

- Very Rough Draft -

## **THE FRENCH REVOLUTION 2.0: EXAMINING FILE-SHARING IN LIGHT OF THE THREE STRIKES POLICY**

Eldar Haber\*

### **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, several countries started debating the possible implementation of a *Three Strikes Policy* (3SP), which includes, *inter alia*, providing for the termination in appropriate circumstances of subscriptions and accounts of repeat infringers. This policy has thus far been implemented by way of legislation in Taiwan (2009), South-Korea (2009), France (2010) and United Kingdom (2010), and by means of private ordering in Ireland (2010), and is considered elsewhere. The 3SP is portrayed as the current panacea for Internet-related infringements.

This paper examines the legal and social implications of implementing the 3SP as a solution to copyright infringements thorough file-sharing. I discuss the potential impact on the right to privacy, due process rights and free speech. I will locate the 3SP within the emerging framework of Users' Rights and criticize it. After doing so, I propose my version of an improved 3SP, if indeed it is implemented. I note that the 3SP is an inappropriate attempt to strengthen right holders power over users and might reshuffle and jeopardize the balance set in copyright regime between the interests of authors and those of the public. Finally, I conclude that the 3SP is not a proper tool in order to resolve illegal file-sharing issues, thus, it is an inappropriate attempt to fight copyright infringements and should not be implemented anywhere, and certainly not yet.

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\* Ph.D. Candidate, Zvi Meitar Center for Advanced Legal Studies, Faculty of Law, Tel Aviv University. I would like to thank Michael Birnhack for his helpful comments and guidance. I would also like to thank the participants at the American University, Washington College of Law conference on *Public Interest Analysis of the Intellectual Property Enforcement Agenda* (June, 2010) for their helpful comments.

## I. Introduction

The emergence of the Internet opened a gateway to many intellectual property infringements. As technological innovations continue to evolve, the Internet has become easier to use for users around the globe. Technology holds many advantages. It allows, *inter alia*, 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 copyright holders. Accordingly, Internet file-sharing of copyrighted materials caused a struggle between right holders, Internet Service Providers (ISPs) and file-sharers. After several different attempts to resolve the struggle, several countries now consider the implementation of the so called Graduated Response or *Three Strikes Policy* (hereafter: 3SP),<sup>1</sup> which includes, *inter alia*, providing for the termination in appropriate circumstances of subscriptions and accounts of repeat infringers. This policy has thus far been implemented by way of legislation in Taiwan (2009), South-Korea (2009), France (2010) and United Kingdom (2010), and by means of private ordering in Ireland (2010), and is considered elsewhere. In a nutshell, the 3SP means that if a user is caught infringing copyrighted material over the Internet, three times within a limited time period, after receiving two prior notices, the user might be suspended from all domestic Internet access providers for a certain period of time.

In this paper, I examine the legal and social 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 frame enables us to realize that the 3SP is an inappropriate attempt to strengthen right holders' power over users that might reshuffle and jeopardize the balance set in the copyright law regime between the interests of authors and those of the public.<sup>2</sup> Furthermore, I will argue that the 3SP is inapplicable and is likely to be yet another downfall for the right holders.

Part II describes the 3SP in general and its implementation in France in particular, as the most applicable policy which was implemented so far, in that it sets a clearer image of how the policy would be implemented. Part III portrays 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 IV

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<sup>1</sup> Also known as the "Digital Guillotine". See: WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 11 (2009).

<sup>2</sup> For more on Users' Rights see: RAY L. 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).

discusses enforcement issues that are likely to arise in the implementation of the 3SP. Part V examines the possible 3SP success and highlights further implementation issues. Part VI outlines a revised and more proportionate 3SP model. The last Part summarizes the discussion and concludes that the 3SP is not a proper tool in order to resolve illegal file-sharing issues, thus, it an inappropriate attempt to fight copyright infringements and should not be implemented anywhere.

## 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, the 3SP has recently emerged as a possible panacea for dealing with copyright infringements. The policy received its name from an analogy to baseball, as each batter receives three attempts to strike the ball before he is out of the game.<sup>3</sup> The 3SP--in a different context--was first implemented in several U.S. States, such as California, as an attempt to deter from committing criminal crimes.<sup>4</sup> The Californian state law states that each person that will be convicted in a third offence (by certain classifications of different felonies), will receive a 25 years penalty, at least, regardless of the nature of the third offence. In relation to intellectual property, the 3SP has been thus far implemented in Taiwan,<sup>5</sup> South-Korea,<sup>6</sup>

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<sup>3</sup> 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. *See*: Kodi, *European ACTA Negotiators Reject "Three Strikes" Moniker*, DUGGBACK (2010), available at: [www.dugback.com/tech\\_news/ACTA\\_Negotiators\\_Reject\\_Three\\_Strikes\\_Moniker](http://www.dugback.com/tech_news/ACTA_Negotiators_Reject_Three_Strikes_Moniker).

<sup>4</sup> Cal. Pen. Code § 667.

<sup>5</sup> Article 90 quinquies Taiwanese Copyright Act. [Taiwan]

<sup>6</sup> Article 133bis of the Korean Copyright Act. [Korea]

France,<sup>7</sup> UK,<sup>8</sup> and to some extent in Ireland<sup>9</sup> and had thus far been rejected in Germany, Honk Kong, Spain and Sweden.<sup>10</sup>

Some countries, like New Zealand, are still considering the implementation of the 3SP quite favorably, while other countries are making use of similar methods without direct legislation. For example, in Australia<sup>11</sup> and Singapore<sup>12</sup> a user can be disconnected from the Internet in a judicial procedure regarding online copyright infringement. In the U.S, ISPs can disconnect users from the Internet, by relying on the DMCA's safe-harbor provisions,<sup>13</sup> which instructs 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*".<sup>14</sup> However, the implementation of this DMCA requirement had thus far been problematic due to the generality and rather vague section and therefore although it

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<sup>7</sup> Projet de loi favorisant la diffusion et la protection de la création sur Internet 2009. [France]

<sup>8</sup> Digital Economy Act of 2010, which modified the Communications Act, 2003 § 124a.

<sup>9</sup> The 3SP is now being implemented through private ordering as part of a settlement agreement between Eircom, the largest Irish ISP and the music industry. *See* EMI Records & Ors v. Eircom Ltd, [2010] IEHC 108, *available at*: [www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/7e52f4a2660d8840802577070035082f?OpenDocument](http://www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/7e52f4a2660d8840802577070035082f?OpenDocument).

<sup>10</sup> At first, a district court in Sweden indicated that the 3SP could definitely be appropriate to resolve file-sharing. Not longer after, the Swedish Minister of Justice and Culture published a public opinion piece setting out their forthcoming policy that explicitly excluded the three strikes model. *See*: Michael Geist, "*Three Strikes and You're Out*" *Policy Strikes Out* (2008), *available at*: [www.michaelgeist.ca/content/view/2851/135](http://www.michaelgeist.ca/content/view/2851/135).

<sup>11</sup> Copyright Act, 1968 § 116AH(1)(1) [Aust.]

<sup>12</sup> § 193DB(1)(b) [Sing.]

<sup>13</sup> 17 U.S.C. § 512(i).

<sup>14</sup> 17 U.S.C. § 512(i)(1)(A). The American ISP, Comcast, disconnected users according to the DMCA section and a stipulation from the terms of use indicating that: "It 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". *See*: [www.comcast.net/terms/use](http://www.comcast.net/terms/use). For this matter, some ISPs choose to include such paragraphs in their license agreements, like AT&T and Verizon, while other ISPs are avoiding this kind of private orderings. *See*: Chloe Albanesius, *Comcast, Others Deny "Three Strikes" Piracy Plan*, PCMag (Mar. 27, 2009), *available at*: [www.pcmag.com/article2/0,2817,2343977,00.asp](http://www.pcmag.com/article2/0,2817,2343977,00.asp). Also *see*: Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 24 OR. L. REV. (forthcoming 2010), *available at* [ssrn.com/abstract=1565038](http://ssrn.com/abstract=1565038).

usually exists in End Users' Licensing Agreements (EULA), it has rarely been used by the ISPs.<sup>15</sup>

In Ireland, the 3SP is now being implemented 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.<sup>16</sup>

Along the different local legislation and different versions of private ordering, we can also spot first signs of an attempt to require, on a global level, the implementation of a 3SP in local legislation. In 2007, an unofficial Anti-Counterfeiting Trade Agreement (ACTA) deliberation was leaked.<sup>17</sup> While the ACTA leaked document did not propose to force the countries to implement a 3SP, it encouraged them to do so in order to qualify for a safe-harbor provision.<sup>18</sup> On the other hand, in an official

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<sup>15</sup> See MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.10(A)(2). The writers claim that one is not an “infringer” for purposes of the repeat infringer's 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 Michael Murtagh, *The FCC, the DMCA, and Why Takedown Notices are Not Enough*, 61 HASTINGS L.J. 233, 259 (2009); Andres Sawicki, *Repeat Infringement in the Digital Millennium Copyright Act*, 73 U. CHI. L. REV. 1455 (2006). In the U.S. (20 U.S.C. §1092), 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 higher education facilities the participation in federal financial aid programs on certification that the participating institution has developed plans to effectively combat the unauthorized distribution of copyrighted materials. It seems that that HEOA was legislated based on a research indicating that one of the main groups which infringe copyright over the Internet is collage students. 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: Chris Hogg, *The Movie Industry That Cried Wolf: MPAA Admits Piracy Numbers Vastly Inflated*, DIGITAL JOURNAL (2008), available at: [www.digitaljournal.com/article/249246/The\\_Movie\\_Industry\\_That\\_Cried\\_Wolf\\_MPAA\\_Admits\\_Piracy\\_Numbers\\_Vastly\\_Inflated](http://www.digitaljournal.com/article/249246/The_Movie_Industry_That_Cried_Wolf_MPAA_Admits_Piracy_Numbers_Vastly_Inflated).

<sup>16</sup> The Irish court dismissed claims made by the Irish Data Protection Commissioner regarding the possible impact on user's right to privacy. See EMI Records, *supra* note 9.

<sup>17</sup> Anti-Counterfeiting Trade Agreement, informal draft (2010).

<sup>18</sup> “[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”. See Anti-Counterfeiting Trade Agreement, informal draft (2010); Michael Geist, *ACTA Internet Chapter Leaks: Renegotiates WIPO, Sets 3 Strikes as Model* (2010), available at: [www.michaelgeist.ca/content/view/4808/125](http://www.michaelgeist.ca/content/view/4808/125).

ACTA draft version published in April 2010, there was no example of such policy and instead it stated that at least one delegation of the ACTA (the text does not indicate which one) proposes to include language regarding "policy", in order to provide greater certainty that its existing national law complies with this requirement.<sup>19</sup>

This attempt emphasizes 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 take a turn against most *individuals* around the globe. However, the meaning of the two different ACTA versions is yet uncertain. If at first, the ACTA clearly stated that ISPs seeking immunity should implement a policy of Internet access suspension in cases of infringing activities, the current, official version requires only that a policy be implemented, but not necessarily a 3SP. The omission of the policy example can be interpreted in various ways, at least until there is an official or an inside explanation. One possible interpretation is that the current version allows flexibility and a wide margin of appreciation for each future member of ACTA to implement its own policies. Note that the original (leaked) text provided the 3SP as an example, rather than a binding policy. A second possible interpretation is less generous: that the intentions of the drafters are indeed to implement the 3SP and that the vague language is a deliberate strategy. In any case, the current text does not rule out the 3SP. 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 it will not support a mandatory 3SP,<sup>20</sup> it seems that such provisions could be a part of ACTA.

Thus, the 3SP has various manifestations and no one unified form. Here, I focus on the French 3SP as a leading example of how the 3SP can be implemented and enforced, if legislated globally. The French implementation is the most applicable model out of the four countries which have already implemented the policy, in that it sets a clearer blueprint of how the policy would be implemented. The discussion that follows, thus serves as a model for discussion and close examination.

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<sup>19</sup> Anti-Counterfeiting Trade Agreement, consolidated text prepared for public release (2010).

<sup>20</sup> "...Considers that in order to respect fundamental rights such as freedom of expression and the right to privacy, with full respect for subsidiary, the proposed Agreement must refrain from imposing any so called "three strikes" procedures, in full respect of the decision of Parliament on article 1.1b in the Directive 2009/140/EC that calls to insert a new para (3) a to article 1". See David Meyer, *Europe "Will Not Accept" Three Strikes in ACTA Treaty*, ZDNET (Feb. 26, 2010), available at: [news.zdnet.co.uk/communications/0,1000000085,40057434,00.htm](http://news.zdnet.co.uk/communications/0,1000000085,40057434,00.htm). Also see [christianengstrom.files.wordpress.com/2010/03/common-resolution-acta-final-8-march-2010.doc](http://christianengstrom.files.wordpress.com/2010/03/common-resolution-acta-final-8-march-2010.doc).

France is one of the first countries which began searching for a legislative solution to Internet illegal file-sharing. 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 DRM.<sup>21</sup> The new law entitled DADVSI (Loi sur le Droit d'Auteur et les Droits Voisins dans la Société de l'Information), indicates that Internet filtering should be applied in order 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 this was not enough for the policy makers. The French government continued its search for a more practical solution to the illegal file-sharing problem. In November 2007, after much deliberation, the French government, the copyright industry and French ISPs signed the *Elysée Agreement*.<sup>22</sup> The French government has committed to enact anti-piracy legislation instituting the 3SP and soon after, it did.

The French government proposed a new law entitled *a Law Promoting the Distribution and Protection of Creative Works on the Internet*, i.e., *Creation and Internet Act (Loi favorisant la diffusion et la protection de la création sur Internet)*, which implements the 3SP. The new law was passed by the French National Assembly on May 12, 2009 and was approved by French Senate the day after. However, on June 10, 2009, the Constitutional Council declared that the law is unlawful since the French Constitution lists freedom of communication and expression as a basic human right and that the presumption of innocence prevails, thus, the sanctions under the law can only be imposed in a judicial procedure.<sup>23</sup> 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.<sup>24</sup>

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<sup>21</sup> 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).

<sup>22</sup> Winn & Jondet, Id. at 562.

<sup>23</sup> See *CC decision no. 2009-580DC*, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE (July 10 2009), available at [www.conseil-constitutionnel.fr/decision.42666.html](http://www.conseil-constitutionnel.fr/decision.42666.html) [French].

<sup>24</sup> 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), available at: [www.lexpress.fr/actualite/high-tech/HADOPI-couacs-autour-de-la-petition-des-10-000-artistes\\_754193.html](http://www.lexpress.fr/actualite/high-tech/HADOPI-couacs-autour-de-la-petition-des-10-000-artistes_754193.html) [French].

The Creation and Internet Act formed a regulatory authority named HADOPI,<sup>25</sup> which replaced the ARMT and from now on 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 that 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 alleged infringement details, *i.e.*, of the protected work that was allegedly infringed. HADOPI will then notify the user's ISP and the ISP will send a first notice to the user by e-mail suggesting the user to cease any illegal activity, indicating the exact time and date of the alleged infringement. If HADOPI receives a second infringement notice of infringements made by the same IP address within a six months 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 case of a third notice referring to the same IP within a one year period following the second notice, charges will be filed against the user in a special judicial procedure held by a single judge.<sup>26</sup> The judge has the authority to fine the user and/or to suspend his or her Internet access for two months and up to one year.<sup>27</sup>

There are yet no reported cases of disconnecting users according to the French or any other 3SP.<sup>28</sup> Accordingly, there is yet 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. Pros & Cons

The general structure of the 3SP in the various jurisdictions where it has already been implemented is similar: If a user is caught infringing

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<sup>25</sup> 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).

<sup>26</sup> 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.

<sup>27</sup> The user will be black-listed 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 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.

<sup>28</sup> See e.g., in France: 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](http://www.nytimes.com/2010/07/19/technology/internet/19iht-CACHE.html?_r=1&ref=music). See in South-Korea: Heesob Nam, *Three Strikes Rule: Sleeping for Seven Months*, HEESOB'S IP BLOG (March 9, 2010), available at: [hurips.blogspot.com/2010/03/three-strikes-rule-sleeping-for-seven.html](http://hurips.blogspot.com/2010/03/three-strikes-rule-sleeping-for-seven.html).



copyrighted material three times within a limited time period without the right holder's permission, the user might be cut-off from all domestic Internet access providers for a certain period of time. In order to assess whether the 3SP should be implemented as a global solution to illegal file-sharing, I examine its main pros and cons.<sup>29</sup> I will begin by describing the benefits and drawbacks that the 3SP might have on right holders, ISPs and users, and use it to examine whether the current 3SPs deal with the drawbacks in a satisfactory manner.

#### A. Pros

The 3SP is yet another attempt to deter Internet users who download copyrighted materials without permission. For many of us, the Internet became an integrated part of our lives. Through the Internet, we are able to make a world of activities, *inter alia*, communicating, socializing, creating new works of authorship, purchasing and acquiring various goods and services, studying and researching, or just having a good time. Thus, the Internet has become an important tool for many and preventing the usage of this tool might seem a bit harsh and unlikely to them. Therefore, threatening to disconnect users from the Internet might be an effective method of intimidation that might actually work.<sup>30</sup>

From the right holder's point of view, the 3SP might reduce and even eliminate file-sharing of copyright materials, therefore increase profits. If the 3SP is implemented extensively and enforced, users might actually be concerned of being disconnected from the Internet, hence desisting illegal activities in relation to online copyrighted materials. 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

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<sup>29</sup> For a general discussion regarding the benefits and drawbacks of the 3SP, *See*: Peter Yu, *The Graduated Response*, 62 FLORIDA L. REV. 1, 8 (forthcoming 2010), available at: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1579782](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579782).

<sup>30</sup> *See* for example the following study which was conducted in England. The study shows that 70% of the users that will receive a first notice to stop illegal file-sharing, will actually do so for at least 6 months, and that 16% will stop their actions after the second notice. *See*: Barry Sookman & Dan Glover, *Graduated Response and Copyright: An Idea That Is Right for the Times*, THE LAWYERS WEEKLY (Jan. 2010). Yu, *Id.* at 6.

purpose,<sup>31</sup> the 3SP litigation is a relatively fast and cheap method which could achieve its purpose by sending a simple e-mail.

The strategies conducted by the right holders in order to prevent illegal file-sharing over the Internet should be examined so to find out which strategy leads to an optimal cost reduction, meaning, identifying the cheapest cost avoider which can prevent the damage at the lowest cost overall and therefore should take action.<sup>32</sup>

A first strategy employed by the right holders was to sue ISPs for direct liability, but was proven unsuccessful.<sup>33</sup> A second strategy, applied also in *Netcom*, was to sue the ISPs for secondary liability (contributory infringement, vicarious infringement or inducement), due to the fact that they seemed as the cheapest cost avoiders. The right holders estimated that if file-sharing networks are outlawed, Internet users would cease their unlawful behavior regarding file sharing of copyrighted materials. Although it might be appropriate to impose liability in certain cases in which the intermediary is directly involved in the misconduct, e.g. *Napster*<sup>34</sup> or knowingly induced infringement, new P2P technologies made it difficult to detect the misconduct and prevent it and therefore should not directly be held liable.<sup>35</sup>

After some limited success and a greater failure in civil litigations against ISPs, the right holders turned to prosecute the users with a direct

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<sup>31</sup> 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 cease filling new lawsuits against them. See L. Raine & M. Madden, *The Impact of Recording Industry Suits Against Music File Swappers* (2004), available at: [www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Society\\_and\\_the\\_Internet/pew\\_Internet\\_music\\_downloads\\_010504.pdf](http://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 (December 19, 2008), available at: [news.cnet.com/8301-1023\\_3-10126914-93.html](http://news.cnet.com/8301-1023_3-10126914-93.html).

<sup>32</sup> 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 ECONOMICS 1, 43 (2008), available at: [www.bepress.com/cgi/viewcontent.cgi?article=1214&context=gwp](http://www.bepress.com/cgi/viewcontent.cgi?article=1214&context=gwp).

<sup>33</sup> *Religious Technology Center v. Netcom On-Line Communications Service*, 907 F. Supp. 1361 (1995).

<sup>34</sup> See *A&M Records Inc. v. Napster Inc.*, 239 F.3d 1004 (9th Cir. 2001).

<sup>35</sup> A proper determination requires not only that the gatekeepers be able to detect offenses, but they also be able to detect and prevent them economically. See Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 259 (2005).

liability accusation.<sup>36</sup> Although civil litigation against file-sharing users succeeded in many cases, the problem for the right holders has not been resolved yet, as illegal file-sharing continues.

Thus, the owners started to search for another method, such as the 3SP. A brief and sketchy economic analysis regarding the 3SP compared to other methods can highlight the novelty of the 3SP. In order to achieve economic efficiency, it is important to identify the action that will lead to an optimal cost reduction, resulting in spotting the cheapest cost avoider and imposing liability on it. The 3SP is an enforcement model that perceives imposing certain rules on the ISPs as an optimal cost reduction method. However, liability rules might not be enough for the model to succeed. For that, users will have to be deterred, thus, stopping or at least reducing illegal file-sharing of copyrighted materials. The 3SP may be the optimal cost reduction method if user's behavior alters without the usage of massive lawsuits. However, a model which seeks an optimal cost reduction, might be more effective against the ISPs, other than users, and stricter liability rules applied on them might actually achieve right holders goals, but not without a cost from society. In some cases misconduct can be sanctioned most effectively through the indirect imposition of liability on intermediaries.<sup>37</sup> 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.<sup>38</sup>

The 3SP might be perceived as beneficial for the ISPs as well. ISPs, who 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.<sup>39</sup> Although Internet access providers usually serve as mere conduits and therefore enjoy immunity and are not held accountable for their subscribers' actions,<sup>40</sup> the 3SP insures them full immunity if they comply with the law, by using safe harbor provisions. This is an important

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<sup>36</sup> See for example in the U.S.: *Sony BMG Music Ent. v. Tenenbaum*, No. 07-cv-11446-NG (D. Mass. 2008); *Capitol Records, Inc. v. Thomas-Rasset*, No. 06-1497 (D. Minn. 2009); *Maverick Recording Co v. Harper* No: 08-51194 (February 25, 2010).

<sup>37</sup> Mann & Belzley, *Id.* at 258. For a general discussion see: 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).

<sup>38</sup> Mann & Belzley, *Id.* at 286.

<sup>39</sup> See for example *A&M Records*, *supra* note 34.

<sup>40</sup> See in the U.S.: 17 U.S.C. § 512(k)(1)(A); in Europe: see Articles 12-13 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

matter in countries which do not provide immunity or safe harbor provisions for ISPs, much like those set by the DMCA.<sup>41</sup> Therefore, ISPs will be able to allocate more funds to improve services and infrastructure or reduce fees.<sup>42</sup>

There are also potential financial benefits. Many users which 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, in which they have to allocate funds and labor as part of the civil litigation process against those users. Although usually the ISPs can disconnect users from the Internet without a 3SP, applying contractual stipulations, it will be perceived more legitimate to disconnect users due to legislation and may result in financial benefits for the ISPs as mentioned.<sup>43</sup> 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 of problematic users without the possible outcome of been portrayed as the "bad guys".

At first glance it seems that the 3SP does not benefit users, as it increases enforcement and limits their ability to share copyrighted material. 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.<sup>44</sup> Consider for example civil litigation against individual file-sharers in the U.S., which started soon after the right holder's realized that filing lawsuits against file sharing companies (e.g. Napster) became more difficult due to new technologies that allow substantial non-infringing uses of those software (e.g., p2p).<sup>45</sup> The industry's policy of suing individual file-shares was harmful to users for several reasons: Many users received false

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<sup>41</sup> Yu, *supra* note 29.

<sup>42</sup> Although the mentioned funds will not necessarily be directed for these purposes. See 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). Yu, *Id.* At 8.

<sup>43</sup> For general discussion see NIMMER ON COPYRIGHT, *supra* note 15 at § 12B.10[B][3][b].

<sup>44</sup> See Fred von Lohmann, *RIAA v. The People Turns from Lawsuits to 3 Strikes*, EFF (Dec. 19, 2008), available at: [www.eff.org/deeplinks/2008/12/riaa-v-people-turns-lawsuits-3-strikes](http://www.eff.org/deeplinks/2008/12/riaa-v-people-turns-lawsuits-3-strikes); Yu, *supra* note 29, at 11.

<sup>45</sup> After several different lawsuits involving file-sharing technologies of companies such as: Napster, KazaA and Grokster, new technologies like the Bittorrent protocol emerged and made prosecution more difficult. For the principle of substantial non-infringing use, see *Sony Corp. of America v. Universal City Studios Inc.*, 464 U.S. 417 (1984). The main litigation against file sharing companies is *A&M Records., Supra* note 34; *MGM, Inc. v. Grokster, Inc.* 545 U.S. 913 (2005).

accusations;<sup>46</sup> some users were asked to pay huge amounts of money, while others settled for less.<sup>47</sup> For the industry, suing its own (past, present or potential) customers might have been a public relations nightmare.

However, unlike regular civil law suits filed against users globally, the 3SP does not fall out of the blue on users: disconnecting a user is the last (third) resort, after two warnings, meaning that users have time to consider the possible consequences of their actions. This matter is important to the discussion regarding the proportionality of the 3SP.<sup>48</sup> Despite the fact that several litigation processes in the past began with a warning letter, many other users did not receive a fair warning before being sued. The 3SP seems to avoid such difficulties, as it warns the public prior to any actual sanction and promotes global intellectual property awareness (at least the industries' view). Moreover, the user's identity is not revealed to the right holder, unlike the prior civil litigation. This might enhance the users' anonymity and privacy, at least as long as the user's information is revealed only to the ISPs (and in France, to HADOPI), and is not misused.

Moreover, from a legitimate user's point of view, the 3SP may enhance and improve Internet connection. Downloading large-scale files over the Internet - an action made many times by illegal file-sharers - might slowdown Internet traffic for all users of the same ISP. If the 3SP dramatically downsizes illegal file-sharing, it would also reduce network congestions to all users.<sup>49</sup>

Therefore, the 3SP has many pros. First, it can actually resolve a real problem for the right holders which struggle to find a solution to Internet illegal file-sharing. Second, it may assist the ISPs with establishing clearer legal boundaries where those do not exist and aid them in allocating more funds to enhance and improve Internet services and infrastructures.

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<sup>46</sup> See Greg Sandoval, *Grandma endures wrongful ISP piracy suspension*, CNET (2010) available at: [news.cnet.com/8301-31001\\_3-10444879-261.html?tag=newsLeadStoriesArea.1](http://news.cnet.com/8301-31001_3-10444879-261.html?tag=newsLeadStoriesArea.1); John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either*, N.Y. TIMES (Sept. 25, 2003), available at: [www.nytimes.com/2003/09/25/business/media/25TUNE.html](http://www.nytimes.com/2003/09/25/business/media/25TUNE.html); Jared Moya, *UK P2P Game Crackdown Catches Non-Gaming Elderly Couple*, ZEROPAID (2008) available at: [www.zeropaid.com/news/9826/uk\\_p2p\\_game\\_crackdown\\_catches\\_nongaming\\_elderly\\_couple](http://www.zeropaid.com/news/9826/uk_p2p_game_crackdown_catches_nongaming_elderly_couple).

<sup>47</sup> See for example *Capitol Records, Inc. v. Thomas-Rasset*, No. 06-1497 (D. Minn. 2009); *Sony BMG Music Ent. v. Tenenbaum*, No. 07-cv-11446-NG (D. Mass. 2008); *Maverick Recording Co v. Harper* No: 08-51194 (February 25, 2010).

<sup>48</sup> The proportionality principle acquires a constitutional meaning under the European Union and other countries around the world. In the U.S., the proportionality principle arises usually by a court reviewing a federal law, while a constitutional right might be infringed. The Federal law must be justified by a compelling governmental interest and be narrowly tailored to achieve that goal or interest, i.e., be proportionate. See: *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

<sup>49</sup> Yu, *supra* note 29, at 9.

Moreover, the 3SP may actually benefit Internet users as they are better warned before any actual sanction is taken and network congestions might be reduced, providing faster and better connections for all users.

## B. Cons

The 3SP may actually serve its purpose and reduce illegal file-sharing over the Internet. Although achieving this purpose may be important, it might also take a heavy toll from society as a whole and from individual users. I will now turn to examine the 3SP cons from two perspectives: the ISPs and the users, while emphasizing the legal aspects that the model raises.

I begin with a general comment regarding a possible drawback that might arise for the right holders. From some right holders' and artists' point of view, the 3SP could harm their business models, much like any policy that will eliminate file-sharing. Although it is usually perceived that right holders are 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 a broader exposure, thus, expanding their audience and therefore may increase concert ticket sales and other merchandise.<sup>50</sup> While it seems that the 3SP will not affect those artists, which will not contact HADOPI for infringements, a possible *chilling effect* of file-sharing network might still occur due to public deterrence from being suspended from the Internet, meaning that users will be afraid to use file-sharing networks, regardless of the shared materials.<sup>51</sup> Therefore, the 3SP might endanger the usage of such networks that might actually contribute to some right holders and artists.

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<sup>50</sup> See for example, Radiohead's attempt to release their 7<sup>th</sup> album – "In Rainbows" through their own website ([www.inrainbows.com](http://www.inrainbows.com)), while every user could download the album for free, and decide later whether he would like to pay the band for its usage. See Mike Masnick, *Radiohead Tells Fans To Name Their Own Price For Latest Album Downloads Gives Them A Reason To Pay*, TECHDIRT (2007), available at: [www.techdirt.com/articles/20070930/214524.shtml](http://www.techdirt.com/articles/20070930/214524.shtml); *Radiohead Publishers Reveal "In Rainbows" Numbers*, ROLLINGSTONE (2008), available at: [www.rollingstone.com/rockdaily/index.php/2008/10/15/radiohead-publishers-reveal-in-rainbows-numbers/](http://www.rollingstone.com/rockdaily/index.php/2008/10/15/radiohead-publishers-reveal-in-rainbows-numbers/). More artists have 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, therefore, usually receive only a small percentage of the profits. See, for example, Courtney Love, *Courtney Love does the math*, SALON (Jun 14, 2000), available at: [www.salon.com/technology/feature/2000/06/14/love/index.html](http://www.salon.com/technology/feature/2000/06/14/love/index.html).

<sup>51</sup> This could be resolved, at least partly, if artists that seek to make usage of file-sharing networks, will differentiate their shared files by using certain symbols, such as naming legal-files differently. However, users' deterrence might still occur, due to the uncertainty of the content and legal statuses of the files.

From the ISPs point of view, the model surely has some drawbacks. In order 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.<sup>52</sup> The French law tries to reduce the financial burden laid on ISPs by charging the suspended subscriber fully for the duration of suspension. As this action might compensate ISPs, I am uncertain that it will be enough. The ISPs' expenses will probably be much higher than users' subscription payments, due to the fact, *inter alia*, that 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 implementations of the new policy. The intermediary tasks that the law imposes - searching and matching IP addresses to users, sending notices etc. - also have their administrative costs. The ISPs might choose to roll over those costs onto the users, by increasing subscription fees, an action that might harm both the ISPs and users.<sup>53</sup>

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 providers. While a user that will be struck-out 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 those ISPs who act as different service providers, 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 different rights including, *inter alia*, the right to privacy, due process rights, free speech, and users' rights in copyright regime. I briefly point out the main concerns regarding the negative impact on those rights in the 3SP.

A negative impact on the right to privacy,<sup>54</sup> in countries where privacy is protected,<sup>55</sup> might occur due to the fact that the implementation of the 3SP requires some sort of monitoring of user activists in order to

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<sup>52</sup> See Generally, Yu, *supra* note 29, at 13.

<sup>53</sup> 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.

<sup>54</sup> See Generally, Yu, *supra* note 29, at 18.

<sup>55</sup> The right to privacy has different global definitions. In U.S. law, for example, certain aspects of the right to privacy are protected by the Fourth Amendment and by specific legal regulations, such as the Children's Online Privacy Protection Act of 1998 (COPPA). The right to privacy is also part of many European constitutions, for example, section 13 of the Swiss Constitution; section 10 of the German Federal Constitution; sections 3 and 6 of chapter B in the Swedish Constitution, as well as several human rights conventions: the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) adopted in Rome on 4 November 1950, and declarations such as the Universal Declaration of Human Rights, 1948, in section 12.

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 their copyrighted works over the file-sharing networks. After locating the alleged infringements, they would usually apply for a subpoena to reveal the true identity of the file-sharer in order to file a civil lawsuit against him or her.<sup>56</sup> Much similar, in the French model, a right holder locates its material in the same manner and then contacts HADOPI with details, such as the user's IP and alleged infringement nature. After that, HADOPI contacts the ISP to unmask the user's identity and send him or her proper notice.

The Internet is built from information pipes which are considered "dumb", while the brain lies at the ends.<sup>57</sup> Each computer that connects to the Internet is assigned with a digital identification known as Internet Protocol (IP) address. The IP address is represented in dot-decimal notation, thus ranging from 0 to 255 and separated by dots, e.g. 123.45.67.89. The unique nature of the Internet allows users to browse through the Internet with certain anonymity that contributes to pluralism, hence, enhancing the advancement of freedom of speech.<sup>58</sup>

Where does it leave us? If the 3SP will only use this method to locate infringing uses, it seems legitimate, in a sense that it may be proportionate in its implementation, similar to the situation prior to the 3SP, and might even be better than regular civil litigation, since the right holder has no knowledge of the user's identity.<sup>59</sup> In particular, it seems that the right to privacy in this matter will not be jeopardized.<sup>60</sup> That is due to the fact that the impact on privacy is not very strong and might qualify as a

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<sup>56</sup> See: 17 U.S.C. § 512(h). Note that this matter is not always easy for courts to decide on, e.g., the fact that 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]; Lyrrisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537 (2007).

<sup>57</sup> The infrastructure is usually referred as "E2E" (End to End). For more information see: Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001).

<sup>58</sup> Although some claim that the right that users give up their right to privacy over the Internet. See Sun Micro-Systems chief executive officer, Mr. Scott McNealy, at: Polly Sprenger, *Sun on Privacy 'Get Over It'*, WIRED (1999), available at: [www.wired.com/politics/law/news/1999/01/17538](http://www.wired.com/politics/law/news/1999/01/17538) (1999).

<sup>59</sup> See e.g., *London Sire Records, Inc. v. Doe 1*, 542 F.Supp.2d 153, 160 (D. Mass. 2008).

<sup>60</sup> IP address could sometimes be defined as personal data and therefore could be protected by different legislation, but even so, it seems that the right to privacy in this matter will not be jeopardized. See in Europe, for example, the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in article 2.



necessary measure to protect the rights of the holders.<sup>61</sup> However, this is only true for the current methods which are used to locate illegal file-sharing. If the right holders undertake those methods a step further and require ISPs to actively monitor their users' actions, on their behalf, the privacy implications might alter. Furthermore, if HADOPI will make further use of their retrieved information regarding those users, their right to privacy might actually be jeopardized, due to the fact that it might undertake our general right to preserve our surroundings, i.e., our thoughts, our secrets, our feelings and our identity.

Due process rights might also be impacted. The 3SP creates a certain shift in the copyright regime, from civil litigation to criminal enforcement. If thus far the right holder usually filed lawsuits against the users in order to receive remedies and maybe to deter other users, the 3SP provides the state with a legitimate authority to prosecute users, raising the bar on public intimidation. This is somewhat troublesome. If legislators seek to alter the copyright regime into a criminal area, and some have already done so,<sup>62</sup> they ought to preserve basic rights that defendants receive in criminal litigation. Hence, if the 3SP is implemented, every user should enjoy due process rights which differs in different countries,<sup>63</sup> but usually hold rights such as the right to be notified when he or she is charged with an offence and to receive full details regarding that offence; the right to be heard in trial and the right to insure that his or her claims

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<sup>61</sup> 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 as a necessary measure. 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. *See* the European Data Protection Supervisor (EDPS) opinion on the negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA), *available at*: [www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2010/10-02-22\\_ACTA\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2010/10-02-22_ACTA_EN.pdf).

<sup>62</sup> *See e.g.*, in the U.S., the No Electronic Theft ("NET") Act of 1997, codified as 17 U.S.C. §§ 101, 506, 507 and 18 U.S.C. §§ 2319, 2319a, 2320.

<sup>63</sup> In the U.S., for example it is protected by the Fifth and Fourteen Amendments, and was reapproved by the court in *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). In Europe, The European Directive (2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services OJ L 108/33 24.4.2002) states that every access termination to the Internet may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and 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.

will be taken in consideration in court sentencing.<sup>64</sup> Moreover, the 3SP must respect the presumption of innocence.

It seems that under the 3SP, these rights are 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 could not count as a judicial process. Moreover, the fast-track judicial process in France is not necessarily adequate and does not necessarily comply with the presumption of innocence,<sup>65</sup> due to the fact that under the 3SP, the user is considered guilty unless proven otherwise, not always a simple task, which might prove to be a real burden on users and might lead to false accusations, and therefore might not be proportionate in its implementation.<sup>66</sup>

Another endangered right under the 3SP, is freedom of speech.<sup>67</sup> Due to the important role the Internet plays in our lives,<sup>68</sup> suspending access to the Internet might be a real burden on users. The right of acquiring Internet access is sometimes considered an independent legal

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<sup>64</sup> See James R. Maxeiner, *Practical Global Civil Justice: Decisions According to Law in the United States, Germany, Korea; Chapter 6 - Process: The Right to Be Heard* (February 5, 2010), available at: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1506547](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1506547).

<sup>65</sup> Sometimes considered as a constitutional right, for example in the U.S. (U.S. CONST. amend. XIV), and also regarded as one by courts. See: *Coffin v. U.S.* 156 U.S. 432, 453 (1895).

<sup>66</sup> Yu, *supra* note 29, at 18. It is noted that the presumption of innocence, like any other right, can be violated usually when it is proportionate to achieve an important goal. It is sometimes in use regarding enforcements issues of criminal behavior, usually related to traffic control, such as traffic enforcement camera systems which are set to detect traffic regulation violations, including speeding, vehicles going through a red traffic light, unauthorized use of a bus lane, etc. in this case, the vehicle owner will receive a fine notice, meaning that he was found guilty, and he must pay all such fines regardless of whether he was driving at the time of the offense. Also, much like the traffic enforcement controversy, the burden on users to prove their innocent is not an easy task. Take for example a user that was disconnected from Internet service due allegedly to illegal file-sharing. That user appeals and the burden of proof is now on her. This is no easy task. That user has to prove that the downloadable file, if such even exists, was lawfully downloaded. There could be many different scenarios which 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 provide the user with the proper tools handling this task.

<sup>67</sup> Yu, *Id.* at 18.

<sup>68</sup> See e.g., a global poll conducted by GlobeScan for the BBC, finding 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." See [news.bbc.co.uk/2/shared/bsp/hi/pdfs/08\\_03\\_10\\_BBC\\_Internet\\_poll.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/08_03_10_BBC_Internet_poll.pdf).

right, or at least an important one.<sup>69</sup> Moreover, even if Internet connection does not enjoy the status of a legal right, freedom of speech usually does. As the Internet serves as a somewhat anonymous field, where users can exchange opinions without the fear of being detected by others, Internet suspension might limit their opportunities, inhibit their ability to fulfill themselves as individuals and therefore might impact free speech and access to knowledge and be perceived as disproportionate. Furthermore, the 3SP in its current manifestation is not implemented in furtherance of a compelling state interest and definitely not narrowly tailored to achieve its interest.<sup>70</sup>

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-holders' prior permission, such as the fair use defense,<sup>71</sup> and the use of materials that are in the public domain. As to the latter, the 3SP should not usually create a big problem. However, fair use is a different issue. The different position between right holders and users might take a turn for the worse in this case. *First*, the 3SP does not include an examination of the different alleged copyright infringements. When a right holder notifies HADOPI of an alleged infringement, a notice to the user is sent, without any 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 and in

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<sup>69</sup> See for example, amendment 138/46 of the Telecoms Package in Europe (Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services OJ L 108/33 24.4.2002) in section 3(a): "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 was never declared as a legal right, Congress allocated funds for broadband expansion across America. See U.S. Dept. of Commerce Nat'l Telecomm. & Info. Admin., Broadband Technology Opportunities Program (BTOP), available at [www.ntia.doc.gov/broadbandgrants](http://www.ntia.doc.gov/broadbandgrants). The government of Finland, for example, officially made having Internet connections a legal right for Finnish citizens, see: Gordon Aldridge, *Finland: Internet Connection Made a Legal Right*, iNEWP (July 1, 2010), available at: [inewp.com/?p=3466](http://inewp.com/?p=3466).

<sup>70</sup> For more on the importance of anonymous speech see *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). For more regarding "strict scrutiny", see *Widmar v. Vincent*, 454 U.S. 263 (1981).

<sup>71</sup> See in the U.S.: 17 U.S.C § 107.

particular the fair use defense. Therefore, many users who will receive a notification might cease all file-sharing actions, although at least some of those actions are fair uses. In other words, the 3SP does not allow sufficient breathing space for the fair use defense and thus might be overbroad and create a chilling effect.<sup>72</sup>

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 definitely not that obvious. Moreover, the two warnings users receive prior to any sanction given, will also be problematic for user's rights due to similar reasons. If a user will receive warnings, he or she might not act against them, i.e., try to cancel them, although the actions may be 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. Therefore, I believe 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.

Therefore, along with its pros, the 3SP has many cons. First, it can actually resolve illegal file-sharing problem, but at the same time harm artists that benefit from those activities. Second, it might impose obligations on the ISPs which will force them to undertake structural and financial changes, while allocating human resources to deal with right-holders' claims. Moreover, the 3SP might impose a new role on ISPs which they did not apply for, thus, putting them in an ambivalent position, causing financial ramifications. Also, the 3SP might have dramatic impacts on different rights including privacy, due process rights, free speech and users' rights in copyright regime, thus, reshuffling the balance set in copyright regime between the interests of authors and those of the public.

Putting aside the debate regarding the 3SP pros and cons, enforcement issues of the 3SP might jeopardize its success.

#### IV. 3SP Enforcement

The 3SP raises some questions as to its enforcement. If the 3SP is inapplicable to begin with, it should not be applied at all. Although it will take some time until we can analyze the success or failure of the different 3SPs which have already been implemented in various jurisdictions and in

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<sup>72</sup> 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).

various forms, here I wish to point out 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: one, ex ante, users can either avoid getting caught by the right holders, ISPs and the regulatory authorities and second, ex post, they can even surpass the Internet suspension sanction.

##### i. Avoid Detection

There are two main methods that might be used in order to avoid detection of downloaded materials. 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 those users, right holders connect to a p2p network and search for their copyrighted materials. When detecting such materials which are downloadable without permission, they simply track the user's IP address. However, the Internet is packed with different ways to make usage of copyrighted materials other than file-sharing networks.<sup>73</sup> Using other methods of downloading and data consumption, such as websites that offer streaming of copyrighted materials, access to copyrighted materials,<sup>74</sup> instant messaging and chat softwares,<sup>75</sup> will make enforcement much more difficult for the right holders to detect illegal file-

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<sup>73</sup> See *How To Not Get Sued for File Sharing*, EFF (2006), available at: [www.eff.org/wp/how-not-get-sued-file-sharing](http://www.eff.org/wp/how-not-get-sued-file-sharing). 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. The second method, known as Protocol analysis, uses an application or piece of equipment monitors traffic passing through the network and inspects the data payload of the packets according to some previously defined P2P application signatures. 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. See *Identifying P2P users using traffic analysis*, SYMANTEC (2005), available at: [www.symantec.com/connect/articles/identifying-p2p-users-using-traffic-analysis](http://www.symantec.com/connect/articles/identifying-p2p-users-using-traffic-analysis).

<sup>74</sup> E.g., Rapidshare & MegaUpload.

<sup>75</sup> E.g., Usenet or Internet Relay Chat (IRC).

sharing made by end-users and might be proven inapplicable.<sup>76</sup> The cat and mouse wars of copyright owners and users over the past 15 years teach us this lesson.

Second, as technology never ceases to evolve, users can make use of different technologies that allow them to encrypt their actions or their Internet identity (IP address) using various methods, and thus avoid getting caught.<sup>77</sup> 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 likely to continue—reported incidents of false accusations. A 53 year-old American user was accused of downloading copyrighted television series such as South Park, while been the only user of her home network and not having any actual knowledge of file-sharing at all.<sup>78</sup> The RIAA sent legal notices to people who were deceased during the alleged infringements took place.<sup>79</sup>

Therefore, current copyright infringements detection methods will be obsolete and might 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.

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<sup>76</sup> A recent research conduct in Rennes, France, indicated that the 3SP did actually reduce the usage of file-sharing softwares but enhanced the usage of other methods. See Nate Anderson, *Piracy up in France after tough three-strikes law passed*, ARSTECHNICA (2010), available at: [arstechnica.com/tech-policy/news/2010/03/piracy-up-in-france-after-tough-three-strikes-law-passed.ars?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=rss](http://arstechnica.com/tech-policy/news/2010/03/piracy-up-in-france-after-tough-three-strikes-law-passed.ars?utm_source=rss&utm_medium=rss&utm_campaign=rss). For the research findings see (in French): [recherche.telecom-bretagne.eu/marsouin/IMG/pdf/NoteHADOPix.pdf](http://recherche.telecom-bretagne.eu/marsouin/IMG/pdf/NoteHADOPix.pdf).

<sup>77</sup> See e.g., Itshidden.com website or Peerguardian software.

<sup>78</sup> See Greg Sandoval, *Grandma endures wrongful ISP piracy suspension*, CNET (2010), available at: [news.cnet.com/8301-31001\\_3-10444879-261.html?tag=newsLeadStoriesArea.1](http://news.cnet.com/8301-31001_3-10444879-261.html?tag=newsLeadStoriesArea.1). In Boston, a 66 year-old woman was a suspected rap music file-sharer, although she never downloaded any materials over the net. See John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either*, N.Y. TIMES (Sept. 25, 2003), available at: [www.nytimes.com/2003/09/25/business/media/25TUNE.html](http://www.nytimes.com/2003/09/25/business/media/25TUNE.html). This also occurred outside the U.S.. In the UK for example, many elderly citizens were accused downloading different computer games, which they obviously didn't. See Jared Moya, *UK P2P Game Crackdown Catches Non-Gaming Elderly Couple*, ZEROPAID (2008) available at:

[www.zeropaid.com/news/9826/uk\\_p2p\\_game\\_crackdown\\_catches\\_nongaming\\_elderly\\_couple](http://www.zeropaid.com/news/9826/uk_p2p_game_crackdown_catches_nongaming_elderly_couple). 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), available at: [www.post-gazette.com/columnists/20030914edroddy0914p1.asp](http://www.post-gazette.com/columnists/20030914edroddy0914p1.asp).

<sup>79</sup> Andrew Orlovski, *RIAA Sues the Dead*, THE REGISTER (2005), available at: [www.theregister.co.uk/2005/02/05/riaa\\_sues\\_the\\_dead/](http://www.theregister.co.uk/2005/02/05/riaa_sues_the_dead/).

ii. 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 period of time. However, there are still multiple Internet access solutions available for the user's usage, thus, endangering the applicability of the 3SP.

Disconnected users can use of wireless networks, such as WiFi (Wireless Fidelity) or WiMax (Worldwide Interoperability for Microwave Access) that are often 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 slip the attention of legislatures around the world, trying to implement different policies over the Internet. In Italy, for example, in an attempt to fight terror, citizens are required to take measures in order to secure their network connection, while business are obliged to register and track all Internet users using their connection and to retain their personal information as well as their Internet activities.<sup>80</sup> If the 3SP requires similar obligations, it might be more difficult for the disconnected user to reconnect in such a manner,<sup>81</sup> and jeopardize different rights, hence, while business will be required to monitor their costumers' actions, the users' privacy will be in real danger. Also, these measures will have a certain impact on free speech and users' rights, when a business might not allow users to perform legal file-sharing under a fair use exemption, for example.

Thus, the various methods that are currently available for Internet connection are vast. Moreover, it seems that the method of suspending a user from the Internet, while blocking her connection to any other ISP in her country using black-lists, lies somewhere between an extremely difficult task to an impossible one. While ISPs posses two different identities of each user, i.e., her actual identity and her virtual one in a form of an IP address (either static or dynamic), it is hard to understand which user's identity will be black-listed. In either of the two methods, it will still be possible for another person at the user's house hold to connect to the Internet through the same ISP or a different one. Think for example of a family of five, using the same Internet access connection. If one member of the family is stricken-out and is suspended from the Internet, using his or her other household members, the disconnected user still has 11 more strikes to go, using his other household identities. The main issue here lays in the fact that if this could actually be resolved, meaning that the whole

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<sup>80</sup> Convertito nella Legge 155/05. [It.]

<sup>81</sup> Individually securing an Internet connection will require knowledge, which some users do not posses. Also, mandating Internet connection obligations on businesses might be a financial burden to small business, therefore, providing larger businesses with commercial advantage.

house hold will be black-listed, it will raise further questions regarding the proportionality of the 3SP, meaning, if a whole family should be affected so harshly due to one of its member's copyright wrongs. I believe the answer should be negative.

## V. The Success of the 3SP & Further Questions

One of the main questions arising from the implementation of the 3SP is its potential success to eliminate 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 3SP success.

First, the 3SP will only succeed if users will actually be deterred by the legal sanctions applied in the 3SP. As much as disconnecting users from the Internet might be perceived as intimidating, current copyright infringements sanctions might be even more intimidating, such as paying a large fine or even face imprisonment. If the 3SP wishes to succeed where other policies have failed, it should be implemented and strongly enforced by the right holders, ISPs and governmental bodies such as the French HADOPI, meaning that sanctions will have to be applied at least once, if not more, thus, deterring other users to act accordingly.<sup>82</sup>

Second, implementing the 3SP does not come cheap. From governmental point of view, there will be costs such as judicial time and

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<sup>82</sup> It is hard to tell exactly how many times users will have to be prosecuted, until users deterrence will begin, if at all. However, users might be deterred even if no actual Internet suspension will take place. Take this following example: The U.S. government, which currently does not possess a 3SP, announces that from now on, every user that will be caught file-sharing on Sundays, will be prosecuted and might even go to jail. Even if the U.S. government will 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. See for example a general study regarding the dynamics of deterrence in criminal offences. In this study it was found that *"When 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."* Although copyright regime is not the same as criminal, it seems that this might work in regards to file-sharers. For the study See Mark Kleiman & Beau Kilmer, *The Dynamics of Deterrence*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA, 106(34) (2009); Also, see Ed Felten, *Targeted Copyright Enforcement: Detering Many Users with a Few Lawsuits*, FREEDOM TO TINKER (Nov. 9, 2009), available at: [www.freedom-to-tinker.com/blog/felten/targeted-copyright-enforcement-detering-many-users-few-lawsuits](http://www.freedom-to-tinker.com/blog/felten/targeted-copyright-enforcement-detering-many-users-few-lawsuits).



the allocation of funds to create and support the actions of the governmental body and the ISPs. As mentioned, the ISPs will have to undertake structural and financial changes, while allocating human resources to deal with right-holders' claims which might be higher than the fee that the subscriber pays fully for the duration of suspension as set in the French law.<sup>83</sup> Although the ISPs can choose to role-over those costs onto the users by increasing subscription fees, such an action might not be profitable for the ISPs, as the number of subscriptions might be reduced.

Third, 3SP raises questions regarding the proportionality of the sanction. In the U.S., the 3SP was implemented in a different and more general context, in few different states such as California as a criminal method to reduce crime.<sup>84</sup> Using this method, Mr. Cecilio Gonzalez, who was convicted in two prior felonies, failed to reregister as a sex offender within five working days of his birthday and due to the 3SP, had been sentenced to twenty-eight years of imprisonment.<sup>85</sup> Only after appealing against this cruel punishment, Gonzalez trial was sent back to the lower court for re-ruling.<sup>86</sup> Applying the 3SP within the area of intellectual property might raise similar questions regarding the differences between different incidents. Hence, for example, the 3SP does not differentiate between a user who shares 1000 copyrighted files and a user who only

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<sup>83</sup> See for example a study in the UK, as to the Digital Economy Act, which was set to provide an impact assessment for the Digital Economy Act of 2010. The study found that the related costs of implementing a 3SP might reach £500,000,000 over a 10 years 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."* See [interactive.bis.gov.uk/digitalbritain/wp-content/uploads/2009/11/DEB-Impact-Assessments.pdf](http://interactive.bis.gov.uk/digitalbritain/wp-content/uploads/2009/11/DEB-Impact-Assessments.pdf), at 13. In regard to the right holder's claims, the 3SP should also consider inserting a system in which right holders pay a fee to insure that ISPs will have proper funds to deal with their claims.

<sup>84</sup> Cal. Pen. Code § 667.

<sup>85</sup> Gonzalez v. Duncan, 551 F.3d 875 (C.A. 9, 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.]

<sup>86</sup> Accordingly, we follow the Court of Appeal in finding that violation of the annual registration requirement of § 290(a)(1)(D) alone is "an entirely passive, harmless, and technical violation of the registration law". See Gonzalez v. Duncan, id.

shares a single file, other than giving a judge the opportunity to decide the length of Internet suspension. That does not seem enough.<sup>87</sup>

Fourth, as mentioned, the 3SP raises further questions regarding collective and false punishments. If for example, a household is connected to the Internet by a single connection, while the whole family is making usage of the connection, and one household member downloads illegal files over the Internet, the registered user will be held liable instead of the actual infringer. Therefore, even if legislators find a proper way to enforce the Internet access suspension, the whole household would be held liable and would be collectively punished.<sup>88</sup>

The 3SP can also be misused by the right holders. Therefore, unless any other general law prevents such abuse, right holders might have real incentives to report as many users as they can to HADOPI, since they will not be punished if those accusations are proven false. In order to prevent this scenario, a plausible 3SP should have to include similar mechanisms, for example such as those set in the DMCA, to prevent misuse, or even paying a fine to HADOPI—and to the wrongly disconnected user—in case of false accusations.<sup>89</sup>

A final remark regarding the 3SP is that if the policy succeeds in its mission to eliminate illegal file-sharing, countries which implement it would be required to amend certain legislation that was set in order to compensate right holders for infringements.<sup>90</sup> This is required to prevent a situation in which right holders will be compensated twice for their financial losses. If the 3SP succeed in its mission to prevent illegal file-

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<sup>87</sup> It seems that due to the nature of the 3SP identification techniques, Hence, identifying infringers through P2P softwares, and sending notification notices without a distinction between two different file-sharers (e.g., some one who shares one song and another person which 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 later, the right holders gets a much better picture of the user's profile then in the 3SP, and therefore they have a wider range of decision in regards to the alleged infringer, i.e., they can chose whether they want to prosecute someone who downloaded a single song or rather focus on "larger fish".

<sup>88</sup> Collective punishments are known in some legal systems. Take for example a person caught driving 30mph over the speed limit in Florida, which could face vehicle confiscation (along with five to ten years in prison and a ten-year license suspension). If someone else is using this person's vehicle, e.g., his wife, she could not use his vehicle any longer although she did not act unlawfully. However, as I will argue later, the 3SP is not a similar situation and therefore those sanctions might not be appropriate. See in Florida, Bill HB 137.

<sup>89</sup> 17 U.S.C. § 512 (f).

<sup>90</sup> In the U.S. for example, *see* the Audio Home Recording Act of 1992 (17 U.S.C. §§ 1001-10).

sharing, such legislation would no longer be needed, and therefore should be amended accordingly. In France, for example, there will have to be an amendment to a law compensating right holders using a levy system on digital instruments that can be used to store music.<sup>91</sup>

## VI. 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.<sup>92</sup> 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 undertake a more crucial part analyzing right holders' claims prior to sending alleged infringement notices to users, hiring human resources that had actually established knowledge regarding copyright law. Furthermore, in order to reduce an impact on due process rights, the official governmental body must supply the user with an adequate right to be heard, meaning that the governmental body will possess the power to stop proceedings against a user who was falsely accused. In this way, users will be able to make legitimate use claims, i.e., fair use, and a proper balance between the interests of authors and those of the public will be preserved. Legislators must also form some rules regarding the nature of information usage, thus preserving their right to privacy. Moreover, as mentioned, the 3SP must create similar mechanisms such as set in the DMCA to address misuse, or even paying a fine to HADOPI in case of false accusations.<sup>93</sup> The government will have to 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 an ability to suspend a user for a very short time, if it seems that the alleged infringement occurred due to unjust circumstances. As for the 3SP in France, the minimum penalty is set to a period of two months' suspension, a long period which does not provide the judge with sufficient power to reduce penalty for lighter

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<sup>91</sup> Article L. 311-5 of the French Code. Also see Bernt Hugenholtz & Guibault Sjoerd Van Geffen, *The Future of Levies in a Digital Environment, Final Report*, INSTITUTE FOR INFORMATION LAW (2003).

<sup>92</sup> See in general, Yu, *supra* note 29 at 31 (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 seriously its educative and rehabilitative roles).

<sup>93</sup> Much like statutory damages set in U.S. copyright law that provides the court the authority to reduce damages to \$200 if the defendant was not aware of and had no reason to believe that its acts constituted a violation; 17 U.S.C. § 504.

infringers. Finally, if the 3SP succeeds in its mission, certain legislation that was set in order to compensate right holders for copyright infringements should be amended in order 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, thus, not having proper time to alter her behavior and internalize the policy.<sup>94</sup> 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.

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.<sup>95</sup> Moreover, I submit that Internet suspension should only be limited to certain actions and that the user will still be able to use different actions that do not threaten right holders, such as e-mail services and the usage of governmental websites, hence, reducing the impact on free speech and freedom of information, making the 3SP a more reasonable and proportional method.

## VII. 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 an easy one. In order to allow the restriction of the mentioned rights and freedoms, the 3SP may only be imposed if it is proportionate to its cause, meaning that it is implemented in furtherance of a compelling state interest, and narrowly tailored to achieve that interest. As mentioned above, this is hardly the case in current 3SP.

The 3SP wishes to succeed where other enforcement methods have thus far failed. In order to achieve public deterrence of illegal file-sharing using the 3SP, it should be implemented and fully enforced. The main difference between the 3SP and earlier methods of enforcement regarding file-sharing, i.e., filing lawsuits against file sharing companies or suing individual file-shares, lies in the simplicity of the new policy. While other methods, such as filing lawsuits against individual users might be costly and take a long time, the 3SP policy might achieve its purpose from day one, after sending a simple notification notice, usually a simple and

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<sup>94</sup> NIMMER ON COPYRIGHT, *supra* note 15, at § 12B.10[C][1]; Yu, *supra* note 29, at 31.

<sup>95</sup> Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 39 (1996).

inexpensive action. In the worst case, after receiving two prior notices, a quick judicial procedure is easier and cheaper than regular civil or criminal procedures. Hence, the 3SP might actually achieve its purpose. The question is, does achieving this purpose more important than preserving basic human rights and underlying copyrights balances, thus, examining whether the policy is a proportionate mean to respond to copyright infringements.

In order to come up with a proper answer to the normative question, I would like to compare and analysis the 3SP to different enforcement methods. The comparison will comprise of enforcement methods, much like the 3SP, in which the main sanction imposed is depriving the user from usage of the tool that was used to commit the wrong, much like the deprivation of Internet access used for illegal file-sharing under the 3SP.

I start with an analogy to a more ancient telecommunication device, the telephone. Telephones have become an inseparable part of our lives. We even carry them around with us to most places we go. Although used usually for conversations and in recent years it serves as a tool for different activities, it can also be used to plan or commit crimes such as planning a robbery, committing major frauds or harassing other people.<sup>96</sup> Committing crimes using a telephone might cause the service to be suspended by either the phone company or by the court.<sup>97</sup> It seems that in this case, the criminal usage of the telephone causes a public risk and therefore the disconnection serves a public interest.

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<sup>96</sup> Besides the telephone, The Internet can also be used to various criminal offences. Take for example the case of William Melchert-Dinkel, a former nurse from Minnesota, which allegedly was telling people over the Internet how to commit suicide. The court ordered him to stay of the internet while the case is ongoing at the District court of Minnesota. See *Guy Who Encouraged People To Commit Suicide Online Banned From The Internet*, TECHDIRT (May 26, 2010), available at: [www.techdirt.com/articles/20100526/1822349594.shtml](http://www.techdirt.com/articles/20100526/1822349594.shtml).

<sup>97</sup> In some U.S. states, 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, that such facility should not be discontinued or removed, or should be restored." See 18 U.S.C. § 1084(d). Needless to say, common carriers can usually terminate service where customers are in breach of contract.

Peter Yu suggested another analogy of enforcement methods which is closer to the 3SP.<sup>98</sup> If a driver decides to drive his car while under the influence of alcohol for example, the driver might lose his driver license and could face the confiscation of the vehicle (even if he does not own the car) for a period of time.<sup>99</sup> Those sanctions might be perceived more severe than disconnecting a user from the Internet and might affect other people's life. Many times, most of us need to make usage of cars in order to live our lives and provide for our families. Basic human rights are affected such as our freedom of movement. Also, unlike the 3SP which provides us with a fair warning (two, in fact) before imposing a sanction, this enforcement method is immediate, without a judicial process unless requested and in that case the driver will be held guilty until proved otherwise.

More examples are found in criminal law. Take for example the Criminal Code of Illinois.<sup>100</sup> The statute lists a variety of offenses in which the used vehicle is subjected to seizure. Those felonies include, *inter alia*, first degree murder, reckless homicide, an aggravated battery with a firearm and aggravated criminal sexual assault.<sup>101</sup>

It seems the main discussion as to whether the 3SP is appropriate regarding file-sharing, circles around the implementation of main principles that lies under similar sanctions in criminal law. In criminal law, legislators sometimes seek to prevent public hazards by legislating and enforcing laws that might reduce a possible negative impact on society.<sup>102</sup> Let's take for example release conditions set by U.S. courts for convicted sex offenders, which bans Internet access.<sup>103</sup> Internet sex offenders' release is sometimes conditioned on an Internet suspension, usually for a limited period of time.<sup>104</sup> Such conditions must have a clear nexus with the underlying crime and involve no greater deprivation of liberty than is reasonably necessary to

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<sup>98</sup> "To some extent, the threat of internet disconnection is similar to, and as effective as, the threat of suspension of driver's license for drunk driving." For this analogy, see Yu, *supra* note 29, at 6.

<sup>99</sup> In California for example, if a driver is convicted with drunk driving the first time, his driver's license might be suspended up to 6 months and the duration of suspension might rise in following similar convictions. See California Vehicle Code Section 23152 (a) and (b).

<sup>100</sup> Section 5/36-1 of the Criminal Code. For more information see [www.dui-illinois-attorney.com/CM/Articles/Articles9.asp](http://www.dui-illinois-attorney.com/CM/Articles/Articles9.asp).

<sup>101</sup> See 720 ILCS 5/9-1; 720 ILCS 5/9-3; 720 ILCS 5/12-4.2; 720 ILCS 5/13.

<sup>102</sup> See for example, statutory standards for special conditions set by 18 U.S.C.A. § 3583: the release conditions must entail "no greater deprivation of liberty than is reasonably necessary to deter future crime, protect the public, and rehabilitate the defendant."

<sup>103</sup> See *United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999); *United States v. Freeman*, 316 F.3d 386 (3d Cir. 2003); *United States v. Voelker*, 489 F.3d 139 (3d Cir. 2007); *United States v. Thielemann*, 575 F.3d 265 (3d Cir. 2009).

<sup>104</sup> *Id.*

deter criminal conduct, to protect the public from further crimes by the defendant and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment.<sup>105</sup> In a recent case, Paul Thielemann was convicted on eighteen counts in relation to the production, receipt, distribution and possession of child pornography over the Internet.<sup>106</sup> The court upheld a ten-year special condition of supervised release that prohibited Thielemann from using the Internet without prior permission from a probation officer and concluded that a 10 year restriction on computer and internet use does not involve a greater deprivation of liberty than is necessary.<sup>107</sup> However, in a recent similar case, the court held that a condition against 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.<sup>108</sup> In sum, the U.S. courts, deciding sex offenders' Internet access, weighed the liberty interests of the defendant against the interests of the state in ensuring public safety and rehabilitation, and concluded that special conditions implicating First Amendment rights must be "narrowly tailored", hence, the restriction must result in a benefit to public safety to be constitutional.<sup>109</sup> However, in many cases, courts overturned decisions to suspend Internet access of convicted sex offenders, explaining that they are unreasonably excessive.<sup>110</sup>

What should be the case with file-sharing over the Internet? Although file-sharing might harm different business models of the media industry, it can hardly qualify as a public hazard,<sup>111</sup> and suspending Internet access from file-sharers can hardly benefit to public safety, surly no more than sex offenders. Hence, in file-sharing the restriction does not result in a

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<sup>105</sup> See *United States v. Voelker*, 489 F.3d 139, 144 (3d Cir. 2007); 18 U.S.C.A. § 3583(d)(2); Harvard Law Review, *Third Circuit Approves Decade-Long Internet Ban for Sex Offender — United States v. Thielemann*, 575 F.3d 265 (3d Cir. 2009), 123 HARV. L. REV. 776 (2010).

<sup>106</sup> *United States v. Thielemann*, 575 F.3d 265 (3d Cir. 2009).

<sup>107</sup> *Id.* at 278.

<sup>108</sup> *United States v. Freeman*, 316 F.3d 386, 391 (3d Cir. 2003).

<sup>109</sup> *Thielemann*, 575 F.3d at 273; Harvard Law Review, *supra* note 105, at 778.

<sup>110</sup> For example, Mark Wayne Russell solicited a "13-years old girl" (an undercover cop) over the Internet, and was sentenced to 46 months in prison, and was ordered not to make any usage of computers, *inter alia*, internet connection until the year 2039. Later, the internet ban was removed by a federal appeals court, indicating that Internet ban was deemed "substantively unreasonable" and "aggressively interferes with the goal of rehabilitation. See *US vs. Russell*, No. 08-3120 - United States Court of Appeals; *Once Again, A Court Overturns Internet Ban For Convicted Criminal*, TECHDIRT (Apr., 2 2010), available at: [www.techdirt.com/articles/20100402/1750348856.shtml](http://www.techdirt.com/articles/20100402/1750348856.shtml).

<sup>111</sup> Although, file-sharing might be perceived as a public hazard in some cases, such as if it will bankrupt media industries, and which will lead to massive job dismissal, for example.

benefit to public safety and is not constitutional. Therefore, civil litigation is a more proportionate method of fighting against file-sharing, whether it achieves its purpose or not.

The analogies to criminal enforcement methods raises further question regarding the role of the State in the 3SP. Usually, the state does not take sides when it comes to copyright infringements on a non-commercial base, meaning that the state does not take an active part perusing the infringers. However, the 3SP contains a certain shift from civil litigation to criminal enforcement. By implementing a similar 3SP as the French model, the state undertakes an active part in the pre-judicial allegations against users, by creating a governmental body directed to deal with right holder's infringement allegations. Furthermore, the judicial procedure set in the French 3SP resembles criminal litigation much more than civil litigation, in a sense that in the 3SP, much like in criminal litigation, the state files charges against the user and not the right holder.<sup>112</sup>

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 copyright regime between the interests of authors and those of the public, by depriving users to use copyrighted materials without the right-holders' prior permission, mainly the fair use defense. In a more general note, it seems that policy-makers should not take an active part when it comes to copyrighted infringements on a non-commercial base, especially not in criminal-based enforcement methods. Right holders still possess a variety of methods in order to fight against illegal file-sharing. If legislators wish to resolve the file-sharing struggle in a more proportional manner, they should seriously consider either implementing a 3SP which only restricts file-sharing and not the whole usage of the Internet,<sup>113</sup> or better, consider new approaches, such as implementing a noncommercial use levy system into file-sharing, as suggested in the past by William Fisher and Neil Netanel.<sup>114</sup>

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<sup>112</sup> It is still unclear how this procedure will actually occur, since no allegations were yet to be filled 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 reveals the true identity of the procedure, i.e., the state. See: Pfanner, *supra* note 28.

<sup>113</sup> Even though restricting only file-sharing might be a difficult task, mere administrative ease cannot justify the deprivation of a constitutional right. See 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); Harvard Law Review, *supra* note 105, at 783.

<sup>114</sup> See Neil 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).



## VIII. Conclusion

Technological innovations clearly enhanced media consumption, partly due to Internet file-sharing. The sharing of files between users could promote freedom of speech and information, but on the other hand, may pose a real problem for the business models of the copyright holders, creating a real struggle between right holders, ISPs and file-sharers. After several attempts to resolve this struggle, the 3SP has emerged as a penance for the right holders, but not without a cost. In this paper I highlighted some of the legal and social implications of implementing the 3SP as a solution to copyright infringements thorough file-sharing, and discussed the potential impact on the right to privacy, due process rights, free speech and especially user's rights. After pointing out the pros and cons of the 3SP, I highlighted a few enforcement issues that might arise while implementing the 3SP, and which might even harm its purpose. After doing so, I proposed my version of an improved 3SP, if indeed it is implemented. I also noted that the 3SP is an inappropriate attempt to strengthen right holders power over users and might reshuffle and jeopardize the balance set in copyright regime between the interests of authors and those of the public. Finally, I conclude that the 3SP is not a proper tool in order to resolve illegal file-sharing issues, thus, it an inappropriate attempt to fight copyright infringements and should not be implemented anywhere, and certainly not yet.