

Six Strikes Measured against Five Norms

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Presentation Structure

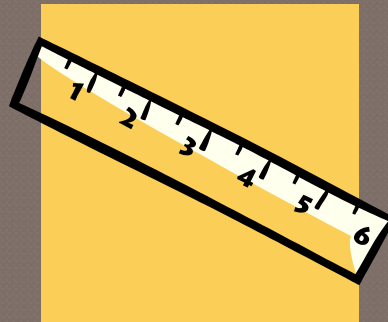
◎ Two parts

1. Descriptive

- What's the Copyright Alert System (CAS)?

2. Normative

- How does it measure up against norms & values important to Internet users?



Parties to the Graduated Response MOU

BROADBAND PROVIDERS



COPYRIGHT OWNERS



Copyright Alert System (CAS) Parameters

PRIMARILY A “NOTICE AND NOTICE” SYSTEM



Copyright Alert System (CAS) Parameters

○ 4 Steps, 6 Alerts

1. Initial Educational Step

- 2 “Educational Step Copyright Alerts”
- At least 7 days apart

2. Acknowledgement Step

- 2 “Acknowledgement Step Copyright Alerts”
- At least 7 days apart
- Subscriber must acknowledge receipt (landing page or pop-up)

3. Mitigation Measures Step

- 1 “Mitigation Measure Copyright Alert”
- Imposition of MM (delayed to allow for Independent Review option)
- A range of possibilities – ISP has discretion
- May be waived in favor of a “Fifth Warning Copyright Alert”

4. Post-Mitigation Measures Step

- 1 “Post-Mitigation Measure Copyright Alert”
- Initial MM reapplied or different MM applied (delayed to allow for Review option)

Copyright Alert System (CAS) Parameters

- ◉ What happens after the 6th Alert?
 - ISP does not have to keep sending alerts but must continue to track and report notices received for the subscriber in question
 - System resets for every subscriber after 12 months



Copyright Alert System (CAS) Parameters

- ◉ What are the possible Mitigation Measures?
 - Temporary reduction in transmission speed
 - Temporary step-down in service tier to a restricted throughput tier
 - Temporary redirection to a landing page for copyright “instruction” or until subscriber contacts customer service
 - Temporary suspension of access for a reasonable time (ISP decides what’s “reasonable”)
 - Other

Copyright Alert System (CAS) Parameters

- How does the Independent Review work?
 - Center for Copyright Information (CCI) Executive Committee chooses a provider (now known to be AAA), which assembles a panel of neutrals
 - Each neutral must be a lawyer trained to apply “prevailing legal principles as determined by U.S. federal courts” (TBD by an “accepted, independent expert” on copyright)
 - Process must be automated to the maximum extent possible
 - One reviewer per case; no live hearing; no discovery
 - Subscriber’s identity not revealed to copyright owner
 - Limited range of defenses available
 - \$35 filing fee – refundable if subscriber wins; may be waived
 - Does not preclude civil action for either party

Copyright Alert System (CAS) Parameters

- ◉ What defenses are available?
 - Misidentification of account
 - Unauthorized use of account (once only)
 - Authorization
 - Fair use
 - Misidentification of file
 - Work published before 1923

Finding a balance

ON THE ONE HAND... COPYRIGHT OWNERS

- ◉ protect legal rights granted by copyright
- ◉ stem the unlawful distribution of works

ON THE OTHER HAND... CONSUMERS

- ◉ provide education
- ◉ protect privacy
- ◉ give fair warning
- ◉ provide an opportunity for review



What other values are in the balance for consumers?

○ Five norms

1. Freedom of expression

- Access to lawful content is insured

2. Privacy

- Anonymity is protected

3. Fairness

- Innocence is presumed
- Allegations are adjudicated neutrally
- Sound legal principles are applied consistently

4. Proportionality

- Sanctions fit the infraction

5. Transparency

- Protocol terms are easy to find and easy to understand
- People running the show are easy to identify
- There is ongoing public disclosure of system performance

Five Norms:

1. Freedom of Expression

- ◉ The major threat to **freedom of expression** in online enforcement is **over-enforcement**
 - Misidentification of content
 - Inability of automated systems to “process” fair use
- ◉ Enforcement protocols that block or filter content are the most problematic



Five Norms:

1. Freedom of Expression

- How does the MOU stack up?
 - No in-network blocking or filtering of content by ISPs
 - Agreement to focus on files containing complete or substantially complete copyrighted works
 - Methods for identifying copyrighted content are subject to review by an “impartial technical expert”
 - A method is deemed inadequate only if “fundamentally unreliable”
 - Expert findings of inadequacy are confidential
 - Expert recommendations for improvement are non-binding
 - Notices will not be issued on the basis of inadequate methods (but the public has no way to know about findings of inadequacy)

Five Norms:

1. Freedom of Expression

The Six Strikes system is protective of consumer **freedom of expression.**



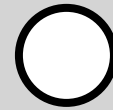
**Strongly
Agree**



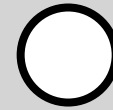
Agree



Neutral



Disagree



**Strongly
Disagree**

Five Norms:

1. Freedom of Expression

◉ Room for improvement?

- Content ID methodology is OK unless “fundamentally unreliable”? *Yikes!*
- Expert recommendations for improvement should be binding
- Findings of inadequacy should be publicly disclosed if not remedied within a set period of time

Five Norms

2. Privacy

- ◎ The major threats to **privacy** in online copyright enforcement
 - Loss of anonymity without legal process (i.e., no subpoena)
 - Surveillance of subscriber traffic



Five Norms

2. Privacy

⦿ How does the MOU stack up?

- ISPs forward notices but do not identify alleged infringers to copyright owners
- Information is gathered by copyright owners from open P2P networks; ISPs are not monitoring traffic
- Review/appeal process does not involve ID of subscribers
- Methods for identifying infringements are subject to review by “recognized privacy experts”
 - (But) recommendations for improvement are confidential and non-binding

Five Norms

2. Privacy

The Six Strikes system is protective of consumer **privacy**.



**Strongly
Agree**



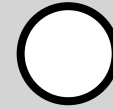
Agree



Neutral



Disagree



**Strongly
Disagree**

Five Norms

2. Privacy

⦿ Room for improvement?

- Expert findings of inadequacy with respect to privacy should be made public if they are not remedied within a reasonable time
- Expert recommendations for improvements in methodologies should be binding

Five Norms

3. Fairness

- ⦿ Threats to **fairness** in online copyright enforcement
 - Rush to judgment (presumption of guilt)
 - Lack of an opportunity to be heard by a neutral adjudicator
 - Unknown or inconsistent standards
 - Limitations on defenses



Five Norms

3. Fairness

○ How does the MOU stack up?

- Rights owners get the benefit of two presumptions:
 1. IP addresses are accurately captured
 2. Copyrighted files are accurately identified
- Subscribers have a right to independent review of alerts
- The organization conducting the reviews is charged with training reviewers in accepted principles of federal law developed by an “independent expert”—but what are they, and who is that?
- Subscribers may raise defenses, but they are limited to 6 enumerated defenses

Five Norms

3. Fairness

The Six Strikes system is **fair** to consumers.



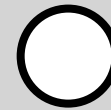
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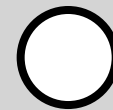
Agree



Neutral



Disagree



**Strongly
Disagree**

Five Norms

3. Fairness

◉ Room for improvement?

- Presumptions should be earned, not given uncritically
 - Methods for identifying IP addresses and infringing files must be provably reliable as a technical matter
- Legal principles to be applied in the review process should be made public, as should the identity of the “independent expert” who developed them
- Subscribers should be entitled to any defense cognizable under US copyright law, not just the six enumerated in the MOU

Five Norms

4. Proportionality

- ◎ The main threat to **proportionality** is a sanction or sanctions more severe or far-reaching than the offense warrants



Five Norms

4. Proportionality

○ How does the MOU stack up?

- Five alerts before any mitigation measure (MM) is imposed
- 7-day grace periods between alerts
- Termination of access is not a required MM
- Speed/throughput sanctions are not a required MM
- ISPs have discretion to waive the MM once per account
- Critical services (e.g., VOIP, e-mail, security/medical monitoring) are exempt
- “Reset” after 12 months

Five Norms

4. Proportionality

The Six Strikes system is **proportional** in its approach to sanctions.



**Strongly
Agree**



Agree



Neutral



Disagree



**Strongly
Disagree**

Five Norms

5. Transparency

- ⦿ Threats to **transparency** are secrecy and lack of disclosure surrounding various aspects of the program
 - Design
 - Implementation
 - Oversight
 - Outcomes
- ⦿ Lack of transparency undermines credibility and public confidence in program neutrality

Five Norms

5. Transparency

- ⦿ Parties are accountable on an ongoing basis to each other but not to the public
 - Internal CAS reports and audits are confidential
- ⦿ All input from independent technical experts on methodological weaknesses is confidential
- ⦿ Identities of technical experts are not disclosed
- ⦿ Identity of copyright expert is not disclosed
- ⦿ Process for choosing, training, and evaluating independent reviewers is confidential
- ⦿ Substantive legal principles applied by independent reviewers are not disclosed

Five Norms

5. Transparency

The Six Strikes system is **transparent** to the public in its governance and operations.



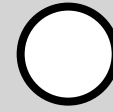
**Strongly
Agree**



Agree



Neutral



Disagree



**Strongly
Disagree**

Five Norms

5. Transparency

◉ Room for improvement?

- Input from technical experts about methodological shortcomings should be made public if remedial action is not taken within a reasonable time
- Annual reports containing detailed statistics on the program's operation and the outcome of independent reviews should be published on the CCI web site
- The legal standards applied by independent reviewers should be made public
- The independent review process should be audited annually by someone other than the CCI
- The identities of retained independent technical and legal experts should be disclosed

One overarching pro-consumer recommendation

- ◉ The Executive Committee of the CCI has ultimate responsibility for operation and oversight of the program
 - Appointments are evenly split between the parties (3+3)
- ◉ Why not give consumers a voice on that Committee? Why relegate that voice to an Advisory Board?
 - 2 members each from ISP and CO groups (2+2)
 - 1 independent copyright expert (+1)
 - 1 consumer/public interest advocate (+1)
- ◉ Alternatively, give the Advisory Board power to make **binding** recommendations