Antitrust Implications of the Copyright Alert System

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THE COPYRIGHT ALERT SYSTEM is a private copyright enforcement mechanism jointly adopted by numerous content owners and internet service providers to deter illegal peer-to-peer file sharing.[1] While many analysts have studied how the Copyright Alert System interacts with other areas of American jurisprudence, few commentators have analyzed its significant antitrust implications. This paper explores the history of online copyright infringement through peer-to-peer file sharing, an overview of the Copyright Alert System, and the antitrust ramifications resulting from private copyright enforcement through the Copyright Alert System.

Introduction

In July 2011, a conglomerate of content owners[2] and internet service providers[3] announced the formation of the Copyright Alert System, which is a graduated notification system aimed at educating, alerting, and punishing individual internet service subscribers who engage in online copyright infringement.[4] The Copyright Alert System,

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1. *See Memorandum of Understanding, Preamble*, CENTER FOR COPYRIGHT INFRINGEMENT (July 6, 2011), [hereinafter *Memo*] https://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf [https://perma.cc/WA78-4QBS].

2. *Memo, supra* note 1, at Section 1. Entertainment industry associations involved include the Independent Film and Television Alliance ("IFTA") and the American Association of Independent Musicians ("A2IM"); Recording Industry Association of American members Universal Music Group, Warner Music Group, Sony Music Entertainment, and EMI Music; and Motion Picture Association of America members Walt Disney Studios Motion Pictures, Paramount Pictures, Sony Pictures Entertainment, Twentieth Century Fox Film Corporation, Universal Studios, and Warner Brothers Entertainment. *Memo*, Section I (July 6, 2011).

3. *See Memo, supra* note 1, at Attachment A.

4. *See Memo, supra* note 1, at Part IV(G).

commonly referred to as the "six strikes" program,[5] requires signatory content owners to monitor peer-to-peer file sharing sites for downloaded copyrighted material. Once the content owner informs the internet service provider of a subscriber's alleged copyright infringement, the six strikes policy is enforced against the subscriber, which may culminate into a copyright infringement lawsuit if not resolved.[6]

After the Copyright Alert System's implementation in February 2013, legal analysts have evaluated the relationship between the Alert System and other areas of American law such as the First Amendment,[7] fair use,[8] and §512 of the Digital Millennium Copyright Act ("DMCA").[9] In addition to these concerns, private copyright enforcement through the Copyright Alert System may also produce negative antitrust implications. Section 1 of the Sherman Act prohibits any restraint of trade that may boycott individuals or companies from engaging in a free market industry.[10] By allowing companies that would be natural competitors to enter into both a horizontal and vertical agreement to privately enforce copyright protections, and effectively punish alleged infringers via ambiguous "mitigating measures"[11] without legal authority, these companies may be illegally restraining trade by purposefully blacklisting consumers who receive online media content from other sources.[12] The Copyright Alert System may also be considered an anti-competitive behavior under §1 of the Sherman Act under both a per se and rule of reason analysis.

Peer-to-Peer File Sharing—The Evil or the Excuse?

Peer-to-peer file sharing is the process of sharing online material, such as media files, music, books, movies, and games, directly from one end-user computer to another.[13] Early versions of file-sharing sites

5. Cyrus Farivar, *"Six Strikes" Program Could Affect Businesses Too, Even if Infringer is Unknown,* ARS TECHNICA (Jan. 14, 2013), http://arstechnica.com/business/2013/01/six-strikes-program-could-affect-businesses-too-even-if-infringer-is-unknown/ [https://perma.cc/366Q-9DVK].

6. *See Memo supra* note 1, at Part IV(G)(i) (July 6, 2011).

7. *E.g.*, Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1413–16 (2010).

8. *Id.* at 1417–18.

9. *Id.* at 1403–10.

10. 15 U.S.C. § 1 (2006).

11. *See Memo, supra* note 1, at Part IV(G)(iii).

12. *See generally id.* at Part IV (G)(iv).

13. *What You Need to Know About Peer-to-Peer File Sharing,* ZONEALARM BY CHECKPOINT (June 4, 2014), http://www.zonealarm.com/blog/2014/06/what-need-know-about-peer-to-peer-file-sharing/ [https://perma.cc/X2EZ-ZKCD].

simply connected end-user computers ("leechers") who wanted digital media to a network of "seeders," other end-users who distributed digital media content.[14]

Previous peer-to-peer networks employed a centralized communication model, a type of online network where all users connected to one central server. Currently, peer-to-peer networks use a non-centralized model. Multiple servers rather than one[15] now allow individuals to connect to other "seeders" who install peer-to-peer software on their own computer.[16] This decentralized approach has made identifying and catching peer-to-peer content sites, such as BitTorrent, significantly more challenging. BitTorrent is a peer-to-peer file sharing network that allows users to search, download and upload media files to popular torrent interface sites, such as The PirateBay, through the following process:

> [T]o download a file [. . .], you have to find and download a torrent file (which uses the .torrent file extension) and then open it with your BitTorrent client software. The torrent file does not contain your files. Instead, it contains information which tells your BitTorrent client where it can find peers who are also sharing and downloading the file.[17]

Peer-to-peer file sharing can be a high-speed and low bandwidth way to share large files between computers, allowing large amounts of data to be transmitted without spending thousands of dollars on bandwidth costs.[18] But, there are many critics that condemn peer-to-peer file sharing as illegal and morally wrong.

Although over 70 million people engage in peer-to-peer file sharing,[19] in most instances it is still considered copyright infringement. Under copyright law, a copyright owner has the exclusive right to copy, create derivative works of, distribute, perform, and display their

14. *Defining Peer-to-Peer File Sharing: How it Works,* THE LSE CYBERLAW STUDENT BLOG (Feb., 2016), http://lsecyberlaw.blogspot.com/2016/02/defining-peer-to-peer-file-sharing-how.html, [https://perma.cc/SL9X-YEVQ].

15. *Id.*

16. *See generally* Carman Carmack, *How BitTorrent Works*, HOW STUFF WORKS (March 26, 2005), http://computer.howstuffworks.com/bittorrent1.htm [https://perma.cc/V3A7-2BKA].

17. Adam Pash, *A beginner's guide to BitTorrent*, LIFE HACKER BLOG (Aug. 3, 2007, 24:00 EST), http://lifehacker.com/285489/a-beginners-guide-to-bittorrent [https://perma.cc/626D-UG2Q].

18. *Id.*

19. Ray Delgado, *Law professors examine ethical controversies of peer-to-peer file sharing,* STANFORD REPORT (Mar. 17, 2004), http://news.stanford.edu/news/2004/march17/fileshare-317.html [https://perma.cc/YGE2-HPKH].

work.[20] Any unauthorized person who violates one of these exclusive rights is liable for copyright infringement.[21] In order for an end-user to receive the digital material in peer-to-peer file sharing, the user must "download" the file to their computer, which results in an electronic "copy." The act of downloading copyrighted material without the copyright owner's permission is typically considered copyright infringement unless the material is being used for the purpose of criticism, education, news reporting, scholarship, or commentary.[22]

This poses a new and unique problem with copyright enforcement. With millions of people participating in peer-to-peer file sharing, enforcing online copyright protection is becoming very difficult. Currently, relief from online copyright infringement is only available in the form of individual lawsuits filed against each infringer, which results in considerable monetary and efficiency concerns.

American attitudes about peer-to-peer file sharing are also shifting. In the US alone, 80% of people who possess online music files and 73% of people who possess online TV and movie files believe that it is "perfectly appropriate" to share them with family members.[23] Additionally, younger Americans between 18–29 years old believe that uploading and linking unauthorized TV/movie files online is reasonable.[24] Historically, public opinion of peer-to-peer file sharing has been overwhelmingly negative.[25] This recent shift surrounding peer-to-peer file sharing may have longstanding jurisprudential effects on how courts view protecting online copyright protections.

A primary reason why peer-to-peer file sharing is still viewed so negatively is due to the supposed economic effects on the entertainment industry. Yet the large quantity of peer-to-peer shared files may not produce the profound economic impact that the entertainment industry claims. Although overall music sales declined with the introduction of peer-to-peer file sharing technology, beginning with Napster,[26] varying economic studies have linked the downturn of music

20. See 17 U.S.C. § 106 (1990).

21. See 17 U.S.C. § 501 (2006).

22. See 17 U.S.C. § 107 (1990).

23. Attitudes about Piracy, THE AMERICAN ASSEMBLY, http://piracy.americanassembly.org/copy-culture-report/attitudes/ (last visited May 11, 2016) [https://perma.cc/43PK-JFGQ].

24. *Id.*

25. Bootie Cosgrove-Mather, *CBS news poll: Young Say File Sharing OK*, CBS NEWS (Sept. 18, 2003), http://www.cbsnews.com/news/poll-young-say-file-sharing-ok/ [https://perma.cc/T4MW-C877].

26. *See* Sanjay Goel, Paul Miesing, & Uday Chandra, *The Impact of Illegal Peer-to-Peer File Sharing*, 52 CAL. MGMT. REV. NO. 3, 6 (2010), http://www.albany.edu/~pm157/research/

sales to a shift in how consumers enjoy music rather than "piracy" over peer-to-peer networks.[27] Yochai Benkler, a co-director of the Berkman Center for Internet & Society at Harvard University, goes so far as to suggest that peer-to-peer file sharing may actually be economically efficient in the long term.[28]

In the film industry, a study published by the Motion Picture Association of America stated that American studios lost $2.373 billion to internet piracy through peer-to-peer file sharing in 2005.[29] Yet commentators have doubted the study's legitimacy due to lack of statistical and scientific transparency.[30] Additionally, the study assumed that one lost movie sale amounted to one illegal download from a peer-to-peer network. This assumption fails to consider that a downloader may not have purchased, or even watched the movie unless it was available in a peer-to-peer network.[31]

Although peer-to-peer file sharing may be an efficient, profitable, and widespread solution to acquiring online content, it is still illegal. Conventional anti-piracy efforts have inadequately addressed the long-standing issue around file sharing—how to stop mass online copyright infringement by millions of Americans. The Copyright Alert System is the entertainment industry's attempt to develop a private solution.

The Copyright Alert System—An Overview

The Copyright Alert System was prescribed in a Memorandum of Understanding among some of the largest internet service providers such as Verizon, Comcast, and a conglomerate of large entertainment

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The%20Impact%20of%20Illegal%20Peer-to-Peer%20File-Sharing%20on%20the%20Media%20Industry.pdf [https://perma.cc/FYK2-4Y4M].

27. The NDP Group: Music File Sharing Declined Significantly in 2012, NDP Group (Feb. 12, 2016), https://www.npd.com/wps/portal/npd/us/news/press-releases/the-npd-group-music-file-sharing-declined-significantly-in-2012/ [https://perma.cc/8QTT-CUST]. *See also* Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. of Political Economy 1, 1–42 (Feb. 2007).

28. Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and Freedom, 86 (2006).

29. *Swedish Authorities Sink Pirates Bay,* Eche. . .Blah. . .Blah (May 31, 2016), http://echeblahblah.blogspot.com/2006/06/swedish-authorities-sink-pirate-bay.html [https://perma.cc/PV8R-TC5M].

30. See generally *Ken Fisher,* The problem with MPAA's shocking piracy numbers, Ars Technica (May 5, 2006), http://arstechnica.com/uncategorized/2006/05/6761-2/ [https://perma.cc/7KMW-47KJ].

31. Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis,* UNC Chapel Hill (March, 2004) at http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf [https://perma.cc/GK5U-WL4N].

content owners.[32] The Memorandum of Understanding outlines a uniform graduated response system that signatory internet service providers must implement against alleged copyright infringers.[33] A series of notices are sent to an internet subscriber's registered email account after a content owner notifies their internet service provider of a subscriber's infringing behavior.[34]

Content owners use "certain automated techniques" to identify subscribers who they think are engaged in peer-to-peer file sharing.[35] However, the validity and accuracy of these techniques are unsubstantiated, with weak legal footing when determining what constitutes copyright infringement. Once an internet service provider is notified of a subscriber's alleged copyright infringement, the Copyright Alert System is implemented.

The program is divided into a four-step procedure capable of distributing up to six alerts to a given subscriber.[36]

Step 1: Initial Education

Once the Copyright Alert System is activated, the internet service provider is required to notify their subscriber of the alerted infringement via an Initial Education notice.[37] Typical information contained in an educational notice states that: (1) online copyright infringement is an illegal act punishable under §512 of the Digital Millennium Copyright Act ("DMCA"), (2) the subscriber cannot engage in online copyright infringement, (3) online copyright infringement is also a violation of their internet service provider's terms of service, (4) subscribers can obtain copyrighted works lawfully through the internet service provider, and (5) continued infringing behavior will result in further actions by the internet service provider.[38] Internet service providers can send up to two educational notices to each alleged infringer.[39]

After the Copyright Alert System is triggered, signatory content owners face some repercussions. Content owners are removed from

32. *See Memo, supra* note 1, at Attachment A (July 6, 2011).
33. See generally *Memo, supra* note 1, at Part IV(G) (July 6, 2011).
34. *Id.*
35. *Copyrights and Verizon's Copyright Alert Program*, VERIZON, https://www.verizon.com/support/consumer/account-and-billing/copyright-alert-program-faqs (last visited Jan., 2017) [https://perma.cc/XPL5-J8PP].
36. See generally *id.*
37. See *id.*
38. *See Memo, supra* note 1, at Part IV(G)(i) (July 6, 2011).
39. *Id.*

the copyright enforcement process, leaving only internet service providers to implement the Copyright Alert System. Additionally, once the Copyright Alert System is activated, content owners cannot seek federal copyright remedies against an infringer until the last step of this system is completed. This bars content owners from receiving monetary remedies against an alleged infringer until after the sixth strike is implemented.[40] Content owners can also only report a limited number of alleged copyright infringements per month, thus requiring content owners to discriminate between infringing subscribers that they want to pursue.[41]

The Copyright Alert System may also have an impact on internet service providers. Signatory internet service providers may be precluded from copyright liability under DMCA section 512. Under the DMCA, online service providers are exempt from copyright liability if they respond to directed notices of copyright infringement with mitigating measures, such as taking down the illegal file.[42] It is unclear if DMCA remedies would be helpful in combating peer-to-peer sharing, or even that peer-to-peer sharing existed when the law was passed. If an internet service provider implements this system, they may be shielded from future copyright liability. Thus, content owners waive their right in advance to pursue financial remedies against internet service providers, which may or may not be a good trade.

Subscribers also face procedural effects beyond receiving an educational notice. At this stage, subscribers cannot combat any allegations of copyright infringement, even in cases of mistaken alerts. Subscribers must wait until the third stage of the Copyright Alert System to challenge any mistaken or alleged copyright infringement. Thus, the Copyright Alert System fails to provide adequate "due process" to subscribers, or any kind of process whatsoever, until the third stage of alerts and punishment.

Step 2: Acknowledgment

The Acknowledgment Step requires an internet service provider to send a third notice to the alleged infringer. The internet service provider requires the subscriber to acknowledge their receipt of the

40. See generally *Memo, supra* note 1, at Part IV(G)(iv) (July 6, 2011).

41. *See Memo, supra* note 1, at Part V(C) (July 6, 2011).

42. *See generally* Ashley Cullins, *Music Industry A-Listers Call on Congress to Reform Copyright Act*, HOLLYWOOD REPORTER (March 31, 2016, 13:48 EST) http://www.hollywoodreporter.com/thr-esq/music-industry-a-listers-call-879718 [https://perma.cc/JM5P-GFFS].

first two notices and agree to cease all infringing conduct.[43] This alert is supposed to be carefully worded to not require the subscriber to "acknowledge participation in any allegedly infringing activity."[44] This step also requires internet service providers to alert subscribers that their identity and information may be provided to third parties, such as content owners, if their conduct continues.[45]

In order for a subscriber to acknowledge the alert, the subscriber must go to either a temporary landing page or a "pop-up" notice will appear.[46] If infringing behavior continues, the internet service provider has the choice of sending another Educational Alert or sending up to two Acknowledgment Step Copyright Alerts.[47] It seems that this stage only prolongs the Educational Stage with an additional bite, requiring acknowledgement of copyright infringement regardless of culpability.

Step 3: Mitigation Measures

The Mitigation Measures stage escalates previous notification requirements. This stage requires:

> (a) [the subscriber] acknowledge . . . receipt of the Copyright Alert as described in the Acknowledgement Step, (b) [confirmation that]. . . the subscriber has received prior warning regarding alleged peer-to-peer online infringement, and (c) inform[s] the subscriber that, per the Participating Internet Service Provider's . . . Terms Of Service and as set forth in prior Copyright Alerts, additional consequences [shall] be applied upon the subscriber's account . . . .[48]

A subscriber is given an allotted grace period to dispute the notice.[49] If the subscriber does not dispute the notice within the grace period, the internet service provider must implement various mitigating measures against the subscriber. These mitigating measures in-

43. *See Memo, supra* note 1, at Part IV(G)(ii) (July 6, 2011).

44. *Id.*

45. "Participating ISP may provide relevant identifying information about the Subscriber and the Subscriber's infringing conduct to third parties, including Content Owner Representatives or their agents and law enforcement agencies." *See Memo, supra* note 1, at Part IV(G)(ii) (July 6, 2011).

46. *See Memo, supra* note 1, at Part IV(G)(ii) (July 6, 2011).

47. *Id.*

48. *See Memo, supra* note 1, at Part IV(G)(iii) (July 6, 2011).

49. A subscriber can dispute the notice through application to the Independent Review Program, which provides a binding decision within the confines of the Copyright Alert Program. *See Memo, supra* note 1, at Part IV(H)(i) (July 6, 2011). The Dispute period is calculated as ten business days or fourteen calendar days after receipt of the notice. *See Memo, supra* note 1, at Part IV(G)(iii) (July 6, 2011).

clude temporary reductions and restrictions of the subscriber's internet service for a "reasonable" period of time as determined at the discretion of the internet service provider.[50]

For a subscriber to dispute an alleged infringement,[51] they must challenge the allegation under one of six grounds:[52] (1) misidentification of the account, (2) authorization to download, (3) misidentification of the file, (4) work was published before 1923, (5) fair use, and (6) unauthorized use of the subscriber's account.[53] A subscriber must also pay a nonrefundable $35.00 fee[54] unless they qualify for a hardship waiver.[55] The subscriber's disputed copyright infringement claim then is resolved through the binding decision of an ad hoc Independent Review Board. This leaves all due process concerns to be resolved in a burdensome and scant proceeding. The Independent Review Board does not allow subscribers to challenge alleged copyright infringement under theories of copyright invalidity, de minimis copying, or any exception as outlined under 17 U.S.C. §§108-122, such as the "library exception."[56]

Additionally, if either the content owner or alleged copyright infringer seeks further legal review, any determination of the Independent Review Board is excluded from admission as evidence. This forces both content owners and subscribers to re-plead their case in court and submit evidence of copyright infringement that is difficult to ascertain without an internet service provider's assistance.[57]

Step 4: Post-Mitigation Measures

The final escalation is the Post Mitigation Measures step, which requires that the internet service provider give another notice of alleged infringement and requires the subscriber to seek review.[58] If the subscriber does not seek review, the internet service provider must implement one of the above mitigating measures and may take legal action under the repeat infringer policy as outlined under section 512

50. *Id.*
51. See generally *Memo, supra* note 1, at Part IV(H) (July 6, 2011).
52. *See Memo, supra* note 1, at Attachment C, Part I(i)–(iv) (July 6, 2011).
53. *Id.*
54. *See Memo, supra* note 1, at Attachment C, Part IV(vi)(i) (July 6, 2011).
55. See generally *id.*
56. *See Defenses to Copyright Infringement,* UNIVERSITY OF NORTH CAROLINA, http://www.unc.edu/~unclng/copyright-defenses.htm (last visited Jan, 2017) [https://perma.cc/XT9V-Y6RM].
57. *See Memo, supra* note 1, at Part IV(G)(i) (July 6, 2011).
58. *See Memo, supra* note 1, at Part IV(G)(iv) (July 6, 2011).

of the DMCA.[59] The repeat infringer policy under §512(i)(1)(A) of the DMCA requires that the internet service provider "(i) adopt a policy that provides for the termination of service access for repeat copyright infringers, (ii) inform users of the service policy, and (iii) implement the policy in a reasonable manner."[60] While it seems that the Copyright Alert System may fulfill this requirement, the DMCA provision requires the internet service provider to go one step further and complete termination of the subscriber's account.

Although the internet service provider does not need to continually send notices during this period, it must track the subscriber's online activity and report all infringement allegations to content owners who choose to initiate a lawsuit.[61] An internet service provider can waive this step if it directs its subscriber to a "final warning" notice.[62]

Antitrust Law

Overview—The Sherman Act and Antitrust Legal Standards Of Review

The Sherman Antitrust Act was a late nineteenth century legislative response to the rise and expansion of large companies such as the Standard Oil Company.[63] The Act aimed to help prevent the rise of monopolistic conglomerates. This gave the Attorney General authority to sue companies engaging in anticompetitive behavior.[64] Over the years, antitrust enforcement has evolved to enforce fairness and protectionism in the competitive process, maintaining that consumers should be entitled to have a high supply of goods at the lowest prices possible.[65] Thus, antitrust law protects a free marketplace rather than specific competitors.[66]

Section 1 of the Sherman Act states that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations,

59. *Id.*

60. See Capitol Records, *L.L.C. v. Escape Media Group, Inc.,* 114 U.S.P.Q.2d 1196 (S.D.N.Y. March 25, 2015).

61. *See Memo, supra* note 1, at Part IV(G)(iv) (July 6, 2011).

62. *Id.*

63. William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act*, 54–55 (1965).

64. *Id.* at 94.

65. Keith N. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* (2003) 40–42.

66. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

is declared to be illegal."[67] Any supposed violation of this section is adjudicated against either a "per se" or "rule of reason" standard.

"Per se" antitrust violations are practices that the Supreme Court has deemed prima facie evidence of illegal conduct such as horizontal price-fixing and group boycotts.[68] Per se violations provide a guidepost for public and private companies to know what business practices are blatantly illegal.[69] Per se illegal business practices offer no pro-competitive justifications to the market.

For business practices that may have arguable pro-competitive benefits, courts use a "rule of reason" standard.[70] In a rule of reason analysis, the court determines whether the company in question has sufficient market power[71] to have an impact on competition.[72] If the business has sufficient market power, then the court weighs if the challenged business practice has any justifiable pro-competitive benefits enough to outweigh its inherent anticompetitive effects.[73]

Tensions Between Antitrust Law and Copyright Law—The Copyright Alert System

Antitrust and copyright law are philosophically in tension with one another. Copyright law seeks to enjoin authors with monopolistic rights to their work,[74] whereas antitrust law attempts to limit the monopolistic power of individuals and corporations.[75] Yet both copyright law and antitrust law coexist within American law because, arguably,

67. 15 U.S.C. § 1 (2000).

68. Horizontal price fixing refers to competitors at the same level of the market distribution chain agreeing to sell items or services at a certain price, typically a price that is greater than the natural free market would allow. Roberta F. Howell, "*Price Fixing and Other Horizontal Requirements,*" DISQUS (March 2, 2011), https://www.inddist.com/article/2011/03/price-fixing-and-other-horizontal-requirements [https://perma.cc/8E9P-CGE5]. *See also* HYLTON, *supra* note 65, at 104–31 (2003).

69. *Id.* at 129–31.

70. *Id.* at 104–105.

71. Thomas G. Krattenmaker, Robert H. Lande, & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 27 J. REPRINTS ANTITRUST L. & ECON. 585 245 (1997) (discussing economic meaning of market power and monopoly power).

72. *California Dental Ass'n v. Fed. Trade Comm'n.,* 526 U.S. 756, 782 (1999) (Breyer, J., dissenting) ("I would break that question down into four, classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?").

73. *Id.*

74. Aaron Xavier Fellmeth, *Copyright Misuse and the Limits of the Intellectual Property Monopoly*, 6 J. INTELL. PROP. L. 1, 3 (1998).

75. See generally *Memo*, *supra* note 1, at, Part IV(C) and accompanying text (July 6, 2011).

they both have similar fundamental aims—to allow creativity and innovation to flourish within a free market system.

The Copyright Alert System requires internet service providers, whose aggregate market share approaches monopoly levels, to help content owners privately enforce their copyright monopolies. In exchange, the internet service providers acquire immunity from liability for the copyright infringements that occur on their networks. Although internet service providers and content owners have valid justifications, it is questionable whether they have the right to jointly encroach on the rights of subscribers.

Group Boycotts—Evolving Legal Standards

The Memorandum of Understanding, under which the Copyright Alert System was formed, may be considered a group boycott against individual internet subscribers. If the Memorandum of Understanding is considered a group boycott, then the Copyright Alert System is deemed a per se violation of antitrust law and is consequently illegal.

A group boycott is when natural competitors voluntarily agree to abstain from buying, using, or dealing with a particular party.[76] The Supreme Court prominently addressed the illegality of group boycotts in *Fashion Originators' Guild of America v. Federal Trade Commission*.[77] Similar to the Copyright Alert System's Memorandum of Understanding, in *Fashion Originators' Guild of America*, textile manufacturers banded together to form the Fashion Originators' Guild of America ("FOGA"), which was aimed to combat the appropriation of non-copyrightable designs by other manufacturers. After its formation, FOGA created and operated a complex private enforcement system for tracking participating retailers who sold pirated garments.[78] The Court found that the agreement between retailers and manufacturers to only sell original designs and consequently punish retailers who reneged on this arrangement to be a per se illegal violation of antitrust law. The Court stated that "the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches

76. Christopher R. Leslie, Antitrust Law and Intellectual Property Rights 460–62 (2011).

77. See Fashion Originators' Guild of America v. Fed. Trade Comm'n., 312 U.S. 457 (1941).

78. *Id.* at 461–62.

upon the power of the national legislature and violates the [antitrust laws.]'"[79]

While the Supreme Court has never overruled using a per se standard of review when assessing group boycotts, in certain instances the Court has implemented a more lenient standard of review. In the Supreme Court case, *Federal Trade Commission v. Indiana Federation of Dentists*,[80] Indiana dentists who were involved in a professional organization "refused to submit x-rays to dental insurers for use in benefits determinations. . ."[81] The Court stated that the dentists did, in fact, engage in a group boycott.[82] Although historically group boycotts were deemed a per se violation of antitrust law,[83] the Court continued to analyze the case under an abridged rule of reason approach.[84] In this abridged approach, the Court looked at the type of restraint at issue and any pro-competitive justifications for the restraint.[85] The Court did not look extensively at market power, stating that:

> [S]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition . . . proof of actual detrimental effect, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effect."[86]

Although the Court did not look at market power in its abridged rule of reason analysis, the enormous aggregate market power of signatory content owners and internet service providers would provide further evidence against the antitrust legality of the Copyright Alert System under a comprehensive rule of reason or per se analysis.

Sherman Act Implications of the Copyright Alert System

The Copyright Alert System may not survive either a per se or rule of reason antitrust analysis. At its core, the Copyright Alert System is a concerted restraint of trade between content owners and internet service providers: it privately enforces copyright protections against

79. *Id.* at 465.
80. Fed. Trade Comm'n. v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986).
81. See *id.* at 449.
82. *Id.* at 458.
83. *Id.* at 458.
84. *Id.* at 459.
85. *Id.* at 460–61.
86. *Id.*

subscribers who use peer-to-peer file sharing to receive online content.

Type of Agreement and Restraint at Issue

The first steps in determining whether the Copyright Alert System violates §1 of the Sherman Act are to analyze whether: (1) the Memorandum of Understanding is a horizontal or vertical agreement between content owners and internet service providers; and (2) the Copyright Alert System restrains trade. If the Copyright Alert System is considered either a horizontal restraint of trade, group boycott, or vertical restraint of trade, the Copyright Alert System may violate antitrust law and the court should apply either a per se or rule of reason analysis to determine its validity.

Horizontal or Vertical Agreement

A horizontal agreement to restrain trade is "made between competing businesses to manipulate competition amongst all competitors in the marketplace."[87] Horizontal agreements require that all participating businesses within a horizontal restraint operate at the same level in the market.[88] Industry-wide conspiracies amongst businesses at the same level of the supply chain are often viewed as horizontal agreements.[89] A vertical agreement to restrain trade, in contrast, is "made between a seller and a buyer in where a retailer can buy products from one manufacturer but in the agreement is restricted from buying from a competing manufacturer."[90] In a vertical restraint, businesses at different levels of the supply chain cooperate.[91] Both vertical and horizontal agreements to restrain trade may violate antitrust law if the arrangements adversely affect the free market.[92] Typically, hori-

87. Horizontal and Vertical Agreements that Violate the Sherman Act, STUDY.COM, http://study.com/academy/lesson/horizontal-and-vertical-agreements-that-violate-the-sherman-act.html (last visited Feb., 2017) [https://perma.cc/QBH9-KVFZ].

88. See generally Executive Summary of Antitrust Laws, FINDLAW, http://corporate.findlaw.com/business-operations/executive-summary-of-the-antitrust-laws.html (last visited Feb., 2017) [https://perma.cc/EER6-39F4].

89. U. S. v. Nat'l Ass'n of Securities Dealers, Inc., 422 U.S. 694, 729–30 (1975).

90. *Id.*

91. *See generally Executive Summary of Antitrust Laws,* FINDLAW, http://corporate.findlaw.com/business-operations/executive-summary-of-the-antitrust-laws.html (last visited Feb., 2017) [https://perma.cc/DK5G-4XCG].

92. *Id.*

zontal restraints are per se violations of antitrust law.[93] The rule of reason analysis is always used to evaluate vertical restraints.[94]

To determine whether the Copyright Alert System is a horizontal or vertical arrangement, we must analyze the structure of the Memorandum of Understanding. In this case, numerous content owners and internet service providers have signed the Memorandum of Understanding. This makes the Memorandum of Understanding a horizontal agreement among content owners and a parallel horizontal agreement among internet service providers. Additionally, the Memorandum of Understanding brings together internet service providers and content owners, constituting a vertical agreement between the suppliers of internet services and the owners of the copyrighted material distributed via the internet.

The majority of the agreement details duties that are owed to content owners by internet service providers in a seemingly vertical arrangement. However, the agreement also incorporates horizontal aspects. According to §5(C) of the Memorandum of Understanding, content owners must collude to only submit a limited number of initial internet service provider notices per month.[95] This provision constitutes an expressed horizontal arrangement between content owners to limit the number of notices of infringement reported to participating internet service providers.

It can be argued that horizontal collusion also occurs among internet service providers who, through the Copyright Alert System, have laid out a precise mechanism for alerting, educating, and punishing subscribers for alleged copyright infringement.[96] Although specific technical implementation mechanisms are not outlined in the Memorandum of Understanding, the agreement outlines pointed and specific requirements and all signatory internet service providers must follow each step of the Copyright Alert System. A signatory internet service provider can only escape this arrangement and cease participation once the agreement is no longer effective.[97]

93. Thomas B. Leary, *A Structured Outline for the Analysis of Horizontal Agreements*, FED. TRADE COMM'N (2004), https://www.ftc.gov/sites/default/files/documents/public_statements/structured-outline-analysis-horizontal-agreements/chairsshowcasetalk.pdf [https://perma.cc/CC73-KW7N].

94. *Id.*

95. *See Memo*, *supra* note 1, at Section V(C) (July 6, 2011).

96. *See Memo*, *supra* note 1, at Section IV (July 6, 2011).

97. *See Memo*, *supra* note 1, at Section VIII (July 6, 2011) (the effective term date of the Memorandum of Understanding is four (4) years upon execution).

The Memorandum of Understanding is not likely to be viewed as strictly as a vertical restraint, which is subject to a comprehensive rule of reason analysis, because of the parallelism of the agreement between two layers of competitors, content owners, and internet service providers. Additionally, the Memorandum of Understanding is not likely to be viewed as an isolated horizontal agreement subject to a strict per se analysis because of its collusive vertical elements. Since private copyright rights are involved, courts have several options when choosing a standard of review for the Copyright Alert System. Courts can analyze the Copyright Alert System under: (1) a group boycott standard of review similar to *Fashion Originators' Guild of America v. Federal Trade Commission*, subject to per se antitrust liability; (2) a general per se standard of review; (3) an abridged rule of reason standard of review; or (4) a comprehensive rule of reason standard of review.

Group Boycott Analysis

The restraint of trade at issue within the Memorandum of Understanding resembles a group boycott similar to *Fashion Originators' Guild of America v. Federal Trade Commission*.[98] The Copyright Alert System is a self-enforcement mechanism that allows content owners and internet service providers to deal, or refuse to deal, with alleged copyright infringers. Instead of targeting companies such as non-signatory content owners and internet service providers, the Copyright Alert System punishes subscribers directly.[99] The Copyright Alert System details multiple punitive measures to block consumers from receiving internet services including: (1) sending warning notices to subscribers;[100] (2) directing subscribers to a landing page without the consumer's consent;[101] and (3) temporarily stepping down the consumer's internet service,[102] which can be described as a blatant restriction of service. This refusal to provide internet service to alleged copyright infringers may constitute a group boycott of subscribers. However, a court may be hesitant to label the Copyright Alert System as a group boycott because subscribers can still receive internet services from their internet service providers, just not at the same caliber.

98. 312 U.S. 457 (1941).

99. *See Memo, supra* note 1, at Section VI(G) (July 6, 2011).

100. *See Memo, supra* note 1, at Section IV(G)(i) (July 6, 2011).

101. *See Memo, supra* note 1, at Section IV(G)(ii) (July 6, 2011).

102. *See Memo, supra* note 1, at Section IV(G)(iii) (July 6, 2011).

Per Se Analysis

Courts still may attach per se antitrust liability to the Copyright Alert System even if it is not considered a group boycott. The Memorandum of Understanding is an express agreement in which five powerful internet service providers and influential content owners have agreed horizontally within their prospective industries to adhere to the prescriptions of the Copyright Alert System. If a signatory party does not adhere to the Copyright Alert System, it is in violation of the Memorandum of Understanding and may be liable for breach of contract. Historically, it is this industry-wide restriction amongst content owners and internet service providers that constitutes a horizontal restriction on trade, which is deemed a per se violation of antitrust law.[103]

Nevertheless, if the Copyright Alert System is not deemed a per se violation, the Alert System would likely not survive a rule of reason analysis.

Comprehensive Rule of Reason Analysis

Under the Copyright Alert System, powerful internet service providers use their overwhelming market power to affect individual subscriber connections. Although a subscriber may have the ability to change internet service providers, this ability is hindered by enormous transfer costs and the Post Mitigation Measure Step, where the internet service provider is required to disclose identity information to other content owners.[104] In order to determine whether the Copyright Alert System could pass a comprehensive rule of reason analysis (and, in turn, an abridged rule of reason analysis), a court must look at the internet service providers' (1) market power and (2) the Copyright Alert System's anticompetitive effects.[105] Signatory parties may present pro-competitive justifications to validate their business practice.

103. Thomas B. Leary, *A Structured Way for the Analysis of Horizontal Agreements*, FED. TRADE COMM'N (2004), https://www.ftc.gov/sites/default/files/documents/public_statements/structured-outline-analysis-horizontal-agreements/chairsshowcasetalk.pdf [https://perma.cc/6KN5-BTZ7].

104. *See Memo, supra* note 1, at Section IV(G)(iv) (July 6, 2011).

105. Daniel C. Fundakowski, *The Rule of Reason: From Balancing to Burden Shifting*, The Civil Practice & Procedure Committee's Young Lawyers Advisory Panel: Perspectives in Antitrust (Jan 22, 2013), http://www.americanbar.org/content/dam/aba/publications /antitrust_law/at303000_ebulletin_20130122.authcheckdam.pdf [https://perma.cc/QX7S-XZB9].

Market Power

For the Copyright Alert System to pass a comprehensive rule of reason analysis, the parties to the Memorandum of Understanding must have sufficient market power. If a court decides to implement an abridged rule of reason analysis, no determination of market power is needed.[106] The product, in this case, is the broadband[107] internet service market. Subscriber participants are the share affected by the restraint. Market power is determined by analyzing the (1) relevant product market involved and (2) geographic market.

Product Market

Generally, a subscriber can receive broadband internet access through a fiber-optic service, satellite internet service, digital subscriber line ("DSL"), broadband over powerlines ("BPL"), cable modem, or through wireless options.[108] Of these six alternatives, it is safe to assume that the wireless versions (wireless and satellite internet services) are not comparable to the other four alternatives because of their increased restrictions on bandwidth usage[109] and signal latency.[110] Additionally, DSL may be eliminated as a comparable substitute because its speed and efficiency is physically limited by its proximity to the telephone company's office.[111] Thus, for a subscriber to receive relatively comparable internet access to the signatory in-

106. *See generally* Fed. Trade Comm'n. v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–61 (1986).

107. The reason the relevant product at hand is broadband internet service access is because the five signatories to the Memorandum of Understanding provide broadband internet access. Dial-up access, which is the other alternative for internet access, is the traditional way to receive internet service but is much slower and much more outdated than broadband internet service.

108. *Types of Broadband Connections,* FED. COMM. COMM'N, https://www.fcc.gov/general/types-broadband-connections (last visited March 25, 2016) [https://perma.cc/UHC5-JUUS].

109. *Satellite Internet,* ISP REVIEWS, http://www.isp-reviews.org/satellite.htm (last visited Feb., 2017) [https://perma.cc/3EPK-KA55].

110. *Id.*

111. DSL modems follow the data rate multiples established by North American and European standards. In general, the maximum range for DSL without a repeater is 5.5 km (18,000 feet). As distance decreases toward the telephone company office, the data rate increases. Another factor is the gauge of the copper wire. The heavier 24-gauge wire carries the same data rate farther than 26-gauge wire. If you live beyond the 5.5 kilometer range, you may still be able to have DSL if your phone company has extended the local loop with optical fiber cable.

Fast Guide to DSL, WHATIS, http://whatis.techtarget.com/definition/0,,sid9_gci213915,00.html (last visited April 1, 2016) [https://perma.cc/9MLQ-2GBM].

ternet service providers, their options are to switch to fiber-optics, cable modem, or BPL.

Geographic Market

Conservatively, signatory internet service providers constitute over 60% of the relevant national market of internet service providers.[112] The lower limit to establish a sufficient presumption of market power is 55%.[113] Yet, even though the signatory internet service providers compose 60% of the national relevant market, a more accurate indicator of their market power can be seen through analyzing their relevant power on a localized basis.

In 2010, the Federal Communications Commission estimated that about 75% of the national population of internet subscribers could only have their local cable television company as a high-speed internet service provider.[114] In effect, if the local internet service provider happens to be Verizon, Cablevision, AT&T, or Time Warner Cable,[115] then subscribers have no other option but to adhere to their service in order to also receive television services. A deficiency of internet options has been a common problem across the country; even the Bay Area is mostly provided by either Comcast or AT&T.[116] Although some areas provide alternative high-speed internet access, their network and services may not be as advanced as the signatory internet service providers.

For example, Comcast provides multiple package options that may bundle telephone, internet, and cable services together, making it difficult, if not impossible, to delineate their internet service from the other two services together. Switching to another internet service provider may entail high switching costs and cancellation fees. These factors make transferring to a new high-speed internet service provider difficult, if not unfathomable, unless the subscriber is willing to

112. *ISP Usage and Market Share*, STATOWL, http://www.statowl.com/network_isp_market_share.php (last visited March 27, 2016) [https://perma.cc/Y4CV-AHRY].

113. United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005).

114. *Connecting America: National Broadband Plan*, FED. COMMC'NS COMM'N (2010), http://download.broadband.gov/plan/national-broadband-plan.pdf [https://perma.cc/N3EJ-9GXN].

115. *See Memo*, *supra* note 1, at Attachment A (July 6, 2011).

116. Troy Wolverton, *Hey Bay Area, your choices for broadband service are between bad and worse*, SILICONBEAT (March 28, 2013), http://www.siliconbeat.com/2013/03/28/hey-bay-area-your-choices-for-broadband-service-are-between-bad-and-worse/ [https://perma.cc/N4DW-7UTV].

forgo their television subscriptions. Courts should weigh these factors when evaluating the barriers to switching internet service providers.

Anticompetitive Effects

Consumer welfare is of great concern in antitrust law, yet the fundamental implementation of the Copyright Alert System may punish subscribers who are accused, but not guilty, of copyright infringement. If a subscriber does not engage in online copyright infringement, they cannot declare their innocence until the third step in the alert process. Additionally, if a subscriber succeeds in challenging the alleged infringement, they must jump through several financial and arbitrational hoops before receiving reprieve.

To challenge a claim of copyright infringement, a subscriber must: (1) pay an additional $35 fee above their monthly subscription price, (2) have their case heard at an ad-hoc extra-judicial tribunal, and (3) assert only one of six defenses to rebut a presumption of copyright infringement. Throughout this process, a subscriber's internet service will still be hampered. Additionally, a subscriber must challenge and win all prior accusations of infringement, with no time limitation on their duration, or they face continuing legal and service repercussions.

Under the Copyright Alert System, the subscriber is also presumed to be an infringer without any due process investigation. The alleged infringer, instead of the internet service provider or content owner, has the burden to prove their innocence and disprove copyright infringement. This is a burden shift from what is required to prove copyright infringement under §501 of the Copyright Act, which states that the content owner, not the alleged infringer, must establish that they are the holder of the copyright and prove that the defendant, the subscriber, infringed on this right.[117] Under the Copyright Alert System, subscribers are forced, without access to any evidence, to prove that they did not infringe. All evidence of copyright infringement is kept with the content owner and internet service provider, making incorrect accusations of copyright infringement more prevalent than under federal law proceedings to establish copyright infringement.

Lawful subscribers may also suffer from the misapplication of the Copyright Alert System. Although the Copyright Alert System and remedies provided by Congress aim to protect innovation and creativ-

117. 17 U.S.C. § 501 (2006).

ity among content creators, all consumers of online media may not be copyright infringers. Incorrect implementation of the Copyright Alert System against non-infringers may upset law-abiding subscribers and negatively shift public concern away from protecting copyright rights altogether.

The Copyright Alert System also restricts content owners from issuing their own notices of copyright infringement. Content owners must go through a quota-like system of reporting to internet service providers, who in turn administer the four-step alert system. Internet service providers are also restricted within the confines of the Copyright Alert System, thus removing their ability to engage in competition without fear of repercussions for violating the Memorandum of Understanding. This restriction of internet service providers and content owners reinforces the anticompetitive nature of the Memorandum of Understanding, and the lack of a clear abdication clause prevents a party from reneging on the Memorandum without facing contractual repercussions.

Furthermore, the Memorandum of Understanding requires signatory parties to share information about subscribers between internet service providers and content owners. The Supreme Court has deemed such collusive information sharing as anticompetitive violations of antitrust law.[118]

Pro-Competitive Justifications

The Copyright Alert System provides few pro-competitive benefits to subscribers. Online infringement may contribute to internet congestion, but if a subscriber is using high speed internet, the slowdown is negligible.[119] Although there are pre-existing federal protections for copyright, if the Copyright Alert System is implemented correctly, it may provide incentives to create new and innovative works.[120] Additionally, subscribers who engage in peer-to-peer file sharing may have increased risk for security breaches of important sensitive information.[121]

118. United States v. U.S. Gypsum Co., 438 U.S. 422, 444 (1978).

119. *Will sharing slow down my Internet connection?*, SpeedGuide, http://www.speedguide.net/faq/will-sharing-slow-down-my-internet-connection-186 (last visited May 13, 2016) [https://perma.cc/P7YV-CJRG].

120. *See Memo, supra* note 1, at Preamble (July 6, 2011).

121. *Peer-to-Peer File Sharing: A Guide for Business*, Fed. Trade Comm'n (2010), https://www.ftc.gov/tips-advice/business-center/guidance/peer-peer-file-sharing-guide-business [https://perma.cc/Z2KW-9L7J].

From a purely economic standpoint, the Memorandum of Understanding could create an incentive for internet service providers to implement only the least restrictive punishments allowed under the Copyright Alert System, thus enticing subscribers to choose their service over others. This would allow internet service providers to lure subscribers away from one another, resulting in increased competition among internet service providers.

Conclusion

The Copyright Alert System empowers content owners, internet service providers, and consumers to acknowledge and take accountability for widespread instances of online copyright infringement. If not challenged, however, the Copyright Alert System may create a safe-haven for legally-sanctioned monopolies in the internet and entertainment industries. This would allow them to flourish, extending beyond the boundaries of what federal copyright was meant to protect. The government has an obligation to protect both copyright owners and consumers, and it must balance the benefits of a private enforcement mechanism, such as the Copyright Alert System, against potential harms to consumers. Administratively, the Copyright Alert System seems convenient, but the government must remain active in regulating its breadth.