Aldridge, *Finland: Internet Connection Made a Legal Right*, INEWP, Jul. 1, 2010, inewp.com/?p=3466 (last visited May 8, 2011).

¹⁰⁵ In sum, freedom of speech is usually considered to be a highly important right. In the U.S., for example, free speech is protected by the First Amendment to the U.S. Constitution. U.S. CONST. amend. I. It is also recognized globally as a human right in various forms of international legislation, agreements and declarations, such as under Article 19 of the Universal Declaration of Human Rights. See Universal Declaration of Human Rights, art. 19, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10 1948). For more information regarding free speech and copyrights, see *generally* COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES (Jonathan Griffiths & Uma Suthersanen eds., Oxford, University Press 2005).

¹⁰⁶ However, it might not seem disproportionate while users still possess various other ways to fulfill themselves as individuals using free speech.

3SP in its current manifestation is not implemented in furtherance of a compelling state interest and is definitely not narrowly tailored.¹⁰⁷ At least in the U.S., 3SP legislation must be “compelling” to describe the societal importance of the law and must be a narrowly tailored means of furthering U.S. interests.¹⁰⁸

Finally, the 3SP might reshuffle the current balance set in the copyright law regime between the interests of authors and those of the public. Copyright law usually provides users with various exemptions and defenses that allow them to use copyrighted materials without the right holder’s prior permission. These include the fair use defense¹⁰⁹ and the use of materials that are in the public domain.¹¹⁰ As to the latter, the 3SP should not usually create much of a problem. However, the 3SP might unduly limit fair use rights for several reasons. First, the 3SP does not include an examination of the alleged copyright infringements. When a right holder notifies HADOPI of an alleged infringement, a notice to the user is sent without HADOPI or any court examining whether an infringement actually occurred. If, for example, someone wishes to download copyrighted material for the purpose of non-commercial academic research, then under the 3SP she might still be treated as an infringer. Second, many users do not have sufficient – if any – knowledge about intellectual property in general and the fair use defense specifically. Therefore, many users who receive a notification might cease all file-sharing actions, although at least some of those actions might qualify as fair uses. In other words, the 3SP does not allow sufficient breathing room for the fair use defense and thus might be overbroad and create a chilling effect.¹¹¹

¹⁰⁷ For more on the importance of anonymous speech, see *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995). For more regarding “strict scrutiny,” see *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 (1938); *Widmar v. Vincent*, 454 U.S. 263 (1981). Narrow tailoring entails that the law capture within its reach no more activity than necessary to advance those compelling ends. A compelling state interest means that only the most pressing circumstances can justify the action. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 *VAND. L. REV.* 793, 800 (2006).

¹⁰⁸ See *supra* note 107.

¹⁰⁹ See 17 U.S.C § 107 (2006).

¹¹⁰ “A work of authorship is in the public domain if it is no longer under copyright protection or if it failed to meet the requirements for copyright protection. Works in the public domain may be used freely without the permission of the former copyright owner.” For this definition, see U.S. Copyright Office. Definitions (FAQ), www.copyright.gov/help/faq/faq-definitions.html (last visited May 11, 2011).

¹¹¹ Fair use allows some use of copyrighted material without requiring permission from the rights holders, such as criticism, comment, news reporting and research, and plays an important role in promoting and safeguarding free speech. See *Eldred v. Ashcroft*, 537 U.S. 186, 205 (2003); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding

This is a crucial drawback of the 3SP. In civil litigation, it is reasonable for users to hire lawyers to defend them in court and raise a fair use defense or any other user rights' claims. Under the 3SP, it is not clear that such a defense is available. Moreover, the two warnings users receive prior to any sanction given will also be problematic for users' rights for similar reasons. Users might not attempt to challenge warnings they receive, even though their file sharing actions are lawful. However, when the third strike arrives, the user might face an Internet suspension without any examination by the court of the first two strikes. It might be too late to act. Therefore, it appears that the 3SP does not currently include proper tools to deal with users' rights issues, and therefore it is not a proper solution for resolving illegal file-sharing over the Internet.

Despite its many potential benefits, the 3SP is not without disadvantages. First, it can resolve the illegal file-sharing problem, but at the same time it may harm artists that benefit from those activities. Second, it might impose obligations on the ISPs that will force them to undertake structural and financial changes like allocating human resources to deal with right holders' claims. Third, the 3SP might impose a new role on ISPs which they did not initially anticipate, putting them in a difficult position and causing adverse financial consequences. Finally, the 3SP might have dramatic impacts on individual rights including privacy, due process rights, free speech, and users' rights.

V. 3SP ENFORCEMENT

Setting aside the debate regarding the 3SP's benefits and drawbacks, enforcement issues of the 3SP might jeopardize its success. Although one cannot yet analyze the actual success or failure of the different 3SPs worldwide, there are some enforcement issues that are likely to arise.

A. *Bypassing the 3SP Limitations*

Technology might aid users in circumventing or surpassing the 3SP's limitations. This might occur in two different situations: first, *ex ante*, users could either avoid getting caught by the right holders, ISPs and the regulatory authorities; second, *ex post*, they could sidestep the Internet suspension sanction.

1. Avoid Detection

There are two main methods that users who illegally download

that a parody, even with a commercial nature, can qualify as fair use under U.S. law).

copyrighted materials could use to avoid detection. First, the 3SP, much like other methods used to detect illegal file-sharing over the Internet, usually depends on the right holder's detection of a copyrighted file shared over a file-sharing network. Usually, in order to detect illegal file-sharing over the Internet and in order to press charges against infringers, right holders connect to a p2p network and search for their copyrighted materials. Once they detect that their copyrighted materials are illegally available, they simply track the user's IP address. However, there are many other ways to make use of copyrighted materials on the Internet.¹¹² Other methods of downloading and data consumption, such as websites that offer streaming of copyrighted materials, direct access to copyrighted materials (such as Rapidshare and MegaUpload), and instant messaging and chat software (such as Usenet or IRC), make detection and enforcement by right holders much more difficult.¹¹³ The endless cat and mouse game of copyright owners and users over the past fifteen years teaches us this lesson.

Second, users can encrypt their actions or their IP addresses using various technologies and thus avoid getting caught.¹¹⁴ This raises further issues: since many of the right holders do not search for the infringements on their own and instead outsource the task, there have been, and will likely continue to be, reported incidents of false accusations. A fifty-three year-old American user was accused of downloading copyrighted television

¹¹² See *How To Not Get Sued for File Sharing*, THE ELECTRONIC FRONTIER FOUNDATION (Jul. 2006), <http://www.eff.org/wp/how-not-get-sued-file-sharing> (last visited May 8, 2011). There are currently two main methods used to detect file-sharing over P2P networks other than the mentioned method. The first, known as port-based analysis, is based on the concept that many P2P applications have default ports on which they function, and administrators "observe the network traffic and check whether there are connection records using these ports." Yimin Gong, *Identifying P2P Users Using Traffic Analysis*, SYMANTEC (Jul. 20, 2005), <http://www.symantec.com/connect/articles/identifying-p2p-users-using-traffic-analysis> (last visited May 8, 2011). The second method, known as protocol analysis, uses "an application or piece of equipment [that] monitors traffic passing through the network and inspects the data payload of the packets according to some previously defined P2P application signatures." *Id.* While those two methods might detect file-sharing over P2P networks, they cannot be used in order to distinguish between legal and illegal file-sharing. *Id.*

¹¹³ A recent study conducted in Rennes, France, indicated that the 3SP did actually reduce the usage of file-sharing software but enhanced the usage of other methods. See Nate Anderson, *Piracy up in France after tough three-strikes law passed*, ARSTECHNICA (Mar. 26, 2010), http://www.arstechnica.com/techpolicy/news/2010/03/piracy-up-in-france-after-tough-three-strikes-lawpassed.ars?utm_source=rss&utm_medium=rss&utm_campaign=rss (last visited May 8, 2011). See also Sylvain Dejean, *Une première évaluation des effets de la loi Hadopi sur les pratiques des Internautes français*, M@RSOUIIN (2010), www.marsouin.org/IMG/pdf/NoteHadopix.pdf (last visited May 8, 2011). For the research findings, see (in French) www.marsouin.org/IMG/pdf/NoteHadopix.pdf.

¹¹⁴ See, e.g., ITS HIDDEN, <http://itshidden.com> (last visited Apr. 9, 2011).

series such as South Park, even though she was the only user of her home network and had no actual knowledge of file-sharing at all.¹¹⁵ The RIAA also sent legal notices to people who were deceased when the alleged infringements took place.¹¹⁶

Therefore, current copyright infringement detection methods may become obsolete and damage the effectiveness of the 3SP. However, enforcement concerns do not stop here. One of the major concerns regarding the enforcement of the 3SP takes place after the legal sanction of suspending the user's Internet access.

2. After Internet Access Suspension

If, under a 3SP, a user is caught three times for copyright infringements, he or she will be disconnected from the Internet for a certain period of time. However, there are still multiple Internet access solutions available to the user that endanger the efficacy of the 3SP.

Disconnected users can use wireless networks such as WiFi (Wireless Fidelity) or WiMax (Worldwide Interoperability for Microwave Access) that are often free, open, and available in cafes. Users can also connect to a neighbor's wireless device, or even connect to the Internet by subscribing as another member of the household. This issue did not escape the attention of legislatures. In Italy, for example, in an attempt to fight terrorism, citizens are required to take measures in order to secure their network connection, while businesses are obligated to register and track all Internet users using their connection and to retain their personal information as well as their Internet activities.¹¹⁷ If the 3SP had similar requirements, it might be more difficult for the disconnected user to reconnect in such a manner.¹¹⁸

¹¹⁵ See Greg Sandoval, *Grandma endures wrongful ISP piracy suspension*, CNET (2010), news.cnet.com/8301-31001_3-10444879-261.html?tag=newsLeadStoriesArea.1 (last visited May 8, 2011). In Boston, a sixty-six year-old woman was a suspected rap music file-sharer, although she never downloaded any materials over the Internet. See John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either*, N.Y. TIMES, Sept. 25, 2003. This also occurred outside the U.S. In the UK, for example, several elderly citizens were falsely accused of downloading computer games. See Jared Moya, *UK P2P Game Crackdown Catches Non-Gaming Elderly Couple*, ZEROPAID (Oct. 30, 2008), www.zeropaid.com/news/9826/uk_p2p_game_crackdown_catches_nongaming_elderly_couple (last visited May 8, 2011). The music industry claims that this is part of the actions, and only a small portion of false accusations are made. See Dennis Roddy, *The Song Remains the Same*, PITTSBURGH POST GAZETTE, Sept. 14, 2003.

¹¹⁶ Andrew Orłowski, *RIAA Sues the Dead*, THE REGISTER (2005), available at www.theregister.co.uk/2005/02/05/riaa_sues_the_dead/.

¹¹⁷ See Legge 31 luglio 2005, n 155 (It.).

¹¹⁸ Individually securing an Internet connection will require technical knowledge, which some users do not possess. Also, mandating Internet connection obligations on businesses

However, requiring businesses to monitor their customers' actions could adversely affect users' privacy rights.

The various methods that are currently available for Internet connection are vast. Moreover, it seems that completely suspending a user from the Internet, while blocking her connection to any other ISP in her country using black-lists, is difficult if not impossible. While ISPs possess two different identities for each user – her actual identity and her IP address – it is hard to understand which user identity would be black-listed. If ISPs black-list both user identities, it seems that the IP identity black-list will pose a real problem in regard to the proportionality of the 3SP, as the same IP address could be used by different people. In either case, it will still be possible for another person at the user's household to connect to the Internet through the same ISP or a different one. Consider, for example, a family of five, using the same Internet access connection. If one member of the family incurs three strikes, she would be barred from internet connectivity. But, because the whole family shares an internet connection, the disconnected user might still have up to twelve more strikes, provided she has access to other family members' computers. On the other hand, preventing the whole household from accessing the internet because of one family member's behavior would raise serious questions regarding the 3SP's proportionality. Why, one might ask, should a whole family suffer because one of its members committed three infringements? I believe they should not.

VI. THE SUCCESS OF THE 3SP & FURTHER QUESTIONS

One of the main questions arising from the implementation of the 3SP is its potential for success in eliminating illegal file-sharing over the Internet. Aside from the enforcement issues just discussed, there is still doubt whether the 3SP can actually achieve its declared goal. This section outlines the main issues regarding the potential success of 3SP.

First, the 3SP will only succeed if users are actually deterred by the legal sanctions applied in the 3SP. As much as disconnecting users from the Internet might be perceived as intimidating, current copyright infringement sanctions, such as large fines and imprisonment, might deter infringement more effectively. If the 3SP is to succeed where other policies have failed, it must be implemented and strongly enforced by the right holders, ISPs and governmental bodies like the French HADOPI. Sanctions

might be a financial burden to small businesses, therefore providing larger businesses with a commercial advantage.

will have to be applied at least once, if not more, to deter other potential infringers.¹¹⁹

Second, implementing the 3SP is expensive. From a governmental point of view, there will be costs such as judicial time and the allocation of funds to create and support the actions of the governmental body and the ISPs. As mentioned, the ISPs will have to undergo structural and financial changes, while allocating human resources to deal with right holders' claims, which might be higher than the fee the subscriber pays for the duration of suspension as set in the French law.¹²⁰

Third, it is not clear that 3SP is a proportionate sanction. In the U.S.,

¹¹⁹ It is hard to determine exactly how often users must be prosecuted until deterrence is achieved, if it can be achieved at all. However, users might be deterred even if no actual Internet suspension takes place. Consider the following example: the U.S. government, which currently does not employ a 3SP, announces that from now on, every user caught file-sharing on Sundays will be prosecuted and may even go to jail. Even if the U.S. government does not actually prosecute every single user or even any user, this might still deter users from downloading on Sundays. Although this is not exactly the same, it does hold similar principles. A general study regarding the dynamics of deterrence in criminal offenses explains that “[w]hen punishment capacity is constrained and offenders’ behavior responds to changes in the probability of punishment, a dual-equilibrium ‘tipping’ situation can result. In that case, temporary increases in punishment capacity can lead to lasting changes in violation rates. A strategy of dynamically concentrating sanctions on a subset of violators can reduce violation rates and the total amount of punishment actually delivered. When the capacity to punish is constrained, dynamic concentration can be more effective and less costly than randomly assigning sanctions to offenders.” Mark Kleiman & Beau Kilmer, *The Dynamics of Deterrence*, 106 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA, no. 34, at 14234 (2009); see also Ed Felten, *Targeted Copyright Enforcement: Deterring Many Users with a Few Lawsuits*, FREEDOM TO TINKER (2009), www.freedom-to-tinker.com/blog/felten/targeted-copyright-enforcement-deterring-many-users-few-lawsuits (last visited May 8, 2011). Although the copyright law regime is not the same as criminal law, it seems that this might work in regards to file-sharers.

¹²⁰ For example, a study in the UK, which was set to provide an impact assessment for the Digital Economy Act of 2010 found that the related costs of implementing a 3SP might reach £500,000,000 over a 10-year duration: “Costs to ISPs of complying with the legislation, including costs of notifying infringers, capital costs to ISPs, costs of setting up and running a call centre, annual capital and operating costs to mobile network operators. Possibility of higher broadband costs for consumers. (Total cost: £290 -500 million.) Costs to low income/low valuation digital product consumers who would stop consuming digital content altogether rather than purchase it; costs to rights holders of identifying infringing IP addresses and taking infringers to court.” Department for Innovation & Skills et al, *Digital Economy Act 2010: Impact Assessment*, 13 (2010), available at webarchive.nationalarchives.gov.uk/20100511084737/http://interactive.bis.gov.uk/digitalbritain/wp-content/uploads/2010/04/Digital-Economy-Act-IAs-final.pdf13. In regard to the right holder's claims, the 3SP should also consider inserting a system in which right holders pay a fee to ensure that ISPs will have proper funds to deal with their claims.

the 3SP was implemented as a deterrent in some states' criminal, as opposed to copyright, law.¹²¹ In California, for instance, Mr. Cecilio Gonzalez failed to reregister as a sex offender within five working days of his birthday. Because Gonzalez had been convicted of two prior offenses, the Court sentenced him to twenty-eight years of imprisonment under California's 3SP criminal law policy.¹²² Applying the 3SP within the area of intellectual property might raise similar questions regarding the fit between punishment and crime. Hence, for example, the 3SP does not differentiate between a user who shares 1000 copyrighted files and a user who only shares a single file, if both are caught only once, other than giving a judge the opportunity to decide the length of Internet suspension. That does not seem enough.¹²³

The 3SP can also be misused by the right holders. In France, for instance, right holders might have incentives to report as many users as they can to HADOPI, since they will not be punished if those accusations are proven false. However, HADOPI will probably find a solution to prevent such a radical scenario. In order to prevent this scenario, a plausible 3SP should have to include mechanisms to prevent misuse similar to those in the DMCA. For instance, possible remedies for false accusations could include paying a fine to the regulator and to the wrongly disconnected user.

Finally, if 3SP succeeds in eliminating illegal file-sharing, countries that implement it would need to amend certain legislation designed to compensate right holders for infringements.¹²⁴ Otherwise, right holders could be compensated twice for their financial losses. In France, for example, there should be an amendment to the law that compensates right holders by imposing a levy on digital devices that can be used to store

¹²¹ See Cal. Pen. Code § 667.

¹²² *Gonzalez v. Duncan*, 551 F.3d 875 (9th Cir. 2008) (finding that Gonzalez failed to update his registration annually within five working days of his birthday, and sentenced him to an indeterminate term of 28 years to life).

¹²³ It seems that due to the nature of the 3SP identification techniques, identifying infringers through P2P software, and sending notification notices without a distinction between two different file-sharers (e.g., someone who shares one song and another person who shares 1000 songs, if caught only once are treated the same), the courts will need more power to differentiate between different file-sharing, such as a non-commercial scale vs. commercial scale of file-sharing (which will be determined by the court). The major difference between the 3SP litigation and "regular" civil litigation in regards to IP, is that in the latter, the right holders get a much better picture of the user's profile than in the 3SP, and therefore they have a wider range of decision in regards to the alleged infringer, i.e., they can choose whether they want to prosecute someone who downloaded a single song or focus on "bigger fish."

¹²⁴ In the U.S. for example, see the Audio Home Recording Act of 1992 (17 U.S.C. §§ 1001-10). Under this Act, all digital recording devices must incorporate a Serial Copy Management System.

music.¹²⁵

VII. ALTERNATIVE 3SP PROPOSITION

If the 3SP is a legitimate method to deal with illegal file-sharing, we should address its problematic aspects and seek to amend them.¹²⁶ First, an official governmental body empowered to deal with illegal file-sharing other than courts, such as HADOPI, must be established. However, this body must take a more active role in analyzing right holders' claims prior to sending alleged infringement notices to users and hire employees with knowledge of copyright law. Furthermore, in order to minimize the infringement of due process rights, the official governmental body must supply the user with an adequate right to be heard. In other words, the governmental body should possess the power to stop proceedings against a user who was falsely accused.¹²⁷ In this way, users will be able to make legitimate use claims like fair use. This will strike the proper balance between the interests of authors and those of the public. Legislators must also formulate rules regarding the nature of information usage to preserve users' right to privacy. Moreover, as mentioned, the 3SP must create mechanisms similar to those set in the DMCA to address misuse.¹²⁸ The government should address financial costs to ISPs who will be affected by the 3SP implementation requirements. The 3SP will also have to provide courts with the power to deal with different file-sharing infringements, meaning that courts will have the ability to suspend a user for a very short time if it seems that the alleged infringement occurred due to unjust circumstances.¹²⁹ For instance, under the 3SP in France, the minimum

¹²⁵ Intellectual Property Article L. 311-5 (Fr.). See also P. Bernt Hugenholtz & Lucie Guibault Sjoerd Van Geffen, *The Future of Levies in a Digital Environment, Final Report*, INSTITUTE FOR INFORMATION LAW (2003).

¹²⁶ See generally, Yu, *supra* note 74 at 1419 (proposing that if the system is to be considered fair and legitimate, and rule of law is to be respected, the infringing activities of those who stand to lose internet service must be verified through an independent review process, and also that the graduated response system needs to take its educative and rehabilitative roles seriously).

¹²⁷ If implemented in the U.S., it will probably be subjected to the Administrative Procedure Act (5 U.S.C. 500 *et seq.*), and the administrative agency will have power to propose and establish regulations.

¹²⁸ This is much like statutory damages set in U.S. copyright law that authorize the court to reduce damages to two-hundred dollars if the defendant was not aware of and had no reason to believe that its acts constituted a violation. See 17 U.S.C. § 504.

¹²⁹ There could be many different situations where users' alleged infringement will occur due to unjust circumstances. For instance, if a user does not know how to "block" his internet connection to other users, his neighbors could download copyrighted files using his IP address, and therefore, he could be sued, unfairly and unknowingly.

penalty is set to a period of two months' suspension, a long period which does not provide the judge with sufficient power to reduce the penalty for lighter infringers. Finally, if the 3SP succeeds in its mission, legislation enacted to compensate right holders for copyright infringements should be amended to prevent double-compensation for the right holders.

Additionally, a reasonable 3SP must set a minimum period of time between the first two accusations of infringements. Under the current 3SP regime, a user could be notified three times within a matter of seconds, which would not give her enough time to alter her behavior and internalize the policy.¹³⁰ Moreover, e-mail notices should not count as a proper notice, since users use different email boxes, sometimes provided by the ISPs and not used by the subscribers; therefore, there is a real chance that this notice will never reach them. This matter might not be perceived as problematic in sense of law;¹³¹ however, it should matter in a normative sense. Finally, if adopted, the 3SP should be widely advertised and explained to the general public. This is due mostly to technological and legal gaps between different users.¹³² Moreover, I submit that Internet suspension should be limited to certain actions, so that users can still use online applications that do not threaten right holders, such as e-mail services and the usage of governmental websites. This would reduce the 3SP's negative impact on free speech and freedom of information, making the 3SP a more reasonable and proportional method of copyright enforcement.

VIII. NEW DIRECTIONS IN COPYRIGHT?

Until recently, civil litigation was the typical means of copyright enforcement.¹³³ The 3SP, by contrast, advances a relatively new approach to copyright protection. Under the 3SP, the state takes on an active role in enforcement by threatening criminal sanctions. This method might have a crucial impact on the current balance set in the copyright law regime between the interests of authors and those of the public. I will analyze the

¹³⁰ NIMMER & NIMMER, *supra* note 23, at § 12B.10(C)(1); Yu, *supra* note 74, at 1420 (arguing that the system should focus on the type of infringement that is understandable by Internet users with limited knowledge of copyright law).

¹³¹ See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

¹³² Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 39 (1996).

¹³³ See *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000); *A & M Records Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003); *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Capitol Records, Inc. v. Thomas-Rasset*, 680 F. Supp.2d 1045 (D. Minn. 2010); *Sony BMG Music Ent. v. Tenenbaum*, No. 07-cv-11446-NG (D. Mass. 2010); *Maverick Recording Co. v. Harper*, 598 F.3d 193 (5th Cir. 2010).

new methods used in file-sharing to elucidate possible new directions in copyright law. I will argue that the fast-track judicial procedure set in the French model misuses the internet-suspension sanction; the system's rationale is clearly punishment, not prevention. On a larger scale, I will claim that the 3SP is yet another step in the criminalization of copyright law.

A. *Copyright Criminalization*

Copyright infringement is primarily a civil wrong. When infringement occurs, copyright holders usually turn to civil litigation for compensation.¹³⁴ While copyright law also includes criminal sanctions, they are usually only applied in cases of infringement for commercial purposes.¹³⁵ The 3SP proposes a new method for copyright holders to deal with infringements through private ordering and criminal procedure. I claim that a global paradigm shift has already started in copyright and that it is reflected in the 3SP. I illustrate this point through a general analysis of U.S. copyright law and various 3SP legislation.

For many decades, willful infringement of a copyright for commercial advantage or private financial gain has carried criminal penalties.¹³⁶ The emergence of the Internet and technologies that enable users to infringe copyrighted materials more easily changed this rationale, expanding the interpretation of commercial advantage and financial gain.¹³⁷

¹³⁴ See Alan N. Young, *Catching Copyright Criminals: R. v. Miles of Music Ltd.*, 5 I.P.J. 257 (1990).

¹³⁵ See, e.g., 17 U.S.C. § 506, 18 U.S.C. § 2319, 18 U.S.C. § 2318, 18 U.S.C. § 2319, 17 U.S.C. §§ 1201-1204, 18 U.S.C. § 2320, 18 U.S.C. § 1832. See also Young, *supra* note 134, at 258; Steven Penney, *Crime, Copyright, and the Digital Age* in WHAT IS A CRIME? CRIMINAL CONDUCT IN CONTEMPORARY SOCIETY 63 (Law Comm'n of Canada ed., 2004); Kent Walker, *Federal Remedies for the Theft of Intellectual Property*, 16 HASTINGS COMM. & ENT. L.J. 681 (1994). See also Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and The Importance of the Willfulness Requirement*, 77 WASH. U.L.Q. 835, 840 (1999).

¹³⁶ See, e.g., NIMMER ON COPYRIGHT, *supra* note 23, at § 15.01(A)(2). In the U.S. criminal procedures were first introduced in copyright law in 1897. See Act of Jan. 6, 1897, ch. 4, 29 Stat. 481-82 (Adding a provision to create criminal sanctions for unlawful public performances and representations of copyrighted dramatic or musical compositions); Copyright Act of 1909, ch. 320, 33 Stat. 1075-82. In 1976, the U.S. continued to include criminal procedures in copyright laws. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. (1987); 18 U.S.C. § 3571; The Copyright Felony Act (Felony Act) of 1992, Pub. L. No. 102-561, 106 Stat. 4233 (1992) (current version at 17 U.S.C.A. §501) (2002); (18 U.S.C. § 2319). See Mary J. Saunders, *Criminal Copyright Infringement and the Copyright Felony Act*, 71 DENV. U.L. REV. 671, 673 (1994); Carol Noonan & Jeffery Raskin, *Intellectual Property Crimes*, 38 AM. CRIM. L. REV. 971, 990 (2001).

¹³⁷ See, e.g., *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994), in which a

The TRIPS agreements, which obligated member states to provide for criminal procedures and penalties in cases of willful trademark counterfeiting or copyright piracy on a commercial scale, demonstrate this global shift.¹³⁸ In 1995, U.S. lawmakers realized that the Internet might have a crucial impact on copyright holders, Congress proposed an act to extend the possibilities of criminal sanctions for non-commercial piracy as well.¹³⁹ Although this act was ultimately not enacted, it led to the passage of the No Electronic Theft Act of 1997 ("The NET Act").¹⁴⁰ The NET Act clearly marks the beginning of a copyright paradigm shift toward criminal procedures.

The NET Act mainly added a provision that criminalizes infringements that are not undertaken for a commercial purpose.¹⁴¹ The Act seems to have had an impact on the traditional perception of copyright in the U.S. and worldwide. On one hand, it seems that subjecting a substantial amount of citizens to criminal penalties is undesirable, even through the eyes of the right holders.¹⁴² On the other hand, introducing criminal sanctions into

twenty-one-year-old student from Massachusetts Institute of Technology was sued for copyright infringement using a bulletin board. The court held that

[c]riminal as well as civil penalties should probably attach to willful, multiple infringements of copyrighted software even absent a commercial motive on the part of the infringer. One can envision ways that the copyright law could be modified to permit such prosecution. But, it is the legislature, not the Court which is to define a crime, and ordain its punishment.

Id. at 545.

¹³⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights (1994) ("TRIPS") at § 5, Article 61.

¹³⁹ Criminal Copyright Improvement Act of 1995, S. 1122, 104th Cong. § 2(b) (1995).

¹⁴⁰ No Electronic Theft (NET) Act, Pub. L. No. 105-47, 111 Stat 2678 (1997), (17 U.S.C. §§ 101, 506, 507; 18 U.S.C. §§ 2319, 2320; 28 U.S.C. § 1498).

¹⁴¹ The NET Act also states that:

Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed . . . (B) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000; or (C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

17 U.S.C. § 506(a)(1) (2008).

¹⁴² See generally *Criminal Sanctions for Violations of Software Copyright: Hearing on S. 893 Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the H. Comm. on the Judiciary*, 102d Cong. (1992); see also *LaMacchia*, 871 F. Supp. at 544 ("It is not clear

copyright law might deter users more effectively than civil compensation.¹⁴³ For users who illegally file-share, the NET Act might prove a real threat as they might face criminal charges.¹⁴⁴

The U.S. continued to criminalize copyright in the DMCA, which criminalized certain circumventions of copyright protection systems.¹⁴⁵ Globally, it seems that this trend will continue if and when the Anti-Counterfeiting Trade Agreement (ACTA) is signed, as ACTA requires the enhancement of criminal intellectual property enforcement.¹⁴⁶

B. The 3SP as a New Link in the Criminal Chain

As mentioned above, the 3SP seems like yet another link in the chain of copyright criminalization. Although the criminalization process started before the 3SP, its implementation through the NET Act was not directed mainly against end-users.¹⁴⁷ The 3SP attempts to change the copyright

that making criminals of a large number of consumers of computer software is a result that even the software industry would consider desirable.”); Eric Goldman, *A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement*, 82 OR. L. REV. 369, 414–15 (2003) (“Even copyright owner industry groups agree that Congress should not ‘accidentally tak[e] a large percentage of the American people . . . into the gray area of criminal law.’” (internal citations omitted)).

¹⁴³ See Ronnie Heather Brandes et al., *Intellectual Property Crimes*, 37 AM. CRIM. L. REV. 657, 680 (2000); but see Penney, *supra* note 135, at 80 (“it would not be surprising if criminal enforcement proved to be ineffective”).

¹⁴⁴ See Declan McCullagh, *Perspective: The Copyright Conundrum*, CNET NEWS (Oct. 14, 2002), news.com.com/2010-1071-961818.html; Goldman, *supra* note 142, at 416; Aaron M. Bailey, *A Nation of Felons?: Napster, the NET Act, and the Criminal Prosecution of File-Sharing*, 50 AM. U. L. REV. 473, 531 (2000). However, infringement might only occur in cases that an actual file-transfer was completed, as opposed to just making it available for download. See Declan McCullagh, *Perspective: The New Jailbird Jingle*, CNET NEWS Jan. 27, 2003, news.cnet.com/2010-1071-982121.html (“For purposes of a criminal prosecution, you’d have to show more than that the defendant made the files available—you’d have to show that she actually made or distributed copies . . . Not too difficult using today’s tools, but you would need to show the actual copying of the file by third parties rather than merely proving that defendant downloaded the files into her share directory.”) (quoting Jessica Litman).

¹⁴⁵ 17 U.S.C. §§ 1201-1204 (1999). The DMCA’s criminal penalties apply only to willful infringements for purposes of commercial advantage or private financial gain. 17 U.S.C. § 1204(a) (1999).

¹⁴⁶ Anti-Counterfeiting Trade Agreement, PUBLIC Predecisional/Deliberative Draft, April 2010, art. 2.14–2.17.

¹⁴⁷ See, e.g., the following cases that were published by the American government: Jeffrey Levy, a 22 year student, “pled guilty to illegally posting computer software programs, musical recordings, entertainment software programs, and digitally-recorded movies on his Internet web site, allowing the general public to download these copyrighted products. On November 23, 1999, Levy was sentenced to a two year period of probation with conditions.” Eric Thornton pled guilty to criminal infringement of a copyright under the

paradigm. Until recently, copyright infringements were treated as civil wrongs or as criminal felonies in cases of willful counterfeiting or copyright piracy on a commercial scale. The emergence of the Internet and file-sharing protocols have changed the way policy makers think and act globally.

The 3SP will make a paradigm shift for several reasons. First, unlike the NET Act where the state takes an active role to prosecute infringers, the 3SP procedure as established in France is simple and any copyright holder can make claims.¹⁴⁸ The simplicity of the 3SP is where the success of the model lies. Even if it is possible to open criminal procedures against end-users on a non-commercial scale, such a strategy has proven ineffective as right holders have not pursued it. I believe that the 3SP's fast judicial procedure will alter that, leading to the enhancement of copyright criminalization.

Moreover, the 3SP sanction plays an important role in its implementation. Although Internet suspension poses many threats to end-users, other criminal sanctions, like imprisonment or large fines, might be viewed as a harsher penalty. Therefore, the 3SP sanction is crucial for the paradigm shift. As long as legislation enables different criminal sanctions against end-users, harsh penalties imposed upon non-commercial end-users might not be viewed as justified in the public's eyes. Even if Internet suspension seems a harsh penalty, it will probably be conceived as a better solution for the public than imprisonment, and therefore will enhance copyright criminalization.¹⁴⁹ However, the Internet has caused many enforcement changes both in copyright law and beyond. To elucidate the possible copyright paradigm change, I will examine a more general guideline that has changed over the years.

C. Internet Criminal Enforcement

The Internet poses threats to many different statutes around the world, due to its unique nature that usually allows for user anonymity and raises questions regarding where an "act" was committed due to the Internet's lack of geographical restrictions.¹⁵⁰ Technology enables users to avoid detection

NET Act for Unlawful Distribution of Software on the Internet. U.S. Dep't. of Justice, Computer Crime and Intellectual Property Section, Intellectual Property Legal Resources, available at www.justice.gov/criminal/cybercrime/iplaws.html. See also Goldman, *supra* note 142, at 381–92 (describing the publicized convictions under the Act).

¹⁴⁸ See *supra* note 4 (discussing French 3SP form).

¹⁴⁹ I believe that as long as legislatures implement relatively lenient criminal sanctions, they will be more broadly used than a harsh penalty. This would introduce more effective criminal sanctions into copyright law.

¹⁵⁰ For more regarding the internet's virtual borders, see generally Joel R. Reidenberg,

not only in the copyright context, but in other areas of law as well.

The Internet facilitates many criminal offenses, including illegal gambling, child pornography, and online scams.¹⁵¹ To deal with the special nature of the Internet and the criminal offenses it enables, legislatures shaped many different policies over the last fifteen years. Take, for example, the different enforcement methods used to deal with illegal online gambling. Online gambling is prohibited in many countries, even when the actual website is hosted in a country where online gambling is legal.¹⁵² In the U.S., Congress decided to prohibit funding of unlawful internet gambling.¹⁵³ By so doing, the American legislature demonstrated its conviction that online gambling poses a real threat and dealt with it by imposing criminal sanctions.

These facts suggest several rationales for implementing the 3SP. First, its implementation may be rationalized due to a general criminalization paradigm shift. Alternatively, its rationalization could be due to the changes the internet has generated for various laws due to enforcement problems. It is hard to say with certainty where the 3SP is located within these two options. I believe that the 3SP, as implemented in France, leans in both directions because the two are linked. However, despite the fact that the 3SP criminal procedure started as a direct result of the fact that the Internet has changed media consumption, I believe that the general criminalization process that already began in copyright law also plays an important role in the 3SP legislation and will continue to do so throughout different legislation around the globe.

D. Discussion

Disconnecting users from the Internet is a harsh penalty. It might not amount to a “cruel and unusual punishment,” but it is definitely not a lenient one. Accordingly, the 3SP should only be imposed if its detrimental

Technology and Internet Jurisdiction, 153 U. PA. L. REV. 1951 (2005). See also *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp 1119 (W.D Pa. 1997) (finding personal jurisdiction over a defendant providing Internet services); *Yahoo! Inc. v. La Ligue Contre Le Racisme et L ‘Antisemitisme*, 379 F.3d 1120 (9th Cir. 2004). (holding that a U.S. court lacked jurisdiction with respect to U.S. search engine’s declaratory judgment action against French anti-Nazi groups seeking to block French internet users’ access to racist web sites).

¹⁵¹ For more on the history of criminal offenses over the Internet and attempts to prevent and prosecute them, see Dawn C. Nunziato, *Technology and Pornography*, 2007 BYU L. REV. 1535 (2007). See also *infra* notes 152–153.

¹⁵² See, e.g., *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999) (enjoining a foreign corporation from operating or offering online gambling services).

¹⁵³ 31 U.S.C. §§ 5361–67 (2006).

effect on personal rights is proportionate to its benefits. In the U.S., for instance, the 3SP endangers freedom of speech, and so would likely be subject to strict scrutiny. Hence, it could be implemented only if it furthered a compelling state interest and was narrowly tailored to achieve that interest.¹⁵⁴ As mentioned above, this is not the case in the current 3SP model.

The 3SP attempts to succeed where other enforcement methods have failed. To achieve public deterrence of illegal file-sharing using the 3SP, the policy would have to be implemented and fully enforced. The main difference between the 3SP and earlier methods of enforcement regarding file-sharing, such as filing lawsuits against file-sharing companies or suing individual file-sharers, lies in the simplicity of the new policy. While other methods, such as filing lawsuits against individual users, might be costly and time-intensive, the 3SP policy could achieve its purpose from day one by sending a user notification, usually a simple and inexpensive action. At worst, after sending a user two prior notices, a quick judicial procedure is easier and cheaper than regular civil or criminal procedures. The question is whether achieving the goals of efficiency and deterrence is more important than preserving the individual rights discussed above.

To answer the normative question, I will compare the 3SP to other enforcement methods. The comparison will consist of enforcement methods, much like the 3SP, in which the main sanction imposed is depriving the user of access to the tool that was used to commit the wrong.

I start with an analogy to an older telecommunication device, the telephone. Telephones have become an integral part of our lives. Although used primarily for communicative activities, they can also be used to plan or commit crimes such as robbery, fraud, and harassment. Committing crimes using a telephone might cause the service to be suspended by either the phone company or by the court.¹⁵⁵ It seems that in this case, the criminal

¹⁵⁴ This refers to the possibility that the U.S. will implement a 3SP, while it must be compelling to describe the societal importance of the law, and must be a narrowly tailored means of furthering U.S. interests, as mentioned. Winkler, *supra* note 107, at 800.

¹⁵⁵ For example, a common carrier is authorized to terminate service based on criminal use of telephones: "When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency,

usage of the telephone causes a public risk and therefore the disconnection serves a public interest.

Peter Yu suggests another analogy of enforcement methods which is closer to the 3SP.¹⁵⁶ If a driver decides to drive his car while under the influence of alcohol, the driver might lose his license and face confiscation of the vehicle, even if he does not own it.¹⁵⁷ Those sanctions might be perceived as more severe than disconnecting a user from the Internet. Also, unlike the 3SP, which provides two warnings before imposing a sanction, this enforcement method is immediate.

It seems the main discussion as to whether the 3SP is appropriate regarding file-sharing circles around the implementation of the main principles that underlie similar sanctions in criminal law. In criminal law, legislators sometimes seek to prevent public hazards by enacting laws that might reduce a possible negative impact on society.¹⁵⁸ Take, for example, release conditions set by some U.S. courts for convicted sex offenders, which ban the offender's Internet access, usually for a limited period of time.¹⁵⁹ Such conditions must have a clear nexus to the underlying crime and involve “no greater deprivation of liberty than is reasonably necessary” to deter future criminal conduct, to protect the public” from further crimes

that such facility should not be discontinued or removed, or should be restored.” 18 U.S.C. § 1084(d) (1994). Needless to say, common carriers can usually terminate service where customers are in breach of contract.

¹⁵⁶ “To some extent, the threat of internet disconnection is similar to, and as effective as, the threat of suspension of a driver's license for drunk driving.” Yu, *supra* note 74, at 1381.

¹⁵⁷ In California, for example, if a driver is convicted of drunk driving the first time, his driver's license might be suspended up to 6 months; for subsequent convictions the duration of suspension may be longer. See CAL. VEHICLE CODE §23152 (a)-(b) for the offences and CAL. VEHICLE CODE § 13352 (a) for the penalties.

¹⁵⁸ See, e.g., 18 U.S.C. § 3583 (d)(1)-(2) (2008) (release conditions must entail “no greater deprivation of liberty than is reasonably necessary” to deter future crime, protect the public, and rehabilitate the defendant.). The release conditions are set to deter future crime; hence, they might reduce a possible negative impact on society.

¹⁵⁹ See *United States v. Thielemann*, 575 F.3d 265, 269 (3d Cir. 2009) (Thielemann was prohibited from “own[ing] or operat[ing] a personal computer with Internet access in a home or at any other location, including employment, without prior written approval of the Probation Office”); *United States v. Voelker*, 489 F.3d 139 (3d Cir. 2007) (overturning a lifetime ban to computers and the internet. However, the court indicated that a limited ban could be imposed in some circumstances); *United States v. Freeman*, 316 F.3d 386, 387 (3d Cir. 2003) (vacating the District Court's decision of supervised release condition by “failing to state the reasons for its special condition of supervised release and by imposing a condition that unreasonably impinges upon Freeman's liberty interests”); *United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999) (The court upheld a three-year ban that prohibited the defendant from using any “computer network, bulletin board, Internet, or exchange format involving computers” without prior permission).

by the defendant and “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”¹⁶⁰ In a recent case, a defendant pleaded guilty to one count of receiving child pornography over the Internet.¹⁶¹ The court upheld a ten-year special condition of supervised release that prohibited the offender from using the Internet without prior permission from a probation officer. The court concluded that a ten-year restriction on computer and internet use does not involve a greater deprivation of liberty than is necessary in this case.¹⁶² However, in a recent similar case, the same court held that a condition barring the offender from using any online computer service without the approval of the probation officer involves a greater deprivation of liberty than is reasonably necessary.¹⁶³ In sum, U.S. courts have weighed the liberty interests of the defendant against the interests of the state in ensuring public safety and rehabilitation, and have concluded that special conditions implicating First Amendment rights must be “narrowly tailored.”¹⁶⁴ However, in many cases, courts overturned decisions to suspend Internet access of convicted sex offenders, explaining that they are unreasonably excessive.¹⁶⁵

Although file-sharing might harm different business models of the media industry, it can hardly qualify as a public hazard,¹⁶⁶ and suspending Internet access does not benefit public safety. Hence, in file-sharing the restriction might not pass as constitutional. Therefore, in accordance with U.S. law, the fast-track judicial procedure in the French model misuses the internet-suspension sanction as a preventative method to deal with users while the rationale that stands behind it is clearly punitive. This strongly suggests that civil litigation is a more appropriate method of fighting against file-sharing, whether it achieves its purpose or not.

The analogies to criminal enforcement methods raise further questions regarding the role of the state in the 3SP. Usually the state does not take

¹⁶⁰ *Voelker*, 489 F.3d at 145 (citing 18 U.S.C. §§ 3583(d)(2), 3553(a)); For further information, see Recent Cases, *Criminal Law - Supervised Release - Third Circuit Approves Decade-Long Internet Ban for Sex Offender*, 123 HARV. L. REV. 776, 776 (2010).

¹⁶¹ *Thielemann*, 575 F.3d at 267.

¹⁶² *Id.* at 278.

¹⁶³ *Freeman*, 316 F.3d 386, at 391–92.

¹⁶⁴ See *Thielemann*, 575 F.3d at 273, 277; see also Recent Case, *supra* note 160, at 778.

¹⁶⁵ See, e.g., *United States v. Russell*, 600 F.3d 631, 637 (D.C. Cir. 2010) (vacating a thirty-year total ban on possessing or using computers for being “substantively unreasonable” and “aggressively interfer[ing] with the goals of rehabilitation” for a man convicted of soliciting a thirteen-year-old girl over the internet).

¹⁶⁶ However, in my opinion, in some cases file-sharing might be perceived as a public hazard, such as if it will bankrupt media industries and subsequently lead to massive job dismissals.

sides when it comes to copyright infringements on a non-commercial basis, meaning that the state does not take an active part pursuing the infringers. However, the 3SP contains a shift from civil litigation to criminal enforcement. When a jurisdiction adopts a 3SP regime similar to the French model, the state undertakes an active role in the pre-judicial allegations against users by creating a governmental body directed to deal with right holders' infringement allegations. Furthermore, the judicial procedure set in the French 3SP resembles criminal litigation much more than civil litigation, in the sense that in the 3SP, much like in criminal litigation, the state files charges against the user and not the right holder.¹⁶⁷

In my opinion, the 3SP is an inappropriate attempt to strengthen right holders' power over users. Furthermore, the 3SP might reshuffle and jeopardize the balance set in the copyright law regime between the interests of authors and those of the public by depriving users of the right to make fair use of copyrighted materials without the right holders' prior permission. On a more general note, it seems that policy-makers should not take an active role when it comes to copyright infringements on a non-commercial basis, especially not with criminally-based enforcement methods. Right holders still possess a variety of methods to fight against illegal file-sharing. If legislators wish to resolve the file-sharing struggle in a more proportionate manner, they should seriously consider either implementing a 3SP which only restricts file-sharing and not the whole usage of the Internet,¹⁶⁸ or better, consider new approaches, such as implementing a noncommercial use levy system, as suggested by William Fisher and Neil Netanel.¹⁶⁹

IX. CONCLUSION

Technological innovations have clearly enhanced media consumption,

¹⁶⁷ It is still unclear how this procedure will actually occur, since no allegations have as yet been filed against users under the French 3SP. Even if the right-holder will actually be the entity who files charges against the user, it seems that the automatic procedure of the 3SP and the fast-track judicial procedure reveal the true identity of what drives the procedure, i.e., the state. See Pfanner, *supra* note 42.

¹⁶⁸ Even though restricting only file-sharing might be a difficult task, mere administrative ease cannot justify the deprivation of a constitutional right. Cf. Frank E. Correll, Jr., *You Fall into Scylla in Seeking To Avoid Charybdis: The Second Circuit's Pragmatic Approach to Supervised Release for Sex Offenders*, 49 WM. & MARY L. REV. 681, 703–706 (2007); see also Recent Case, *supra* note 160, at 783.

¹⁶⁹ See Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J. L. & TECH. 1 (2003); WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT (2004).

partly due to Internet file-sharing. The sharing of files between users could promote freedom of speech and information. On the other hand, this flow of information may pose a real challenge to copyright holders' business models, creating a struggle between right holders, ISPs and file-sharers. After several attempts to resolve this struggle, the 3SP has emerged as a possible solution for the right holders, but not without a cost. Policymakers considering adopting a 3SP regime should consider these costs carefully. I, for one, would not advocate such a system.