

THE LEGITIMACY OF GRADUATED RESPONSE SCHEMES IN COPYRIGHT LAW

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I INTRODUCTION

In an attempt to curb online copyright infringement, copyright owners are increasingly seeking to enlist the assistance of Internet Service Providers ('ISPs') to enforce copyright and impose sanctions on their users.¹ Commonly termed 'graduated response' schemes, these measures generally require that the ISP take some action against users suspected of infringing copyright, ranging from issuing warnings, to collating allegations made against subscribers and reporting to copyright owners, to suspension and eventual termination of service.

In Australia, the question of whether an ISP-administered graduated response scheme should be read into copyright law is the subject of the ongoing litigation between the movie industry and iiNet, a Perth-based ISP.² In the Full Federal Court, Emmett J expressed concern about the legitimacy of a scheme that placed the financial burden and legal risk wholly on ISPs, suggesting that at a minimum, a workable regime would require copyright owners to bear the costs and indemnify ISPs against claims by wrongfully terminated users.³ The Court, by majority, concluded that the allegations of infringement provided to iiNet by the movie industry were not sufficient to give rise to an obligation to terminate, particularly since they were unverifiable by iiNet.⁴ The decision is currently under appeal to the High Court, and it remains to be seen whether copyright owners will be able to provide sufficiently detailed and verifiable allegations of infringement to trigger an obligation to terminate in the future. In addition to this

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¹ See Sarah McBride and Ethan Smith, 'Music Industry to Abandon Mass Suits', *The Wall Street Journal* (online), 19 December 2008 <<http://online.wsj.com/article/SB122966038836021137.html>>; Barry Sookman and Dan Glover, 'Graduated Response and Copyright: An Idea That Is Right for the Times' on Barry Sookman, *Barry Sookman Copyright, Intellectual Property, Computer, Internet, e-Commerce Law* (20 January 2010) <<http://www.barrysookman.com/2010/01/20/graduated-response-and-copyright-an-idea-that-is-right-for-the-times/>>.

² *Roadshow Films Pty Ltd v iiNet Ltd* [2011] FCAFC 23 (24 February 2011) ('*iiNet*').

³ *Ibid* [210].

⁴ *Ibid* [211] (Emmett J); [762]–[763] (Nicholas J).

particular case, there have been some suggestions that a new legislative regime should be introduced to require ISPs to adopt a graduated response scheme, and the Internet Industry Association has begun to draft a code of practice for ISPs to take reasonable steps to address copyright infringement on their networks.⁵

This article highlights fundamental tensions between graduated response schemes and the rule of law, a fundamental tenet of the Australian legal system. Graduated response schemes shift the task of adjudicating upon and enforcing copyright away from the courts and onto intermediaries. This shift is designed to reduce enforcement costs⁶ and avoid the public relations problems associated with the large-scale litigation campaigns the music industry has previously adopted in the United States ('US').⁷ The weakening of judicial oversight, however, poses significant problems for legitimacy. In most common forms, graduated response schemes are highly problematic with regards to due process, the proper exercise of the judicial power of the Commonwealth, and respect for the rights of Australian internet users.

We begin in Part II by introducing the shift towards distributed enforcement of copyright and briefly explaining the core features of graduated response schemes that have been introduced and proposed. In order to evaluate the complex issues surrounding the legitimacy of such schemes, we highlight two main aspects of the rule of law: the requirement of proportionality, and the requirement of due process. Part III begins this analysis by examining the severity of disconnection as a penalty and the issue of proportionality of punishment, both at a general social level and as regards specific cases. In Part IV we turn to the requirements of due process and the problems associated with the quality of allegations of infringement and the ability of non-judicial processes

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- 5 Renai LeMay, 'IIA Starts on ISP Piracy Code of Practice', *ZDNet Australia* (online), 11 March 2011 <<http://www.zdnet.com.au/ia-starts-on-isp-piracy-code-of-practice-339311188.htm>>. See also David Frith, 'Moving With the Times on Movie Downloads', *The Australian* (online), 22 March 2011 <<http://www.theaustralian.com.au/australian-it/moving-with-the-times-on-movie-downloads/story-e6frgakx-1226025054963>> (reporting that iiNet has proposed the development of an independent body to oversee penalties for online copyright infringement); Asher Moses, 'Conroy Under Pressure to Stop Piracy', *The Age* (online), 5 February 2010 <<http://www.theage.com.au/business/conroy-under-pressure-to-stop-piracy-20100204-nge4.html>> (reporting that '[movie studios] would ramp up lobbying of the government to change the law to make ISPs liable for the downloading habits of customers'); Ben Grubb, 'Conroy Calls for Piracy Code of Conduct', *ZDNet Australia* (online), 7 February 2010 <<http://www.zdnet.com.au/news/communications/soa/Conroy-calls-for-piracy-code-of-conduct/0,130061791,339300874,00.htm>> (quoting Senator Conroy, Minister for Broadband, Communications and the Digital Economy: 'I think that a mature approach by both the movie industry and the internet industry sitting down, having a conversation and coming up with a code of practice is the absolute preferable outcome. The problem is at the moment in Australia there is no agreement, there is no discussion, there is no dialogue and people resorted to court'); Andrew Colley, 'Judge Seeks Commercial Copyright Solution', *The Australian* (online), 10 August 2010 <<http://www.theaustralian.com.au/australian-it/judge-seeks-commercial-copyright-solution/story-e6frgakx-1225903159314>>.
- 6 Cf *iiNet* [2011] FCAFC 23 (24 February 2011) [205]–[211] (Emmett J) (expressing concern about the high costs of developing a legitimate graduated enforcement scheme that could validate allegations of infringement while providing some due process guarantees to subscribers).
- 7 See Genan Zilkha, 'The RIAA's Troubling Solution to File-Sharing' (2010) 20 *Fordham Intellectual Property, Media and Entertainment Law Journal* 667, 689.

to evaluate copyright claims. Finally, in order to assess the constitutional validity of graduated response schemes, in Part V we consider the limitations imposed on the exercise of the judicial power of the Commonwealth. We argue that there is a real question to be investigated as to whether either an ISP-administered or a more formal administrative scheme could violate the limitations on the exercise of judicial power contained in Chapter III of the *Constitution*.

The rule of law forms an assumption in Australian law.⁸ The values of the rule of law ensure that our law is created and enforced in a way that protects the legitimate interests of Australian citizens and provides a fair and reasonably certain procedure for resolving disputes. We argue that any potential graduated response scheme should uphold the basic rule of law principles of proportionality and due process. The potentially problematic nature of graduated response schemes in these regards suggests that we should carefully and critically evaluate the legitimacy of both reading a graduated response scheme into existing copyright law and any proposals for the introduction of a more formal administrative scheme. In order to uphold the high standards expected of law in a liberal democracy, we conclude that the evaluation of legal doctrine, the determination of issues of fact, and the discretionary imposition of punishments required of a legitimate graduated response scheme suggest that if a graduated response scheme is to be introduced, it should only be enforced through judicial procedure.

II GRADUATED RESPONSE SCHEMES

The argument for the introduction of graduated response schemes rests on two main justifications: that they will provide a cheaper enforcement mechanism necessary to stem the tide of copyright infringement,⁹ and that ISPs have a social obligation to participate in the enforcement process because they otherwise derive an unfair benefit from infringing behaviour on their networks.¹⁰ The push for graduated responses as an ‘alternative enforcement mechanism’¹¹ comes as the copyright industry begins to move away from a strategy of suing individual

8 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

9 See Olivier Bomsel and Heritiana Ranaivoson, ‘Decreasing Copyright Enforcement Costs: The Scope of a Graduated Response’ (2009) 6(2) *Review of Economic Research on Copyright Issues* 13, 22–3; Peter K Yu, ‘The Graduated Response’ (2010) 62 *Florida Law Review* 1373, 1381–3; Sookman and Glover above n 1.

10 See Annemarie Bridy, ‘Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement’ (2010) 89 *Oregon Law Review* 81, 87–8; see also *EMI Records (Ireland) v Eircom Ltd* [2010] IEHC 108 (16 April 2010) [29] (*‘Eircom’*) (finding that an ISP’s obligation to terminate repeat infringers is necessary ‘for compliance with a legal obligation cast upon the courts, among other organs of the State, to defend the Constitution and the laws of our society.’)

11 Alain Stowel, ‘Internet Piracy as a Wake-up Call for Copyright Law Makers – Is the “Graduated Response” a Good Reply?’ (2009) 1 *WIPO Journal* 75, 78.

filesharers which has been widely criticised as both ineffective and grossly unfair.¹²

Copyright owners have sought to introduce graduated response schemes in two main ways: by direct legislative action, and linking them to the threat of secondary liability. Graduated response schemes have been or are in the process of being implemented in various forms around the world: through court-sanctioned contractual arrangements in Ireland;¹³ by administrative and Ministerial order in South Korea;¹⁴ by legislatively supported industry code in the United Kingdom ('UK');¹⁵ and by judicial determination supported by administrative bodies in New Zealand ('NZ')¹⁶ and France.¹⁷ While no formal schemes exist in the US, a number of large service providers have apparently agreed with copyright owners to terminate the accounts of alleged repeat infringers.¹⁸ In Australia, the Full Federal Court in *iiNet* held, by majority, that iiNet was not obliged to terminate the accounts of subscribers who are alleged to be 'repeat infringers' in order to avoid liability for authorising copyright infringement.¹⁹ The Full Court left open, however, the possibility that such an obligation may arise in future,²⁰ and the movie studios have sought leave to appeal to the High Court.²¹

Understanding the manner in which graduated response schemes are implemented is fundamentally important for evaluating their legitimacy; generally speaking, the more formal legislative schemes include greater

12 McBride and Smith, above n 1; Eliot Van Buskirk, 'RIAA to Stop Suing Music Fans, Cut Them Off Instead' on *Wired: Epicenter* (19 December 2008) <<http://www.wired.com/epicenter/2008/12/riaa-says-it-pl/>>. See also Kristina Groennings, 'Costs and Benefits of the Recording Industry's Litigation Against Individuals' (2005) 20 *Berkeley Technology Law Journal* 571, 589–90.

13 *EMI Records (Ireland) Ltd v Eircom Ltd* [2010] IEHC 108 (16 April 2010) [42]. Note that a recent decision of the Irish High Court held that an injunction requiring another Irish ISP, UPC, to take measures to prevent copyright infringement on its network would be desirable but was not available under Irish law: *EMI Records (Ireland) Ltd v UPC Communications Ireland Ltd* [2010] IEHC 377 (11 October 2010) [96].

14 Heesob Nam, 'Facts and Figures on Copyright Three-Strike Rule in Korea' on *Heesob's IP Blog* (24 October 2010) <<http://hurips.blogspot.com/2010/10/facts-and-figures-on-copyright-three.html>>, explains that a code-based system provides for the voluntary termination of subscriber accounts by ISPs on the recommendation of the Copyright Commission and for mandatory termination of subscriber accounts by order of the Minister of Culture, Sports, and Tourism. In the first full year of the scheme's operation, no Ministerial order to suspend a subscriber account was made, but 31 recommendations to suspend subscriber internet access were made by the Commission and complied with by ISPs. All recommendations to suspend were complied with.

15 *Digital Economy Act 2010* (UK) c 24.

16 *Copyright (Infringing File Sharing) Amendment Act 2011* (NZ).

17 *Loi n° 2009-1311 du 28 octobre 2009* [Law No 2009-1311 of 28 October 2009] (France) JO, 29 October 2009, 18290 art 7, amending *Code de la Propriété Intellectuelle* [Code of Intellectual Property] (France) art L335–7.

18 Bridy, above n 10; Yu, above n 9.

19 *iiNet* [2011] FCAFC 23(24 February 2011).

20 *Ibid* [257] (Emmett J); [757]–[765] (Nicholas J).

21 Andrew Colley, 'AFACT, iiNet Copyright Case Heads to Sydney High Court,' *The Australian* (online), 24 March 2011 <<http://www.theaustralian.com.au/australian-it/iiNet-copyright-case-heads-to-high-court/story-e6frgax-1226027440918>>.

safeguards for due process than do privately negotiated contractual arrangements. In France, for example, after an initial administrative scheme, known as HADOPI, was held to be unconstitutional by the French Constitutional Council,²² a new system was introduced which requires a full criminal proceeding for disconnection for periods up to one year.²³ The least formal schemes, by contrast, are contractual agreements between ISPs and copyright owners, which include no public oversight or appeal mechanisms. In Ireland, for example, a looming secondary liability copyright suit forced Eircom, Ireland's second largest ISP, to enter into a settlement agreement which requires Eircom to implement a three-strikes policy based upon infringement notices issued by copyright owners.²⁴ The exact details for implementation of the three-strikes policy were left to further negotiation²⁵ and have not been made publicly available. Similarly, in the US, some universities and major ISPs have adopted a range of differing measures to disconnect users who are the targets of multiple allegations of infringement, but no public oversight exists.²⁶ As ISPs continue to enter into alliances or amalgamations with media corporations, this trend is expected to continue.²⁷ As a type of compromise between the requirements of legitimacy and the drive to lower enforcement costs, the UK has provided for the future introduction of an administrative code-based graduated response scheme overseen by the communications regulator, which includes minimum safeguards for legitimacy and a limited avenue of appeal to the courts.²⁸ Similarly, NZ has introduced a hybrid ISP–judicial regime, where ISPs will be required to collate allegations of infringement received by subscribers but copyright owners will have to apply to the Court for an order to terminate each subscriber's internet access.²⁹

There are several key concerns about the legitimacy of graduated response schemes that are best highlighted through the discourse of the rule of law. The primary conception of the rule of law is a restraint on the arbitrary exercise of

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- 22 Conseil constitutionnel [French Constitutional Court], decision n° 2009-580 DC, 10 June 2009 reported in JO, 13 June 2009, 9675. (English translation available from the Council.)
- 23 *Loi n° 2009-1311 du 28 octobre 2009* [Law No 2009-1311 of 28 October 2009] (France) JO, 29 October 2009, 18290 art 7, amending *Code de la Propriété Intellectuelle* [Code of Intellectual Property] (France) L 335–7.
- 24 *EMI Records & Ors v Eircom Ltd* [2010] IEHC 108 [9].
- 25 *Ibid.*
- 26 See Bridy, above n 10, 103, 129; Yu, above n 9, 1409–10; Nate Anderson, 'RIAA Graduated Response Plan: Q&A with Cary Sherman,' *Ars Technica* (online), 21 December 2008 <<http://arstechnica.com/old/content/2008/12/riaa-graduated-response-plan-qa-with-cary-sherman.ars>>; Greg Sandoval, 'A Year Out, Where's RIAA's Promised ISP Help?,' *CNET News* (online), 23 December 2009 <http://news.cnet.com/8301-31001_3-10420803-261.html>.
- 27 Yu, above n 9, 1416; Annemarie Bridy, 'ACTA and the Specter of Graduated Response' (Research Paper No 2, Program on Information Justice and Intellectual Property, American University Washington College of Law, September 2010) 11–13 <<http://digitalcommons.wcl.american.edu/research/2/>>. See also Jeremy de Beer and Christopher D Clemmer, 'Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?' (2009) 49 *Jurimetrics* 375.
- 28 See *Digital Economy Act 2010* (UK) c 24, s 3, which inserts *Communications Act 2003* (UK) c 21, s 124A.
- 29 *Copyright (Infringing File Sharing) Amendment Act 2011* (NZ) ss 122C–122F, 122J, 122P.

power: law regulates and legitimises the actions of public authorities.³⁰ In the digital environment, where a great majority of the communications infrastructure is privately owned, the actions and responsibilities of private intermediaries also increasingly implicate public values.³¹ In this paper, we address two main aspects of the rule of law: the requirement of proportionality, and the requirement of due process.

III PROPORTIONALITY OF GRADUATED RESPONSE SCHEMES

One of the key requirements of the rule of law is that laws must ‘serve a defensible view of the common good’.³² There is a strong concern common to all forms of graduated response schemes that the evolution of distributed copyright enforcement is generally justified by a rhetoric of permanent crisis that makes permissible ‘extraordinary countermeasures’³³ that may not otherwise represent the common good. The remedy of prohibiting an individual from accessing the internet is an extraordinary penalty for infringement of a civil right and goes far beyond the predominantly compensatory nature of our current copyright system.³⁴ Graduated response schemes raise a fundamental issue of proportionality which is particularly visible in the systematic disconnect between the severity of the infringing acts and the severity of the penalty.

One of the core principles of proportionality in western jurisprudence is that ‘punishment should fit the crime’.³⁵ At least since the Bill of Rights was introduced in 1689, excessive penalties have not been enforceable in England.³⁶ In Australia, without a Bill of Rights, the principle nonetheless forms part of our

30 See A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 188.

31 See generally Nicolas Suzor, ‘The Role of the Rule of Law in Virtual Communities’ (2011) 25 *Berkeley Technology Law Journal* 1819; Brian F Fitzgerald, ‘Software as Discourse: The Power of Intellectual Property in Digital Architecture’ (2000) 18 *Cardozo Arts & Entertainment Law Journal* 337; Paul Schiff Berman, ‘Symposium Overview – Part IV: How (If At All) to Regulate the Internet: Cyberspace and the State Action Debate – The Cultural Value of Applying Constitutional Norms to Private Regulation’ (2000) 71 *University of Colorado Law Review* 1263. For an interesting discussion of an expanded view of the separation of powers to include decentralising economic power in order to promote public values in an increasingly private domain in the information age, see generally Robert Cunningham, ‘The Separation of (Economic) Power: A Cultural Environmental Perspective of Social Production and the Networked Public Sphere’ [2010] 11 *Journal of High Technology Law* 1.

32 T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) 2.

33 Julie E Cohen, ‘Pervasively Distributed Copyright Enforcement’ [2007] 95 *Georgetown Law Journal* 1, 25–6.

34 Criminal sanctions are available for the infringement of copyright, but these are generally reserved to commercial infringement or infringement on a ‘commercial scale’: *Copyright Act 1968* (Cth) ss 132AC, 132AD–132AM.

35 For an overview of the ‘chequered history’ of proportionality, see generally Richard G Fox, ‘The Meaning of Proportionality in Sentencing’ (1994) 19 *Melbourne University Law Review* 489, 490–4.

36 *Earl of Devon’s Case* (1689) 11 State Tr 133, 136; William Blackstone, *Commentaries on the Laws of England* (Professional Books, first published 1765–1769, 1982 ed), Book 4 chs 16–19.

common law; as Murphy J explained in a concurring judgment in *Veen v The Queen*, quoting Cicero, we must ‘[t]ake care that the punishment does not exceed the guilt’.³⁷ In criminal cases, the High Court has repeatedly and forcefully stressed that the common law prohibits the imposition of penalties that are higher than what is proportionate to the gravity of the offence.³⁸

In copyright law, the normal calculation of damages is compensatory or restitutive.³⁹ Additional damages are available in order to punish flagrant infringement and impose a deterrent effect, but the discretion to impose additional damages lies with the court upon consideration of all applicable circumstances.⁴⁰ Of the current and proposed set of graduated response schemes, only the French and NZ schemes involve judicial discretion as to the imposition and period of suspension. Other schemes, whether they are implemented directly by the ISP or by an administrative body, lack this degree of judicial discretion, which means that it is possible for subscribers to have their internet access terminated for relatively minor infringements.

In evaluating the legitimacy of graduated response schemes, we must address two separate proportionality questions. First, is the scheme justifiable in general in order to limit copyright infringement in society? Second, is the scheme sufficiently attuned to individual circumstances that the penalties imposed are appropriate for the particular harm that is done? In the following sections, we first examine the severity of disconnection as a penalty for copyright infringement. We then turn to consider the appropriateness of termination as a punishment to limit copyright infringement and evaluate the potential chilling effect on the legitimate use of copyright material. Finally, we consider the risk that severe punishments may be imposed for relatively minor instances of wrongdoing in individual cases.

A The Severity of Disconnection

The internet provides core infrastructure for our modern information society. The significance of the internet over all aspects of social life has transformed it from a simple consumer service to a fundamentally important communications medium, and we are increasingly concerned with improving the speed and quality of access and ensuring that we address deficiencies in access in remote

37 (1978) 143 CLR 458, 494, quoting Cicero, *De Officiis*, Book 1, ch 25, [89].

38 See, eg, *Veen v The Queen* (1978) 143 CLR 458; *Veen v The Queen (No 2)* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ), 486 (Wilson J), 490–1 (Deane J), 496 (Gaudron J); *Hoare v The Queen* (1989) 167 CLR 348, 354 (‘a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its *objective* circumstances’) (emphasis in original). See also Fox, above n 35.

39 *Copyright Act 1968* (Cth) s 115(2).

40 *Copyright Act 1968* (Cth) ss 115(4)(b)(i), (4)(b)(ia). See also Andrew Trotter, ‘Statutory Damages in Copyright’ (2010) 21 *Australian Intellectual Property Journal* (forthcoming).

areas,⁴¹ in disadvantaged sectors of society, and amongst elderly citizens. According to the Australian Bureau of Statistics ('ABS') at the end of June 2010 there were 9.5 million internet subscribers in Australia.⁴² Statistics from the World Internet Project in Australia show that the internet is now regarded by users as more important for access to information than newspapers, radio, and television.⁴³ The same report shows that the internet provides an important way for people to communicate, increasing the time that people spend communicating with friends and family;⁴⁴ is an important source for entertainment,⁴⁵ creativity⁴⁶ and commerce;⁴⁷ and changes the way people interact with politics.⁴⁸

Access to online information resources is now critical for research and education. Organising everyday activities such as paying bills, travel, banking and socialising all now have an online element. The growth of the internet has spurred business both in the online delivery of goods and services and the creation of innovative new markets. Governments around the world have, in recent years, made enormous progress in using the internet to enhance

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- 41 The Federal Government has embarked on building a \$35 billion national broadband network ('NBN') that will drastically improve the communications infrastructure and extend broadband access to a larger proportion of the population. The NBN is designed to provide gigabit fibre optic connections to 93 per cent of Australian homes and businesses and supply remaining homes and businesses with wireless and satellite access: Minister for Broadband, Communications and the Digital Economy, 'New National Broadband Network' (Media Release, 7 April 2009) <http://www.minister.dbcde.gov.au/media/media_releases/2009/022>; NBN Co Limited, *NBN Co Annual Report 2010* (29 October 2010) <<http://www.nbnco.com.au/wps/wcm/connect/main/site-base/main-areas/publications-and-announcements/annual-reports/nbnco-annualreport2010>>; 'NBN to Cover 93 Per Cent of Nation - More than Originally Thought, says ALP,' *The Australian* (online), 30 July 2010 <<http://www.theaustralian.com.au/national-affairs/nbn-to-cover-93-per-cent-of-nation-more-than-originally-thought-says-alp/story-fn59niix-1225899098990>>.
- 42 Australian Bureau of Statistics, *Report 8153.0 – Internet Activity, Australia* (2010) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/8153.0>>.
- 43 Scott Ewing and Julian Thomas, *CCi Digital Futures 2010: The Internet in Australia* (17 May 2010) Arc Centre of Excellence for Creative Industries and Innovation, 19 <<http://cci.edu.au/publications/digital-futures-2010>>.
- 44 *Ibid* 13 (65 per cent of respondents surveyed 'thought that the internet had increased their contact with family members').
- 45 *Ibid* 25–6 (internet users rate the internet as more important for entertainment than newspapers and magazines, though still less than television and radio).
- 46 *Ibid* 36 (survey indicates that 'the internet has played a positive role in encouraging creative pursuits').
- 47 *Ibid* 44–5 (over half of internet users surveyed used the internet to purchase at least one product per month, and 70 per cent spend \$100 or more online per month).
- 48 *Ibid* 37–8.

democratic participation and accountability and to help it solve some of the key issues of our time through user or citizen input.⁴⁹

Given the growing importance of the internet, it is not surprising to hear claims that internet access should be a fundamental right in modern society. A recent BBC poll suggests that 87 per cent of internet users in the UK felt that internet access should be the ‘fundamental right of all people’.⁵⁰ Importantly, more than 70 per cent of non-users believed that they should have internet access.⁵¹ In 2000, Estonia declared internet access to be a fundamental human right of its citizens and over the last decade the former Soviet republic has radically transformed its economy and the way in which residents interact with government, health care professionals, banks and each other.⁵² In Finland, a reasonably priced broadband connection is now a legal right for all citizens.⁵³ After a 2001 amendment, the Greek Constitution now includes a right ‘to participate in the Information Society’.⁵⁴ The French Constitutional Court, in ruling that the operative provisions of the first HADOPI graduated response scheme were unconstitutional, intrinsically linked internet access with freedom of expression and communication.⁵⁵ In a debate before the European Parliament concerning amendments to the European Union (‘EU’) Telecoms Package, Commissioner Viviane Reding, EU Commissioner for Information Society and Media, explained that ‘[I]nternet access is a fundamental right such as the freedom of expression and the freedom to access information.’⁵⁶

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- 49 The Government 2.0 Taskforce Report, with which the Government substantially agreed, recommends engagement at the highest level of government to use technology (and the internet) to ‘increase citizen engagement and collaboration in making policy and providing service’ in order to ‘help achieve a more consultative, participatory and transparent government’: Government 2.0 Taskforce, *Engage: Getting on with Government 2.0* (22 December 2009) Department of Finance and Deregulation, 25 <<http://www.finance.gov.au/publications/gov20taskforcereport/index.html>>; Information Management Office (Cth), *Government Response to the Report of the Government 2.0 Taskforce* (3 May 2010) Department of Finance and Deregulation, 3 <<http://www.finance.gov.au/publications/govresponse20report/index.html>>.
- 50 ‘Internet Access is “a Fundamental Right”’, *BBC News* (online), 8 March 2010 <<http://news.bbc.co.uk/2/hi/8548190.stm>>.
- 51 *Ibid.*
- 52 Colin Woodard, ‘Estonia, Where Being Wired is a Human Right’, *The Christian Science Monitor* (online), 1 July 2003 <<http://www.csmonitor.com/2003/0701/p07s01-woeu.html>>; Oana Lungescu, ‘Tiny Estonia Leads Internet Revolution’, *BBC News* (online), 7 April 2004 <<http://news.bbc.co.uk/2/hi/europe/3603943.stm>>.
- 53 ‘1Mb Broadband Access Becomes Legal Right’, *YLE Uutiset* (online), 14 October 2010 <http://www.yle.fi/uutiset/news/2009/10/1mb_broadband_access_becomes_legal_right_1080940.html>; ‘First nation makes broadband access a legal right’, *CNN Tech* (online), 1 July 2010 <http://articles.cnn.com/2010-07-01/tech/finland.broadband_1_broadband-access-internet-access-universal-service?_s=PM:TECH>; Don Reisinger, ‘Finland Makes 1Mb Broadband Access a Legal Right’, *CNET News* (online), 14 October 2009 <http://news.cnet.com/8301-17939_109-10374831-2.html>.
- 54 Σύνταγμα [Constitution of Greece] art 5A(2), as amended in 2001.
- 55 Conseil constitutionnel [French Constitutional Court], decision n° 2009-580 DC, 10 June 2009 reported in JO, 13 June 2009, 9675.
- 56 European Parliament, *Parliamentary Debates*, 5 May 2009, 19.

As Cowdroy J recognised in *iiNet* at first instance, ‘one does not need to consider access to the internet to be a “human right” to appreciate its central role in almost all aspects of modern life’.⁵⁷ To be deprived of internet access, then, is likely to have quite severe consequences. In *Eircom*, Charleton J noted that while disconnection was a ‘serious sanction’,⁵⁸ it would not completely isolate people from the internet: ‘while it is convenient to have internet access at home, most people in Ireland have only to walk down to their local town centre to gain access for around €1.50 an hour.’⁵⁹ While this is certainly the case, we would suggest that his Honour significantly underestimates the value of having internet access at home. The ‘always-on’ nature of broadband has fundamentally changed the way that people access information. With a home internet connection, it is simple to access the web at any time to quickly look up information, to check email and conveniently respond in a timely manner, and to communicate with friends and family long after internet cafes or libraries have closed. Requiring that users go to their town centre to gain access does not just change the ease of access, it changes the nature of access. Such a requirement means that information is no longer available on demand, that students need to take their reading books and materials and set up at a cafe to study, that contractors who work from home need to relocate their office, that families need to take their years of receipts and financial documentation to the library to complete their tax returns,⁶⁰ and that individuals are required to look up and communicate sensitive health information on public terminals.

Two big problems weigh negatively against the proposition that termination is a reasonably proportionate penalty for copyright infringement. The first is that termination typically affects all members of a household, not just the subscriber named in the service contract. If one member receives three allegations of infringement – or if three members each receive one allegation – all members risk losing their internet access. The graduated response scheme contemplated by the *Digital Economy Act 2010* (UK) includes a defence if the subscriber can show that he or she was not the person who infringed copyright in relation to an allegation,⁶¹ but the onus of proof rests with the subscriber. Since most households do not keep accurate logs of all internet access by people on the internal network, it is unclear how the subscriber could reasonably prove that he or she was not responsible for an infringement that apparently came from his or her IP address. The subscriber must additionally show that he or she took ‘reasonable steps’ to prevent infringement using the service, but no guidance is provided as to what exactly this would entail.⁶² None of the current set of proposed graduated response schemes address how internet access is to be denied

57 *Roadshow Films Pty Ltd v iiNet Limited (No 3)* [2010] FCA 24 (4 February 2010) [411].

58 *Eircom* [2010] IEHC 108 (16 April 2010) [9].

59 *Ibid.*

60 It is still possible to file a paper tax return in Australia, but this process is both more time consuming and more prone to error.

61 *Digital Economy Act 2010* (UK) c 24, s 13 inserting *Communications Act 2003* (UK) c 21, s 124K(6)(a).

62 *Digital Economy Act 2010* (UK) c 24, s 13 inserting *Communications Act 2003* (UK) c 21, s 124K(6)(b).

to a particular member of a household. The procedures required to attempt such fine grained blocking would be, if possible, extremely invasive. If a graduated response scheme is implemented, therefore, it would in most cases penalise not just copyright infringers, but all of the family or friends they live with.

The second problem is that to the extent a graduated response scheme is effective in reducing copyright infringement, it will likely have a similarly strong chilling effect on socially beneficial but unlicensed uses. These types of uses, protected by fair dealing defences, require the user of copyright material to make a judgment about whether their otherwise infringing use is permissible. When the severity of the potential penalty increases, the valuation of risk will also change, and there is a real danger that many researchers, parodists, reporters and critics will be much more hesitant to engage with copyright work and contribute to social discourse. Because these exceptions are purposive and subjective, neither copyright owners, ISPs nor industry bodies are in a position to know or suspect that an ostensibly infringing use is actually privileged by law. Anyone wishing to rely on these exceptions in the face of imminent disconnection must then attempt to convince the ISP or industry body that their use is fair and for the privileged purpose. This determination is likely to pose some difficulty, both in the interpretation of complicated legal doctrine and the evaluation of potentially conflicting evidence. Given that the decision maker is unlikely to be legally trained and is not bound by the rules of evidence, there will be a higher than usual amount of uncertainty involved. In the long term, without explicit safeguards, a graduated response scheme is accordingly likely to result in the suppression of legitimate but unlicensed uses of copyright material.

B Justification on a Social Scale: The Effectiveness of a Graduated Response Scheme

Whether a graduated response scheme will be legitimate will depend greatly on weighing the severity of the penalty against the severity of infringement and the effectiveness of termination as a deterrent. The European Parliament addressed the possibility of EU states introducing graduated response schemes and inserted a provision into its Telecoms Reform package that requires that any graduated response measures ‘may only be imposed if they are appropriate, proportionate and necessary within a democratic society’.⁶³ This requirement of proportionality seeks to ensure that a graduated response scheme is, on the whole, a reasonably justifiable method of addressing copyright infringement.

63 *Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services* [2009] OJ L 337/37, 46 (‘EU Telecoms Reform Package’). See also *Digital Economy Act 2010* (UK) c 24, s 12, inserting *Communications Act 2003* (UK) c 21, s 124J(1)(g), which provides that a graduated response scheme should only be adopted if OFCOM is satisfied that its provisions ‘are proportionate to what they are intended to achieve’.

The severity of termination as a penalty seems to suggest that it should be reserved for only the most serious acts of infringement. ‘Piracy’ is the clearest case: the large scale commercial distribution of counterfeit software or entertainment media provides the strongest example of harm to the commercial incentives that copyright aims to protect. This type of infringement is generally already criminalised and subject to severe penalties.⁶⁴ This is not, however, the type of infringement that graduated response schemes seek to address. Graduated response schemes are aimed at individual infringement that is not intended or primarily directed at commercial benefit. For these types of infringements, the severe penalty of termination is much harder to justify.⁶⁵

In *Eircom*, Charleton J held that the proportionality of the privately negotiated graduated response scheme in Ireland was not problematic: ‘[t]here is nothing disproportionate about cutting off internet access because of three infringements of copyright.’⁶⁶ The judgment was notable for the extreme language his Honour used to describe copyright infringement on the internet; the picture painted clearly reflects a conception of crisis⁶⁷ where copyright owners’ works are being ‘stolen’⁶⁸ or ‘filched’.⁶⁹ This characterisation of internet access in Justice Charleton’s judgment in *Eircom* is strikingly dissimilar to that of Cowdroy J in *iiNet* at first instance, who went to great lengths to point out that a substantial portion of internet users are not infringers and that there are many other legitimate uses for ISP services and bandwidth,⁷⁰ and further that copyright infringement should be distinguished from criminal theft.⁷¹ Justice Cowdroy explained that ‘[w]hile termination of accounts would stop the infringement, it would do much more and in the circumstances it would not be reasonable.’⁷² On

64 Agreement on Trade-related Aspects of Intellectual Property Rights (‘TRIPS Agreement’) cl 61. See also *Copyright Act 1968* (Cth) s 132AC (criminal provision for infringement on a commercial scale); pt V div 5 sub-div C (criminal provisions for commercial infringement).

65 See Frank La Rue, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’, UN Human Rights Council, UN Doc A/HRC/17/27 (16 May 2011) [78] <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf>, which concluded that

cutting off users from Internet access, regardless of the justification provided, including on the grounds of violating intellectual property rights law, to be disproportionate and thus a violation of article 19, paragraph 3, of the International Covenant on Civil and Political Rights.

66 *Eircom* [2010] IEHC 108 (16 April 2010) [30].

67 See generally Cohen above n 33.

68 *Eircom* [2010] IEHC 108 (16 April 2010) [1] (describing the settlement’s purpose as ‘to diminish the theft of copyright material over the internet. The infringers are to have their service cut off. ... The substance of the original case concerned the stealing of copyright-protected sound and video recordings over the internet, mainly by peer-to-peer sharing groups.’).

69 *Ibid* [8] (‘no internet service provider had apparently agreed to attempt to tackle this copyright-repugnant situation of their own volition. From the point of view of the participants, everyone seemed to win; except for the creators of original copyright material who were, and are, utterly disregarded. It is only common sense that this attraction of free, but illegal, downloading of the latest songs and videos made the sale of internet access attractive. Those who wished to filch the copyright material of others had to provide others with material to be filched from them.’).

70 *Roadshow Films Pty Ltd v iiNet Limited (No 3)* [2010] FCA 24 (4 February 2010) [250].

71 *Ibid*[171] (obiter).

72 *Ibid*[438].

appeal, a majority of the Full Federal Court in *iiNet* held that while termination was not required in the particular circumstances of the case, suspension or termination may be a reasonable step that could be taken to limit copyright infringement in other circumstances.⁷³

It seems that even if a graduated response scheme is effective at limiting infringement, there is still an inherent issue of proportionality that must be addressed and evaluated. In this regard, Charleton J may have been too quick to dismiss concerns about the appropriateness of termination as a punishment for infringement. We assume that an efficacious graduated response scheme requires suspension of access for a significant period. If, on the other hand, terminated subscribers are only required to find a new ISP, the penalty imposed will be limited to any early-termination fee imposed by the terminating ISP, plus the connection fee charged by the new ISP and a temporary loss of access for anywhere from a few days to a few weeks.⁷⁴ Such a reduced penalty would be less problematic, but would also be much less of a deterrent than suspension for a period of between several weeks and a year (or more⁷⁵). Importantly, the contractual arrangement in Ireland does not explain whether subscribers who have their connection terminated will be able to immediately obtain internet access from a competing ISP, but the more formal schemes provide for disconnection of up to six months in NZ;⁷⁶ up to one year in France;⁷⁷ and for an as yet unspecified period in the UK.⁷⁸

In our modern information society, the real value of a lost ability to access education resources, news and entertainment services, to communicate with friends and family, and to work from home is not easily quantifiable. We would suggest that lengthy periods of disconnection from the internet would impose very substantial penalties on entire households. It is not clear whether such a significant punishment is justified in response to the harm done by copyright infringement.

Graduated response schemes are not typically designed to deal with ‘piracy’ (large-scale, commercial infringement), but with users who download infringing copies of copyright music, film, and television products for personal use.

73 *iiNet* [2011] FCAFC 23 (24 February 2011) [194]–[197] (Emmett J) (‘There is no reason to view a temporary suspension as unreasonable, particularly when *iiNet* had the right to terminate the service altogether. The period of a temporary suspension would be a matter for consideration in any given case. A very long suspension for a very minor infringement may be unreasonable. However, that is not a reason for concluding that no suspension could ever be reasonable.’); [749] (Nicholas J); [426] (Jagot J, dissenting).

74 Even if a terminated subscriber is entitled to contract with another ISP for service, however, this may not be practical in rural areas where access is only practically available from one ISP: Yu, above n 9, 1425.

75 Lemley and Reese, for example, suggest a prohibition against a repeat infringer gaining access for a period of five years: Mark A Lemley and R A Reese, ‘A Quick and Inexpensive System for Resolving Peer-to-Peer Copyright Disputes’ (2005) 23 *Cardozo Arts & Entertainment Law Journal* 1, 14.

76 *Copyright (Infringing File Sharing) Amendment Act 2011* (NZ) s 122O(1A).

77 *Loi n° 2009-1311 du 28 octobre 2009* [Law No 2009-1311 of 28 October 2009] (France), JO, 29 October 2009, 18290 art 7 inserting *Code de la Propriété Intellectuelle* [Code of Intellectual Property] (France) art L 335–7.

78 *Digital Economy Act 2010* (UK) c 24, s 9 inserting *Communications Act 2003* (UK) c 21, s 124G.

Copyright owners are likely to continue to sue for damages against those who profit from widespread infringement and those who first make available copies of unreleased material. The argument for graduated response schemes finds its justification in a model of permanent crisis – the internet makes infringement easy and the low risk of being caught means that filesharing is rampant.⁷⁹ The conclusion, for many parts of the copyright industries, is that severe penalties and lower costs of enforcement are necessary in order to change the behaviour and attitudes of society in general.⁸⁰ This core premise of graduated response schemes is problematic in general because it seeks to drive mass social change through the routine imposition of harsh penalties for quotidian acts of private copyright infringement. Copyright is a utilitarian bargain – we accept the inefficiencies of legislated excludability in order to ensure that creators have sufficient incentives to produce new creative works. More protection, however, is not always socially beneficial, and at some point, the social costs of enforcement and artificial scarcity will outweigh the benefit that society derives through increased deterrence.⁸¹

It is unclear whether, on the whole, the benefits of a graduated response policy outweigh its negative impact. While we acknowledge that arguments can be made that widespread private copying can impact negatively on the incentives that copyright provides, copyright owners have not yet been able to prove substantial harm from unlicensed private copying. Intuitively, copyright owners fear that filesharing will displace legitimate revenue streams. The empirical evidence, however, seems to show that the impact of unlicensed filesharing is much less than commonly assumed; not every download can be equated to a lost sale.⁸²

79 See generally Cohen, above n 32.

80 See Yu, above n 9, 1383.

81 See, eg, the statement of a majority of the Canadian Supreme Court in *Théberge v Galerie d'Art du Petit Champlain Inc* [2002] 2 SCR 336 [31]: 'it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.' (McLachlin CJ, Iacobucci, Major and Binnie JJ).

82 See Felix Oberholzer-Gee and Koleman Strumpf, 'File-Sharing and Copyright' in Josh Lerner and Scott Stern (eds), *Innovation Policy and the Economy* (University of Chicago Press Journals, 2010) vol 10, 19 (arguing, after a meta analysis of empirical studies, that '[t]he cannibalization of sales that is due to file sharing is more modest than many observers assume. Empirical work suggests that in music, no more than 20% of the recent decline in sales is due to sharing. '); Bart Cammaerts and Bingchun Meng, 'Creative Destruction and Copyright Protection: Regulatory Responses to File-sharing' (Media Policy Brief No 1, London School of Economics and Political Science Department of Media and Communications, March 2011), 7 <<http://www.scribd.com/doc/51217629/LSE-MPPbrief1-creative-destruction-and-copyright-protection#>> (arguing that 'the decline in the sale of physical products cannot be exclusively or even in large part attributed to file-sharing of copyright protected content.'). See also Stan Liebowitz, 'MP3s and Copyright Collectives: A Cure Worse Than the Disease?' in Lisa N Takeyama, Wendy J Gordon and Ruth Towse (eds), *Developments in the Economics of Copyright: Research and Analysis* (Edgar Elgar, 2005) 37, 51.

The problem is further complicated because there is also little evidence that a graduated response mechanism is likely to reduce the rates of infringement,⁸³ or be more effective than other mechanisms, such as a much more legitimate notice and notice based system. The Canadian Parliament, for example, has declined to pursue a graduated response scheme in favour of formalising a legislative notice and notice approach.⁸⁴ Alternatively, in the UK, the initial obligations code proposed to be introduced provides that copyright owners can apply for the identification of subscribers who have received a high number of allegations of infringement.⁸⁵ There is some suggestion that these approaches may be just as effective as a termination based regime, without imposing the severe penalties of termination.⁸⁶

Without drawing any definitive conclusions about the proportionality of graduated response schemes, we simply note that the affirmative case for graduated response schemes has not been adequately made out.⁸⁷ Given the severity of graduated response as a penalty, if such a scheme is to be legitimately introduced, much more care needs to be taken to ensure that it is a reasonably proportionate means of achieving a justifiable end.

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- 83 See Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011) Intellectual Property Office (UK), [8.28]–[8.33] <<http://www.ipo.gov.uk/ipreview.htm>>, finding that there is little evidence evaluating the impact that stronger enforcement mechanisms contemplated by the UK are likely to have. See also Joe Karaganis, 'Rethinking Piracy', in Joe Karaganis (ed), *Media Piracy in Emerging Economies*, (Social Science Research Council, 2011) 1, 30, finding that 'Despite the stream of lawsuits and site closures, we see no evidence - and indeed very few claims - that these efforts have had any measurable impact on online piracy.'
- 84 Bill C-32, *An Act to Amend the Copyright Act*, 3d Sess, 40th Parl (Canada) cls 41.25, 41.26. See also Gregory R Hagen, "'Modernizing" ISP Copyright Liability' in Michael Geist (ed) *From 'Radical Extremism' to 'Balanced Copyright': Canadian Copyright and the Digital Agenda* (Irwin Law, 2010) 361; Canadian Cable Television Association, *Comments on the Consultation Paper on Digital Copyright Issues* (14 September 2001) Government of Canada <<http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp00336.html>>.
- 85 *Digital Economy Act 2010* (UK) c 24.
- 86 A study commissioned by the NZ Federation Against Copyright Theft suggested that 71 per cent of young people surveyed would stop infringing behaviour if they received a notice from their ISP that an infringement had been detected, but only 62 per cent would stop infringing if threatened with disconnection: NZFACT, 'One Warning Will Stop Most Youth From Infringing Movies Online' (Media Release, 20 October 2009) <<http://www.nzfact.co.nz/news.html>>. See also InternetNZ, *Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Bill* (17 June 2010) <<http://internetnz.net.nz/our-work/submissions/submission-commerce-select-committee-copyright-infringing-file-sharing-amendmen>>.
- 87 Importantly, the NZ Parliamentary Committee reviewing the proposed NZ graduated response scheme could not come to a conclusion as to whether termination was a proportionate response and recommended that the Bill be amended so as to provide that the termination provisions are not activated until evidence indicated that the combination of a notice and notice scheme and fines imposed by the Copyright Tribunal were not sufficient to deter infringement: Commerce Committee, New Zealand Parliament, *Copyright (Infringing File Sharing) Amendment Bill* (119-2) (2010), 6 <http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/8/3/6/49DBSCH_SCR4901_1-Copyright-Infringing-File-Sharing-Amendment-Bill.htm>.

C Justification on Individual Scales

If termination of internet access can be justified as an appropriate penalty for copyright infringement in the abstract, we must still examine whether it is justifiable in particular cases. The problem is that even if termination is considered to be legitimate for the more severe cases of repeat infringement, it will likely be wholly inappropriate for minor cases of infringement. Whether and how well a graduated response scheme can differentiate between these extremes and impose appropriate penalties for the bulk of cases will be an important factor in evaluating its legitimacy.

In *Infringement Nation*, John Tehranian explains that in an average day, even without accessing peer-to-peer filesharing services, an average internet-using individual is likely to infringe copyright dozens of times.⁸⁸ Tehranian uses examples such as quoting emails in reply and printing or saving pages from websites. In the vast majority of cases, copyright owners do not seek to enforce their rights. These normal, everyday infringements fall into a category of ‘tolerated uses’; cases where the use of copyright material is not authorised or licensed but where it does not make sense to enforce, either because the costs are prohibitive, the harm suffered is too small, or the uses are actually beneficial for the copyright owner.⁸⁹

Because such common interactions with online material result in only trivial harm or no harm at all, it is not appropriate to impose severe penalties for the technical infringement of copyright that results. It follows that a graduated response scheme can only be proportionate if it is sensitive to the severity of infringements that are alleged to have occurred. Otherwise, since all technical infringements could be used to justify disconnection, the system would rely upon the ‘tolerance’ of individual or corporate copyright owners to avoid grossly unfair outcomes.⁹⁰

Under our copyright law, while all infringements are actionable, damages are compensatory or restitutive in nature; if there is no harm done or profit made, damages will usually only be nominal.⁹¹ Non-judicial graduated response schemes remove this standard check on the proportionality of penalties by removing control of the imposition of punishment from the judiciary. In doing so, there is a very acute risk that the penalties imposed will not reflect the severity of the infringing behaviour, and this concern goes to the heart of the legitimacy of such schemes in our society. It seems to follow that if a graduated response

88 John Tehranian, ‘Infringement Nation: Copyright Reform and the Law/Norm Gap’ [2007] *Utah Law Review* 537, 547.

89 Tim Wu, ‘Tolerated Use’ (2007) 31 *Columbia Journal of Law & the Arts* 617, 619–20.

90 Yu, above n 9, 1411–2.

91 Note, however, that Australian courts are sometimes willing to award additional damages for punishment and deterrence where no harm can be proven: see Trotter, above n 40. See also *Aristocrat Technologies Australia Pty Ltd v Dap Services (Kempsey) Pty Ltd (in liq)* (2007) 157 FCR 564; *Futuretronics.com.au Pty Ltd v Graphix Labels Pty Ltd (No 2)* (2008) 76 IPR 763; *Universal Music Australia Pty Ltd v Miyamoto* (2005) 62 IPR 605.

scheme is to avoid imposing severe penalties for trivial acts of infringement, some discretion must be built into the system.

This conclusion poses a significant problem: if a graduated response scheme can only be legitimate if it contains some discretionary power to determine appropriate remedies, then the exercise of that discretionary power must be appropriately constrained to avoid abuse. Accordingly, there must be some safeguards of due process involved in the determination of allegations and the imposition of punishments, but these safeguards are not generally available within ISP-administered schemes and only partially available in administrative approaches.

IV THE REQUIREMENT OF DUE PROCESS

Because disconnection from the internet is such a weighty penalty, if it is to be imposed, it must be done legitimately. In modern liberal articulations of the rule of law, legitimacy requires procedural safeguards of due process in the interpretation and application of law in order to increase predictability and certainty for citizens.⁹² As measures designed to reduce the costs of copyright enforcement by bypassing (for the most part) the judicial system, graduated response schemes pose an essential threat to due process that must be very carefully evaluated. In this section, we examine the difficulty of evaluating the veracity of allegations of infringement and the procedural requirements for legitimacy.

A The Uncertain Quality of Allegations of Infringement

All graduated response schemes are based upon copyright owners or their agents detecting infringement and making allegations to an individual's ISP or the responsible authority. A significant problem, however, is that the quality of these allegations of infringement is often unreliable. Allegations of infringement are extremely cheap to issue en masse; recently, copyright owners have employed specialist detection agencies to send out allegations and warnings by the thousands. Typically, these agencies connect to filesharing networks masquerading as downloaders and record the IP addresses of other users in the swarm.⁹³ Over the past decade, automated methods of detecting infringement

92 See, eg, Lon L Fuller, *The Morality of Law* (Yale University Press, 2nd ed, 1969) 63–4; Friedrich A von Hayek, *The Road to Serfdom* (George Routledge & Sons, 1st ed, 1944) 74–5; Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 *Law Quarterly Review* 195, 198–200; John Rawls, *A Theory of Justice* (Clarendon Press, 9th ed, 1972) 238; T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (University Press, 2001) 121; Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 243.

93 *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* [2010] FCA 24 (4 February 2010) [113] (describing the collection of data by DtecNet, one of the leading copyright infringement detection agencies).

have come under significant criticism,⁹⁴ and although the technology is constantly improving, so too is the sophistication of methods to hide infringement. The problem is compounded because, unless there is an independent legal examination of the evidence, there is little incentive for copyright owners or their agents to take care when collecting data and issuing warnings.⁹⁵ Furthermore, because the allegation system is vulnerable to abuse,⁹⁶ malicious actors and competitors⁹⁷ can easily frame others for infringing behaviour.

Even where the allegations correctly show that a particular subscriber has downloaded a particular file in which copyright subsists, this will not always prove infringement. In some cases, subscribers may have arguable defences of fair dealing – where, for example, the copyright work is included in a parody or is the subject of criticism or review.⁹⁸ Sometimes, the distribution of the work may even be permissible under an explicit or implicit licence that the various agents of the copyright owner may not even be aware of. In the *Viacom v YouTube*⁹⁹ litigation, for example, Google alleged that a number of the copyright works that Viacom claimed had been infringed were in fact uploaded to YouTube by Viacom themselves in attempts at viral marketing.¹⁰⁰

When made properly, an allegation of infringement is at best a statement that the copyright owner has a good faith belief that its copyright is being infringed.¹⁰¹ Determining whether copyright has actually been infringed by the target is then a

94 See, eg, Anders Bylund, 'RIAA Sues Computer-less Family, 234 Others, for File Sharing', *Ars Technica* (online), 24 April 2006 <<http://arstechnica.com/old/content/2006/04/6662.ars>> (a family who did not own a computer were sued by the RIAA for copyright infringement); Eric Bangerman, 'I Sue Dead People...', *Ars Technica* (online), 4 February 2005 <<http://arstechnica.com/old/content/2005/02/4587.ars>> (reporting a suit that was filed against a deceased grandmother who did not own a computer); Michael Piatek, Tadayoshi Kohno and Arvind Krishnamurthy, 'Challenges and Directions for Monitoring P2P File Sharing Networks – or – Why My Printer Received a DMCA Takedown Notice' (Paper presented at HotSec '08: 3rd USENIX Workshop on Hot Topics in Security, San Jose, CA, 29 July 2008) (explaining how computer science researchers were able to trick automated detection software into issuing allegations of infringement against internet connected printers).

95 Yu, above n 9, 1391–2.

96 See Piatek, Kohno and Krishnamurthy above n 91.

97 This behaviour is, unfortunately, all too common in non-judicial copyright processes; a 2006 study shows that over 40 per cent of copyright takedown notices issued to Google under the *Digital Millennium Copyright Act* 17 USC (1998) are issued against business competitors, and over 20 per cent of those contained substantively questionable claims: Jennifer M Urban and Laura Quilter, 'Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act' (2006) 22 *Santa Clara Computer & High Technology Law Journal* 621, 655, 684.

98 *Copyright Act 1968* (Cth) ss 40–42, 103A–103C.

99 718 F Supp 2d 514 (SD NY, 2010). Viacom unsuccessfully sued Google, who own YouTube, for secondary copyright infringement on the basis that Google knew of infringing works on their network and failed to prevent infringement.

100 Zahavah Levine, 'Broadcast Yourself' on *Broadcasting Ourselves* ;) *The Official YouTube Blog* (18 March 2010) <<http://youtube-global.blogspot.com/2010/03/broadcast-yourself.html>>.

101 Yu, above n 9, 1419, quoting *Corbis Corporation v Amazon.com Inc* 351 F Supp 2d 1090, 1105 (WD Wash, 2004) (noting that the 'copyright owner may have a good faith belief that her work is being infringed, but may still be wrong').

difficult question of fact and law.¹⁰² In the Full Federal Court decision in *iiNet*, Emmett J noted that before termination could be reasonable, ‘unequivocal and cogent evidence of the alleged primary acts of infringement’ would be required, and ‘mere assertions’ of infringement, ‘with whatever particulars of the assertion that may be provided, would not, of itself, constitute unequivocal and cogent evidence of the doing of acts of infringement.’¹⁰³ Justice Nicholas, concurring, explained that a primary problem with such allegations was that they ‘necessarily relate to events which have occurred in the past which the [ISP] is not able to independently confirm without considerable difficulty.’¹⁰⁴

B Evaluating Allegations of Infringement

Given that allegations of infringement cannot always be taken at face value, a legitimate procedure for determining their weight seems necessary. Without such a prior procedure, subscribers accused of repeat copyright infringement are left only with the option to appeal a determination that they should be disconnected, which has the effect of reversing the presumption of innocence.¹⁰⁵ This concern was expressed by the European Parliament in its telecommunications reform package, which requires any graduated response schemes to incorporate a presumption of innocence, a ‘prior, fair and impartial procedure ... including the right to be heard of the ... persons concerned’, and a right to ‘effective and timely judicial review’.¹⁰⁶

Due process is a fundamentally important aspect of the rule of law and of our understanding of legitimate governance in a western democracy. In most strands of rule of law theory, due process characterised by ‘the availability of a fair hearing within the judicial process’¹⁰⁷ is critical for the enforcement of law.¹⁰⁸ It

102 In *iiNet* at first instance, Cowdroy J rejected testimony on whether infringement had been made out in the allegations issued, explaining that ‘the definition of repeat infringement is a legal issue, and thus the opinions of any witnesses are irrelevant’: *Roadshow Films Pty Ltd v iiNet Limited (No 3)* [2010] FCA 24 (4 February 2010) [115].

103 *iiNet* [2011] FCAFC 23 (24 February 2011) [210]; cf *iiNet* [2011] FCAFC 23 (24 February 2011) (Jagot J, dissenting): ‘The notices did not make bare allegations of copyright infringement. They provided substantial supporting information which, on its face, indicated that considerable time, effort and money had been expended to provide iiNet with credible evidence of substantial and repeated copyright infringements by persons using the service iiNet provided’: at [402].

104 *Ibid* [758].

105 See *Loi favorisant la diffusion et la protection de la création sur internet* [Act Furthering the Diffusion and Protection of Creation on the Internet], Conseil constitutionnel [French Constitutional Court] decision n°2009-580 DC, 10 June 2009, finding that the original HADOPI legislation impermissibly violated the presumption of innocence under French law.

106 *Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services* [2009] OJ L 337/37, 46, art 1(3a).

107 Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 119.

is this conception of legitimacy that is most at risk in graduated response schemes where ISPs or administrative bodies, with no limiting rules of evidence or other procedural guarantees, are faced with the task of evaluating allegations of infringement made by copyright owners. Unless there is a clear separation between copyright owners and the finder of fact and some legitimate process for determining the truth of the allegations, there is a real risk that citizens will be unjustly subject to the imposition of harsh penalties.

Evaluated on these criteria, the worst of the graduated response schemes in terms of due process are the contractual arrangements between ISPs and copyright owners like those in place in Ireland and emerging in the US. Such ISP-administered graduated response schemes generally do not offer any prior impartial procedure with a right to be heard. Users will sometimes have the ability to contest allegations of infringement with their ISP, but a formal process is unlikely to emerge. The settlement in *Eircom*, for example, merely provides that the ISP reserves a vague right not to terminate a subscriber where a subscriber has complained and the ISP believes that the alleged infringement has not taken place.¹⁰⁹ In general terms, ISPs have very little incentive to spend more time and money investigating allegations of infringement, and certainly are unlikely (without further incentive or subsidy) to invest the resources required to hold any ‘prior, fair, and impartial’ hearing before determining to terminate the account of an alleged infringer.¹¹⁰ In the Full Federal Court’s decision in *iiNet*, Emmett J expressed concern about the financial burden on ISPs, and suggested that before any termination scheme would be reasonable, copyright owners should be required to bear the costs of verifying allegations of infringement.¹¹¹ Justice Emmett also considered that it would be necessary to ensure that users were afforded a reasonable period to refute allegations of infringement before they could be disconnected.¹¹² While the minimum standards enumerated by Emmett J would provide some safeguards to the due process rights of subscribers, they would provide little improvement over the Irish contractual scheme. Most problematically, since there is no practical way for ISPs to verify the accuracy of allegations about past behaviour and no means for ISPs to come to reliable and legitimate determinations of law and fact on evidence provided,

108 See, for example, Raz, ‘The Rule of Law and Its Virtue’, above n 92, 200–2; Rawls, *A Theory of Justice*, above n 92, 235; Allan, above n 32, 121. As Rawls explains ‘the rule of law requires some form of due process: that is, a process reasonably designed to ascertain the truth, in ways consistent with the other ends of the legal system, as to whether a violation has taken place and under what circumstances.’: at 239.

109 Email, ‘Principles for Managing Copyright Infringement by Users of P2P Internet Applications (draft)’ from Lynne Martin, Solicitor, Eircom Limited, to Nicholas Suzor, 23 October 2010.

110 Instituting a prior hearing may be prohibitively expensive; Michael Geist reports that the costs to Canadian ISPs of dealing with allegations of infringement have been estimated to be around \$11 per warning, rising as high as \$30 per warning for the smaller ISPs: see Michael Geist, ‘Three Strikes and You’re Out System Draws Cries of Foul From Governments’, *Toronto Star* (online), 25 January 2010 <<http://www.thestar.com/business/article/755443--geist-three-strikes-and-you-re-out-system-draw-cries-of-foul-from-governments>>; see also Yu, ‘The Graduated Response’, above n 9, 1391–1392.

111 *iiNet* (2011) 275 ALR 1, 48 [210](f) (Emmett J).

112 *Ibid* 48 [210] (Emmett J).

any non-judicial termination scheme would continue to reverse the presumption of innocence.¹¹³

Even the various proposed administrative graduated response schemes pose some problems for due process in the evaluation of allegations and imposition of penalties. When the French HADOPI scheme was first introduced, it provided for an administrative process to determine allegations of infringement and impose sanctions of suspension of service for up to one year.¹¹⁴ The French Constitutional Council struck down the operative provisions of HADOPI, holding that requiring an administrative body to make those determinations violated the principles of freedom of communication and the presumption of innocence and requirement of due process under Articles 11 and 9 of the *Declaration of the Rights of Man and the Citizen (1789)*.¹¹⁵ Following the decision of the Constitutional Council, the French Parliament passed a new act that permits courts to order the disconnection of an internet connection after a finding of criminal copyright infringement.¹¹⁶

In the UK, the *Digital Economy Act 2010* (UK) provides for the future introduction of a graduated response scheme overseen by OFCOM, the communications regulator.¹¹⁷ There must be a right of appeal to a person who is 'for practical purposes independent (so far as determining subscriber appeals is concerned) of internet service providers, copyright owners and OFCOM'.¹¹⁸ There must be a further right of appeal to the First-tier Tribunal, a generic tribunal in the UK system.¹¹⁹ From the First-tier Tribunal, there will be a right to appeal only by leave to the Upper Tribunal,¹²⁰ which is a superior court of record.¹²¹ There will be a further right of appeal by leave to an appellate court from the Upper Tribunal.¹²² Importantly, the burden of proof at the appeal stage rests on the copyright owner or ISP to show that the apparent infringement was an actual infringement of copyright and that the infringing act was done from the subscriber's IP address at the relevant time.¹²³ Where the subscriber wishes to

113 See also *iiNet* (2011) 275 ALR 1, 169 [758] (Nicholas J).

114 *Loi favorisant la diffusion et la protection de la création sur internet* [Act Furthering the Diffusion and Protection of Creation on the Internet], Conseil constitutionnel [French Constitutional Court] decision n° 2009-580 DC, 10 June 2009.

115 *Loi favorisant la diffusion et la protection de la création sur internet* [Act Furthering the Diffusion and Protection of Creation on the Internet], Conseil constitutionnel [French Constitutional Court] decision n° 2009-580 DC, 10 June 2009.

116 *Projet de loi relatif à la protection pénale de la propriété littéraire et artistique sur internet*, Loi n° 2009-1311 du 28 Octobre 2009 (France), Art 3, inserting *Code de la Propriété Intellectuelle* (France) L 335-7 : see Emile Picy, 'French Parliament Approves Disputed Download Law', *Reuters* (online), 22 September 2009
<http://in.reuters.com/article/internetNews/idINTRE58L3K020090922?pageNumber=1&virtualBrandChannel=0>.

117 *Communications Act 2003* (UK), c 21, s 124J(2)(a).

118 *Communications Act 2003* (UK), c 21, s 124K(2)(c).

119 *Communications Act 2003* (UK), c 21, s 124K(2)(a).

120 *Tribunals, Courts and Enforcement Act 2007* (UK), c 2, s 11.

121 *Tribunals, Courts and Enforcement Act 2007* (UK), c 2, s 3(5).

122 *Tribunals, Courts and Enforcement Act 2007* (UK), c 2, s 13.

123 *Communications Act 2003* (UK), c 21, s 124K(5).

appeal on the basis that he or she did not do the apparently infringing act (ie, that someone else used the connection to infringe copyright), the subscriber bears the onus of proof and must further show that he or she ‘took reasonable steps to prevent other persons infringing copyright by means of the internet access service’.¹²⁴

In NZ, the *Copyright (Infringing File Sharing) Amendment Act 2011* (NZ) institutes a notice-based regime where copyright owners provide ISPs with allegations of copyright infringement identified by IP address. ISPs match IP addresses with subscribers and are required to issue notices to subscribers. Upon issuing a third notice (an ‘enforcement notice’) in a nine-month period to any given subscriber, ISPs are required to provide anonymised notice to the relevant copyright owner.¹²⁵ The relevant copyright owner may then apply to the Copyright Tribunal for an order of damages up to \$15 000, and to the District Court for an order to suspend the subscriber’s internet access for up to six months.¹²⁶ If a valid application is made to the Tribunal, the Tribunal will order the ISP to identify the relevant subscriber.¹²⁷ The copyright owner may also apply to the District Court to require the ISP to disclose the subscriber’s details if they are not already known and the copyright owner wishes to apply for suspension of service.¹²⁸ The new Act provides measures for subscribers to contest infringement notices and to contest proceedings before the Tribunal and the District Court. The calculation of damages by the tribunal must be determined in accordance with regulations under the *Copyright Act 1994* (NZ),¹²⁹ and the District Court may only suspend service where it ‘is appropriate in the circumstances, given the seriousness of the infringing’ acts.¹³⁰ Following a recommendation of the NZ Parliamentary Commerce Committee,¹³¹ the termination provisions of the Act will only be brought into effect once sufficient evidence is available that the notice and Tribunal-imposed penalties are not sufficient to deter infringement.¹³²

The proposed New Zealand approach seems to provide better safeguards for due process than does the potential UK code-based approach. The decision to terminate at first instance in the UK model is made by the regulator, OFCOM, and subscribers will apparently only be given a right to appeal after the decision has been made. Because the initial decision is made without input from the subscriber, OFCOM will not be likely to have the relevant information necessary to undertake a detailed examination of the allegations of infringement. There is accordingly a significant risk that the copyright owners’ allegations will be taken as conclusive evidence of infringement at first instance. This process appears to

124 *Communications Act 2003* (UK), c 21, s 124K(6).

125 *Copyright (Infringing File Sharing) Amendment Act 2011* (NZ), s 122F.

126 *Copyright (Infringing File Sharing) Amendment Act 2011* (NZ), ss 122J, 122O, 122P.

127 *Copyright (Infringing File Sharing) Amendment Act 2011* (NZ), s 122J.

128 *Copyright (Infringing File Sharing) Amendment Act 2011* (NZ), s 122Q.

129 *Copyright (Infringing File Sharing) Amendment Act 2011* (NZ), s 122O(2).

130 *Copyright (Infringing File Sharing) Amendment Act 2011* (NZ), s 122P(1)(c).

131 Commerce Committee, above n 87, 6.

132 *Copyright (Infringing File Sharing) Amendment Act 2011* (NZ), s 122R.

reverse the presumption of innocence – a subscriber who has been accused of multiple instances of copyright infringement must then appeal a finding that he or she should be disconnected.

The UK appeals process goes some way to overcoming this limitation by placing the onus of proof on the copyright owner;¹³³ but it is not yet clear how effective this process will be at protecting the legitimate interests of subscribers, particularly as appeal to both the Upper Tribunal and the appellate court is only granted by leave, not as of right. The process seems to fall short of the requirements of due process set by both the French Constitutional Council and by the European Parliament.¹³⁴ The Act is currently under judicial review in the UK for compliance with the EU requirements.¹³⁵

The NZ approach appears to provide a more legitimate system by confining the powers of the non-judicial bodies (in this case, the ISPs) to maintaining the notice and notice system. In order to require an ISP to disconnect a subscriber, copyright owners must apply to the District Court; at this stage the due process rights of NZ citizens are protected by the procedures enshrined in the judicial system. The NZ proposed regime accordingly seems to adequately address the due process concerns inherent in graduated response schemes. The non-judicial imposition of significant financial penalties of up to \$15 000 by the Copyright Tribunal, on the other hand, is much more worrying under the NZ scheme.¹³⁶

Of the current range of proposed graduated response schemes, the French approach appears to provide the strongest protection for due process, as it relies almost wholly on the existing criminal system for the imposition of termination as a penalty.¹³⁷ Subscribers accused of copyright infringement in France will be able to avail themselves of the protection of French criminal law procedure, including a prior judicial hearing and complete appeals process. Issues of proportionality are still likely to arise, but at least the imposition of penalties in France is exercised with judicial discretion.

133 *Communications Act 2003* (UK), c 21, s 124K(5).

134 Importantly, the EU Telecoms Package does not require a prior *judicial* proceeding, but it does require some form of prior impartial proceeding: *Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services* [2009] OJ L 337/37, 46, art 1(3a).

135 See Claudine Beaumont, 'TalkTalk and BT Granted Judicial Review of Digital Economy Act,' *Telegraph* (online), 10 November 2010 <<http://www.telegraph.co.uk/technology/internet/8123412/TalkTalk-and-BT-granted-judicial-review-of-Digital-Economy-Act.html>>.

136 The NZ Parliamentary Commerce Committee recommended that the Bill explicitly provide that the monetary award by the Tribunal include a punitive element: Commerce Committee, above n 87, 5. Since the Tribunal is not a judicial body, a similar provision would likely raise significant Constitutional concerns under Australian law: see *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

137 It must be noted that under the French system and unlike most common law systems, all infringement is criminal in nature: *Code de la propriété intellectuelle* [Intellectual Property Code] (France) art L335-2–L335-4.

C Conclusion on Procedural Requirements

Evaluating the adequacy of due process safeguards in graduated response schemes is not a simple task. The appropriate standards are not absolute; protecting the interests of users has to be weighed against the costs of the system as a whole and the expected social benefits of the scheme. Nevertheless, there are some minimum standards that should be upheld, particularly when dealing with the significant penalty of termination of internet access. At a bare minimum, a right of appeal to a judicial process is fundamentally necessary for any administrative or ISP-implemented graduated response system.

Before the imposition of any penalty, the concerns of the EU and that of the French Constitutional Council¹³⁸ about maintaining a presumption of innocence and a 'prior, fair and impartial procedure'¹³⁹ seem well-founded. A right of appeal against a decision already made, such as proposed in the UK system,¹⁴⁰ or the somewhat more informal right of appeal apparently present in the Irish ISP-administered scheme,¹⁴¹ is not adequate given the severity of disconnection as a penalty. These procedures lack the rigour that the rule of law requires in order to allow citizens to be certain in the regular enforcement of the law. Preferably, any decision to restrict internet access in order to protect copyright interests should be made within the judicial process.¹⁴²

Finally, even before any decision about termination can be made, it seems clear that a better procedure needs to be instituted to increase the standard of reliability of allegations of infringement. Unless copyright owners are required to pay the full cost of a fair investigation of allegations of infringement and exposed to some sufficient compensatory liability or penalty for the making of incorrect allegations, they will continue to have an incentive to make allegations of infringement that are weak or unfounded.¹⁴³ In standard civil proceedings, costs will normally be awarded against the plaintiff if the claim does not succeed.¹⁴⁴ The courts have inherent jurisdiction to dismiss or stay an action where there has

138 *Loi favorisant la diffusion et la protection de la création sur internet* [Act Furthering the Diffusion and Protection of Creation on the Internet], Conseil constitutionnel [French Constitutional Court] decision n° 2009-580 DC, 10 June 2009.

139 *Electronic communications: common regulatory framework for networks and services, access, interconnection and authorisation* ('Telecoms Package') (European Union) COD/2007/0247, Art 1.

140 *Communications Act 2003* (UK), c 21, s 124K.

141 In Ireland, Eircom provide notification to a subscriber that they will terminate the connection in 14 days, during which time the subscriber could make representations to the ISP either about extenuating circumstances or contesting the factual findings of infringement. The Irish High Court found that this right to be heard before disconnection was sufficient to protect the legitimate interests of subscribers. See *Eircom* [2010] IEHC 108 [13], [30]–[31].

142 See *La Rue*, above n 65, [47], recommending that in order to 'avoid infringing the right to freedom of expression and the right to privacy of Internet users', actions by intermediaries to limit access to the internet should only be taken after judicial intervention.

143 See, eg, the ongoing litigation in *Lenz v Universal Music Corp* (ND Cal, C 07-03783-JF, 25 February 2010), where plaintiff Lenz argues that Universal issued a takedown notice for a presumptively fair use video of a baby dancing to a song by Prince without a good faith belief that it was infringing.

144 *Garnett v Bradley* (1878) 3 App Cas 944, 950 (Lord Hatherley), 959 (Lord O'Hagan).

been abuse of process.¹⁴⁵ Under Australian copyright law, aggrieved persons may seek relief, including damages, against someone who makes a groundless threat of infringement.¹⁴⁶ By contrast, the lack of judicial oversight in graduated response schemes makes it much more difficult to control abuses of process. While some forms of graduated response schemes include a requirement that the copyright owner bear a portion of the cost of issuing notices,¹⁴⁷ none of the schemes include any form of penalty for the issuance of groundless allegations. We think that at a minimum there must be a requirement to pay the subscriber's costs of successful appeal,¹⁴⁸ and, if this does not prove to be a sufficient disincentive, a penalty for making unfounded allegations should also be introduced.

IV THE EXERCISE OF JUDICIAL POWER

It seems clear that if a graduated response scheme is to be legitimately implemented, it must contain two important features: it must be discretionary, in that the imposition of termination as a penalty is reasonably proportional to the harm caused by the infringing acts; and it must implement some fair process for determining the veracity of allegations of infringement and the applicability of any defences raised by the subscriber. The problem, however, is that these types of functions are generally reserved to the judiciary under the *Australian Constitution*. The separation of powers requires that the judicial power of the Commonwealth only be exercised by courts established or invested with Federal jurisdiction under Chapter III.¹⁴⁹ This Part examines whether the constitutional limitation on the exercise of the judicial power of the Commonwealth could impact on the validity of either an ISP-administered graduated response scheme established as part of the copyright safe harbours or a more formal administrative regime.

Under a formal liberal understanding of private power, a graduated response scheme effected contractually between ISPs and media companies raises no issues of legitimacy; the actions of private organisations are not considered to be

145 *Hunter v Chief Constable of West Midlands Police*[1982] AC 529, 536. Lord Diplock, with whom the other members of the House of Lords agreed, stated:

the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.

146 *Copyright Act 1968* (Cth) s 202.

147 It appears that under the initial scheme at least, UK copyright owners will be required to pay three-quarters of the costs of issuing infringement notices: see Department for Business Innovations & Skills, *Online Infringement of Copyright (Initial Obligations) Cost-Sharing: HM Government Response* (2010) 2; NZ has provision for a per notice cost in its Bill: *Copyright (Infringing File Sharing) Amendment Act 2011* (NZ) s 122U.

148 See also Lemley and Reese, above n 75, 15, discussing the desirability of costs awards at an administrative procedure.

149 *Australian Constitution* s 71.

subject to review in the same way as those of public authorities.¹⁵⁰ So, for example, Eircom's decision to terminate the accounts of subscribers in Ireland can be thought of as a purely private matter that should not be subject to the same standards of fairness and due process that we would expect of an administrative tribunal or judicial proceeding. Similarly, agreements between ISPs and media companies in the US that require ISPs to police and enforce copyright infringements should not be subject to any form of public oversight.¹⁵¹

The contention that ISP-administered graduated response schemes do not enliven public principles of legitimacy is flawed for three main reasons. First, the pressure for ISPs to introduce graduated response schemes is not entirely borne of the market; it is created by the prospect of liability attaching to ISPs who do not terminate the accounts of repeat infringers. Copyright is a public bargain, and the appropriate contours of copyright law are matters of public policy, as are the penalties that copyright law imposes, directly or indirectly, on infringers.¹⁵² Second, imposing secondary liability on ISPs who do not implement graduated response schemes creates inefficiencies in the market; because they do not bear the social costs of the system, copyright owners have a strong incentive to send as many allegations as possible in order to shift social norms. Due process in this situation becomes prohibitively expensive due to the high numbers of incoming allegations; rational ISPs have a strong incentive to create a cheap system that preferences disconnection without significant

150 Note, however, that where a private body is fulfilling a public duty or public function, it may in some circumstances be subject to public law and common law judicial review: see *R v Wadley, ex parte Burton* [1976] Qd R 286, 295 (Wanstall SPJ, Stable J agreeing) ('it is essential, in the interests of justice, that the Supreme Court should be able, whenever necessary, to exercise the prerogative jurisdiction to supervise, control and correct a body endowed with such extensive powers, under legislative sanction, to affect the rights and liberties of the subject'); *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, 275 (Murphy J) ('When rights are so aggregated that their exercise affects members of the public to a significant degree, they may often be described as public rights and their exercise as that of public power. Such public power must be exercised bona fide, for the purposes for which it is conferred and with due regard to the persons affected by its exercise. This generally requires that where such power is exercised against an individual, due process or natural justice must be observed'.) See also *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] QB 815, 836; cf *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, 298–300 [57]–[63] (McHugh, Hayne and Callinan JJ, Gleeson CJ contra, Kirby J dissenting): decisions of the Australian Wheat Board were not subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) because there was 'no sensible accommodation that could be made between the public and the private considerations which would have had to be taken to account' if the private organisation was obliged to take account of public considerations: at 300. See further P A Keane, 'Judicial Review: The Courts and the Academy' (2008) 82 *Australian Law Journal* 623, explaining that public authorities are not subject to judicial review where they exercise rights available to other members of the community, but only where the decisions 'create or alter or enforce rights by virtue of the sovereign power of the state', and that 'it is no answer to a claim to review a decision that does create or alter rights of others that the decision-maker can plausibly be described as a private body': at 633.

151 See *Cyber Promotions v America Online*, 948 F Supp 436, 440 (ED Pa, 1996), finding that AOL was not a state actor and that accordingly its blocking of unsolicited email did not raise First Amendment concerns; see also *CompuServe Inc v Cyber Promotions*, 962 F Supp 1015, 1026 (SD Ohio, 1997).

152 See, eg, William Patry, *Moral Panics and the Copyright Wars* (Oxford University Press, 2009) 168.

investigation.¹⁵³ The third problem is that if principles of the rule of law do not apply to internet subscriptions, then they do not apply to a vast and increasingly important subset of social activity that occurs online.¹⁵⁴ Over the long term, lack of certainty in internet access is likely to have substantial negative ramifications over all aspects of a citizen's life, including education, commerce, democracy, self-expression, play, and sociability. For these reasons, it is incumbent upon the government to ensure that graduated response schemes are legitimately created and enforced.

The suggestion that non-judicial bodies should enforce private rights and impose penalties for their infringement is problematic in terms of the rule of law and the separation of powers. In France, the Constitutional Council struck down the first iteration of HADOPI because the French Parliament was not at liberty to assign the determination of fundamental rights to an administrative body.¹⁵⁵ By contrast, in the Irish High Court's approval of the settlement in *Eircom*, Charleton J rejected any claim that it was inappropriate for a private ISP to '[uphold] the law'.¹⁵⁶ His Honour explained firstly that termination for copyright infringement was a private consensual matter under the contract for service.¹⁵⁷ Justice Charleton continued, however, explaining that the matter was not wholly private, and that concern for legitimacy of copyright law actually required Eircom to enforce private copyright interests, in order 'to defend the Constitution and the laws of our society.'¹⁵⁸ The graduated response scheme in *Eircom* clearly fulfils a dual purpose; it is both a private contractual agreement and a means of enforcing public constitutional rights. This dual nature of ISP-administered graduated response schemes, however, goes to the heart of the problem.¹⁵⁹ It is rational for firms providing internet access to terminate the accounts of subscribers who pose a legal risk to the firm. Termination, however, is not just

153 The lack of legitimacy is not likely to be solved by market forces. If consumers were prepared to pay a premium price for greater legitimacy, that premium would be likely to steadily rise to an unsustainable point unless copyright owners had some incentive to slow their rates of making allegations. This problem may be exacerbated by an adverse selection problem in that an ISP who offers more legitimacy at a reasonable cost is likely to attract a disproportionate amount of subscribers who are likely to receive allegations of infringement, which could well drive the ISP's costs prohibitively high.

154 See Margaret Jane Radin, 'Regulation by Contract, Regulation by Machine' (2004) 160 *Journal of Institutional and Theoretical Economics* 142, 147.

155 *Loi favorisant la diffusion et la protection de la création sur internet* [Act Furthering the Diffusion and Protection of Creation on the Internet], Conseil constitutionnel [French Constitutional Court] decision n° 2009-580 DC, 10 June 2009.

156 *Eircom* [2010] IEHC 108, [29].

157 'The insertion of express conditions by Eircom in the user–internet service provider contract, as quoted above, against the use of the internet as a facility for transmitting obscene images and against the infringement of the copyright of others is a step taken in pursuance of a corporate policy that is no less than lawful and proper. It is abundantly clear that the data subject has given his or her consent in return for obtaining internet access. Under contract, if any of these conditions be breached, then their access can be terminated. ... A contract for service, involving termination for breach as a consequence on the operation of a condition is present by consent': *ibid.*

158 *Ibid.*

159 See Yu, above n 9, 1399.

about managing risk and maximising profits; it is, as Charleton J explained, also about ‘[upholding] the law and the Constitution.’¹⁶⁰

It is a fundamental principle of the rule of law that the manner in which laws are upheld and enforced must be legitimate.¹⁶¹ In our constitutional framework, it may not be valid for ISPs to play this dual role and impose sanctions for breach of the law. Respect for the rule of law at its most basic level requires, in the words of A V Dicey, that no person ‘is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.’¹⁶²

In practical terms, an ISP-administered graduated response raises the same problematic concerns as a public administrative scheme; both approaches avoid the legitimising structure of the regular independent judicial process. Importantly, the rule of law is not a requirement that can be limited solely to public institutions. Allan explains that:

the division between public and private law, though important, can never be safely invoked without reference to the specific context. ... [T]here can be no clear-cut distinction between the state and other ‘quasi-public’ bodies, or even private associations that exercise significant power over their own members.¹⁶³

If copyright law creates a liability structure that provides an incentive to ISPs to implement graduated response schemes, the legitimacy of those schemes is a fundamentally public concern. Under our current safe harbour regime, if the *iiNet* decision is overturned on appeal, ordinary Australian ISPs who do not actively encourage copyright infringement will be required to implement a graduated response policy in order to avoid authorisation liability. In these circumstances, the distinction between the Commonwealth requiring an administrative body to oversee a formal graduated response scheme and the Commonwealth effectively requiring ISPs to administer an unspecified scheme would, in practical terms, be difficult to discern. On this basis, in the next Part we consider whether, if copyright law is interpreted to practically impose a graduated response scheme, they could contravene the constitutional limitation on the exercise of judicial power.

160 *EMI Records & Ors v Eircom Ltd* [2010] IEHC 108, [29].

161 See Allan, above n 32, 121; Dicey, above n 30, 188; Dworkin, *Law's Empire*, above n 90, 243; Fuller, *The Morality of Law*, above n 92, 63–4; von Hayek, *The Road to Serfdom*, above n 92, 74–5; Raz, ‘The Rule of Law and Its Virtue’, above n 92, 200–2; Rawls, *A Theory of Justice*, above n 92, 235; Tamanaha, above 107, 119.

162 Dicey, above n 30, 110. See also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27–8 (Brennan, Deane, and Dawson JJ), explicitly relying on A V Dicey’s conception of the rule of law, explaining that ‘[e]very citizen is “ruled by the law, and by the law alone” and “may with us be punished for a breach of law, but he can be punished for nothing else”’, quoting with approval Dicey, above n 30, 202.

163 Allan, above n 32, 11; see also T R S Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press, 1993) 4: ‘the ideas and values of which the rule of law consists are reflected and embedded in the ordinary common law.’

A The Judicial Power of the Commonwealth

In Australia, under section 71 of the *Constitution*, the judicial power of the Commonwealth is vested in federal courts and courts vested with federal jurisdiction. If the power to order termination of the internet subscriptions of Australians falls within the judicial power of the Commonwealth, it cannot legitimately be exercised by bodies other than Chapter III courts. If this is the case, it would follow that the legislature is not free to require either an administrative tribunal or an ISP to make a finding that a person has infringed copyright and require that his or her internet access be terminated.¹⁶⁴ Determining whether power falls within the definition of judicial power of the Commonwealth is a difficult process that cannot be reduced to a simplistic formula.¹⁶⁵ The classic definition emphasises the binding and authoritative determination of existing rights:¹⁶⁶ ‘the making of binding declarations of right by way of adjudication of disputes about rights and obligations arising from the operation of the law upon past events or conduct’.¹⁶⁷ While not exhaustive or proscriptive, there are three generally accepted main elements of judicial power: (a) adjudication between parties; (b) the determination of existing rights and duties; and (c) a binding decision.¹⁶⁸

There is a reasonably strong argument that the power to terminate repeat infringers involves the resolution of controversies between parties. On the one hand, it is open for an ISP to exercise its rights under contract as it chooses; in its private capacity, an ISP can legitimately elect not to provide internet access to those subscribers it feels violate the law on its own motion, and this suggests that the power cannot be judicial in nature.¹⁶⁹ On the other hand, an ISP or other body overseeing a graduated response scheme is asked by copyright owners to act against subscribers upon allegations of copyright infringement, which clearly seems to involve the resolution of controversy between the copyright owner and the subscriber in question. In this sense, there is a real qualitative difference between an ISP’s contractual power to terminate for easily determinable issues that relate directly to the ISP’s business (such as non-payment of subscription fees) and a responsibility to investigate and terminate on the basis of allegations

164 There is a separate question as to whether current copyright law *requires* ISPs to adopt a graduated response scheme which we turn to address below.

165 See Cheryl Saunders, ‘The Separation of Powers’ in Brian R Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 14; Leslie Zines, *The High Court and the Constitution* (Butterworths, 2nd ed, 1987) 163; *Precision Data Holdings Limited v Wills* (1991) 173 CLR 167, 188–9, ‘[t]he acknowledged difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive arises from the circumstance that many positive features which are essential to the exercise of the power are not by themselves conclusive of it.’

166 *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ). See also Saunders, above n 165, 14; Zines, *The High Court and the Constitution*, above n 161, 162–3.

167 *Precision Data Holdings Limited v Wills* (1991) 173 CLR 167, 188.

168 See Zines, *The High Court and the Constitution*, above n 161, 162–3; Saunders, above n 165, 14–15.

169 See *R v Spicer; Ex parte Australian Builders’ Labourers’ Federation* (1957) 100 CLR 277, 289 (Dixon CJ).

of infringement by third parties.¹⁷⁰ It seems likely that if an ISP is effectively required by the *Copyright Act 1968* (Cth) and the threat of authorisation liability to adjudicate upon allegations of infringement by copyright owners that there must necessarily be a dispute between at least one copyright owner and a subscriber.¹⁷¹ At any rate, the issue is not necessarily conclusive.¹⁷²

The second issue is whether the matter involves the determination of existing rights and duties according to law.¹⁷³ The issue essentially turns on whether there has been a ‘decision reached by applying the relevant principles of law to the facts as found’¹⁷⁴ with ‘reference to the application of principles and standards “supposed already to exist”’.¹⁷⁵ When an ISP or other administering body is required to come to a conclusion as to whether a person has repeatedly infringed copyright, that determination necessarily involves coming to conclusions of both fact and law. An ISP making a determination that a person is a repeat infringer cannot realistically be said to be coming to that conclusion based upon ordinary (non-legal) standards.¹⁷⁶

The third – and perhaps most important – issue is whether the determination that a subscriber’s internet access should be suspended or terminated has binding or conclusive effect.¹⁷⁷ If the decision in question is immediately enforceable, particularly where it is not subject to review, it is likely to belong exclusively to

170 Cf *Roadshow Films Pty Limited v iiNet Limited* (2011) 275 ALR 1, 44 [190] (Emmett J), 166 [746] (Nicholas J), 96 [406] (Jagot J, dissenting).

171 See *R v Quinn; Ex parte Consolidated Foods Corp* (1977) 138 CLR 1, 11 (Jacobs J, with whom Barwick CJ, Gibbs J, Stephen J, and Mason J agreed) explaining that ‘[t]he application to the Registrar under s 23 (1) is initiated by a person “aggrieved” and therefore there will be a dispute on the hearing of the application between that person and the registered proprietor’.

172 In *R v Davison* (1954) 90 CLR 353, 367–8 Dixon CJ and McTiernan J explained that there were many instances where courts legitimately exercise judicial power without a controversy between subjects, such as the administration of assets or trusts, winding up companies, or the grant of probate of a will; *R v Quinn; Ex parte Consolidated Foods Corp* (1977) 138 CLR 1, 11 the High Court held that even though the issue involved a controversy, the Registrar’s power to oversee the register and maintain its integrity was not judicial in nature.

173 See *R v Davison* (1954) 90 CLR 353, 369 (Dixon CJ and McTiernan J), explaining that ‘the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within judicial power’; see also *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140, 148 (Mason CJ, Brennan, Deane, Dawson, and Toohey JJ): ‘[c]laims for the enforcement of existing legal rights necessarily invoke the exercise of judicial power.’

174 *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245, 258.

175 *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245, 259; citing *Prentis v Atlantic Coast Line*, 211 US 210, 226 (1908) (Holmes J).

176 Cf *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2006) 151 FCR 466, 478, quoted with approval in *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 359–60 [21] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ):

The function of the Board is not, as was submitted, to find (as an exercise of deciding present rights and obligations in the above sense) whether an offence has been committed and, if so, to inflict a punishment therefor. It is, as we have said, to assess whether someone should continue to occupy a statutory position involving skill and probity, in circumstances where (not merely because) the Board is satisfied that the person has failed in the performance of his or her professional duties in the past.

177 See *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 562.

the courts.¹⁷⁸ On one view, under administrative or ISP-administered graduated response schemes, a finding by an ISP or other non-judicial body that a subscriber is a ‘repeat infringer’ is certainly not binding in the same sense that judicial determinations are; the infringements are not proved at law and the subscriber is not held liable to compensate the copyright owner for any loss and is not punishable by the state. Nevertheless, a type of enforcement does exist, because upon a finding that a user is a repeat infringer, the user’s internet connection is suspended or terminated, and the ISP’s decision takes effect immediately.¹⁷⁹ Whether this practical enforceability is sufficiently close to legal enforceability to invoke the judicial power of the Commonwealth is not quite clear.

While there is no simple answer, in practical terms, whether a decision to terminate a subscriber’s internet connection is of a judicial nature will likely depend upon whether termination is seen as a punishment or not: the power to impose punishment is inherently judicial.¹⁸⁰ This practical test turns on whether a graduated response ‘[requires] the intervention of courts as “the bulwark of freedom” for the protection of what have been traditionally regarded as “basic legal rights”.’¹⁸¹ While internet access may not have reached the level of importance of a human right,¹⁸² the right to contract for and receive access is extremely important within modern society. Internet access is not a privilege created by the state and granted to the citizenry that can be removed at any time;¹⁸³ nor is it a special position of power that needs to be regulated for the

178 See *R v Gough; Ex parte Meat & Allied Trades Federation of Australia* (1969) 122 CLR 237, 241 (Barwick CJ, with whom Walsh J agreed); 243 (Menzies J); 248 (Owen J). See further Saunders, above n 165, 15–16; Zines, *The High Court and the Constitution*, above n 165, 179.

179 This type of enforcement was sufficient to show final effect in *R v Quinn*, where it was accepted that the Registrar of Trade Mark’s order to remove a trade mark from the register was final because ‘he himself carries [it] into effect by alteration of the register’: see *R v Quinn; Ex parte Consolidated Foods Corp* (1977) 138 CLR 1, 11 (Jacobs J; Barwick CJ, Stephen J, Mason J, and Murphy J agreeing).

180 *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 283 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (‘Boilermakers’ Case’); *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27–8.

181 *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 379–80 [99] (Kirby J); quoting *R v Quinn; Ex parte Consolidated Foods Corp* (1977) 138 CLR 1, 12 (Jacobs J). Note that Kirby J explicitly cautioned against ‘clos[ing] the list [of judicial power] or [determining] its contents solely by reference to history’: *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 379 [99].

182 *Roadshow Films Pty Ltd v iiNet Limited (No 3)* (2010) 263 ALR 215, 302 [411].

183 Cf *R v Quinn; Ex parte Consolidated Foods Corp* (1977) 138 CLR 1, 10 (Jacobs J, with Barwick CJ, Stephen J, Mason J, and Murphy J agreeing) explained that the right to have a trade mark registered was not a basic right:

The rights involved spring from the statute which governs their creation and continuance. The Registrar is given the administration of the statute. It is his administrative duty to keep the register in the state which the legislature has prescribed. In so doing he must make decisions not only upon what should or should not be placed but also upon what should remain on the register in accordance with the statutory prescriptions.

protection of the public.¹⁸⁴ The fundamental importance of being able to access the global communications network – for recreation, self-expression, education, sociability, political engagement, and commerce – suggests that the removal of the ability to contract for access is the removal of a basic legal right.

In a concurring opinion in *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board*, Kirby J gave a working definition of punishment that could belong exclusively to the judiciary:

a determination of wrong-doing of a public nature, in consequence of which a sanction is imposed on a person to indicate the established wrong-doing and to provide deterrence to others by virtue of the sanction in the particular case.¹⁸⁵

The goal of a graduated response scheme is undoubtedly to punish the wrongdoer and to deter infringement by others.¹⁸⁶ In the United States of America ('US') House of Representatives Committee Report on the Digital Millennium Copyright Act, the Committee explained that the US requirement to terminate repeat infringers is designed so that 'those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access.'¹⁸⁷ The primary justification for graduated response schemes worldwide is to deter copyright infringement; termination of internet access plays no compensatory role and only a limited educative role.¹⁸⁸ This raises a significant

184 Cf *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 (the position of a registered liquidator is given and regulated by statute to protect the public); *Police Service Board v Morris* (1985) 156 CLR 397, 403–407 ((Gibbs CJ) in obiter, explaining that the imposition of a penalty on a police officer was disciplinary in nature and not likely to involve the exercise of judicial power); *R v White; Ex parte Byrnes* (1963) 109 CLR 665, 670 (a fine deducted from the salary of members of the public service for wrongdoing, imposed under statute, was disciplinary in nature, particularly as the provisions did not have 'general operation over all the members of the community.')

185 *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 375 [83] (citations omitted) (Kirby J), citing *R v Wigglesworth* [1987] 2 SCR 541, 560.

186 See Yu, above n 10, 1381, explaining that '[t]he graduated response system can serve as an effective deterrent' and that, quoting from Peter K Yu, 'Digital Copyright Reform and Legal Transplants in Hong Kong' (2010) 48 *University of Louisville Law Review* 693, 702:

The stiffer the penalties, the less likely it is that an individual will commit an offence. Very few people are likely to distribute music or movies without authorization of the copyright holders if they will be sent to jail for thirty years – or worse, if one or both of their hands are to be chopped off.

See also Mark A Lemley and R Anthony Reese, 'Reducing Digital Copyright Infringement without Restricting Innovation' (2004) 56 *Stanford Law Review* 1345, 1422, '[g]iven the increasing importance of online activity in our society, the possibility of losing Internet access should provide an additional deterrent to potential high-volume uploaders.': cf *Roadshow Films Pty Limited v iiNet Limited* (2011) 275 ALR 1, 44 [190] (Emmett J), doubting whether a power to terminate would be an unenforceable penalty at equity.

187 United States HR Res 105-551 §2 (1998), 61. Importantly, since no general purpose US ISP has been found contributorily liable for the infringing acts of its users, no ISPs have had to rely on the safe harbours; whether the 'repeat infringer' provision accordingly introduces a graduated response scheme in the US is accordingly untested but unlikely.

188 In *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* (2010) 263 ALR 215, 310 [440], Cowdroy J held that:

Constitutional problem: while non-punitive sanctions can sometimes be imposed if there is no public declaration of guilt,¹⁸⁹ the imposition of punishment cannot permissibly be separated from the judicial determination of guilt.¹⁹⁰

A useful analogy can be drawn from *Victorian Chamber of Manufactures v Commonwealth*,¹⁹¹ where the High Court considered a regulation that provided that the Minister may close down premises until, in his opinion, lighting equipment conformed with the regulations. Chief Justice Latham and Starke J noted in obiter, that the provision purported to confer judicial power of the Commonwealth ‘to form an opinion that a person has committed an offence by contravening the Regulations and to impose a penalty by closing his premises in respect of such contravention’.¹⁹² The analogy to ISPs judging subscribers to have infringed copyright and suspending their connection is imperfect – no Minister is empowered to make the decision and no physical premises are closed down – but nevertheless seems to suggest that forming an opinion that a person has infringed copyright and imposing a penalty by suspending his or her internet service should be regarded as judicial in nature.

We have argued that the ability to contract for and receive an internet connection should be regarded as a basic legal right, particularly when we consider the important role that the internet plays in modern society. If this is correct, it follows that when multiple allegations of copyright infringement are made to an ISP or other body that is required first to determine the veracity of the allegations and come to a conclusion as to whether copyright has been infringed and second to impose a penalty for those infringements of termination or suspension of service, then that decision is likely to be judicial in nature.

the applicants have made clear their desire to sanction via the respondent those directly infringing copyright, that is, the iiNet users. A letter dated 25 June 2008 by Mr Pisano, the President of the MPA, to Mr Coroneos, the CEO of the IIA, stated ‘[o]ur view is that some adequate sanction is necessary in the implementation of a graduated response program in order for it to be effective to both educate the user and discourage repeat infringements’. Mr Gane said that the ‘graduated program’ proposed by AFACT in a press release dated 29 August 2007 ... ‘would have encapsulated a series of sanctions that an ISP could have taken’ (despite the press release stating that ‘[t]he graduated response AFACT is proposing isn’t about punishing customers – it’s about educating customers’).

189 See *R v White; Ex parte Byrnes* (1963) 109 CLR 665, 670-1; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 358 [17] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

190 In *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, the NSW legislature attempted to give the Supreme Court the power to punish a particular person by imprisonment without trial. As Gummow J explained at 32:

whilst imprisonment pursuant to Supreme Court order is punitive in nature, it is not consequent upon any adjudgment by the Court of criminal guilt. Plainly, ... such an authority could not be conferred by a law of the Commonwealth upon this Court, any other federal court, or a State court exercising federal jurisdiction. Moreover, not only is such an authority non-judicial in nature, it is repugnant to the judicial process in a fundamental degree.

See also *Kruger v Commonwealth* (1997) 190 CLR 1, where the punitive power of detention not consequent on a determination of guilt could not be conferred on the Chief Protector (NT).

191 (1943) 67 CLR 413 (*‘Industrial Lighting Case’*).

192 Ibid 416–7 (Latham CJ, Starke J agreeing at 422), quoted in Zines, *The High Court and the Constitution*, above n 165, 173.

B Do Administrative or ISP-administered Graduated Response Schemes Actually Purport to Devolve the Judicial Power of the Commonwealth?

Importantly, the conclusion that the determination that a subscriber is a repeat infringer and should have their internet connection suspended or terminated is likely to be judicial in nature does not necessarily mean that non-judicial graduated response schemes will be unconstitutional. Much will depend on the manner in which the scheme operates in practical effect and, particularly, whether authorisation liability extends to effectively require ordinary ISPs to investigate and punish infringement. While there is still some uncertainty,¹⁹³ the Full Federal Court in *iiNet* held, by majority, that significantly more information would need to be provided to passive ISPs before they could be taken to ‘authorise’ the infringement of copyright by their subscribers.¹⁹⁴ Following the Full Federal Court’s decision, however, it is not clear whether, in the future, copyright owners may be able to provide sufficiently convincing evidence of infringement to ISPs to enable a court to conclude that, absent a termination scheme, an ISP would be liable for authorising the infringement of its users.

While the circumstances in which ISPs must terminate accounts will arise under the general principles of authorisation liability, it will be the safe harbours that will define how far that liability will extend. Specifically, the safe harbours provide further definition of the circumstances in which ISPs’ liability for damages will be excused. If the safe harbours require what is tantamount to an exercise of the judicial power of the Commonwealth to avoid liability, then our point is made. Accordingly, we focus here on the operation of the repeat infringer policy under the safe harbours, rather than the more general principles that inform the ‘reasonable steps’¹⁹⁵ that ISPs may take to avoid secondary liability.

1 The Repeat Infringer Policy

The current copyright safe harbours require ISPs to terminate the accounts of ‘repeat infringers’ in ‘appropriate circumstances’ in order to be protected from monetary damages for secondary copyright liability.¹⁹⁶ This provision does not, on its face, appear to amount to an attempt by the legislature to devolve the judicial power of the Commonwealth to ISPs. A more detailed examination, however, would seem to reveal that the provision is much more problematic than may be commonly assumed.

If all general purpose ISPs need to rely on the safe harbour to avoid authorisation liability, the repeat infringer requirement raises some serious questions. In these circumstances, the definition of what ‘appropriate

193 See Phillips Fox, *Digital Agenda Review: Report and Recommendations* (2004) 79, reporting that there was significant uncertainty about ISP liability before the introduction of the safe harbours; the *iiNet* case itself can be seen as evidence of uncertainty in the law post introduction of the safe harbours.

194 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 275 ALR 1, 58 [257] (Emmett J), 172 [777] (Nicholas J).

195 *Copyright Act 1968* (Cth) ss 36(1A)(c); 101(1A)(c).

196 *Copyright Act 1968* (Cth) s 116AH(1).

circumstances' will necessitate disconnection will be critical for the legitimacy of the scheme. The Full Federal Court's majority judgments in *iiNet*, while stressing the importance of methods to verify and validate allegations of infringement, is sufficiently ambiguous that copyright owners are likely to continue to seek to require ISPs to terminate the accounts of subscribers on the basis of their investigations. If it becomes accepted that terminating subscriber access on the basis of these allegations without judicial intervention is both appropriate and necessary, the effect will be to read a de facto and ill-defined graduated response scheme into Australian law.¹⁹⁷ If this comes to pass, given the massive potential liability for authorisation infringement, it is unlikely that any ISP would refuse to act to terminate the accounts of alleged repeat infringers. While the legislation does not seem to explicitly attempt to devolve the judicial power of the Commonwealth to Australian ISPs, this would be the practical effect of such a reading of copyright law. Justice Cowdroy at first instance in *iiNet* explained the difficulties of introducing such a scheme through authorisation liability:

The law knows of no sanction for copyright infringement other than that imposed by a court pursuant to Pt V of the Copyright Act. Such sanction is not imposed until after a finding of infringement by a court. Such sanction is not imposed on anyone other than the person who infringed. Such sanction sounds in damages or, if criminal, possible fines and imprisonment, not removal of the provision of the internet.¹⁹⁸

We would argue that a reading of authorisation liability and the safe harbours that creates a de facto graduated response scheme is both highly problematic and unnecessary. There is nothing in the legislative history that suggests that the introduction of the safe harbours was designed to require ISPs to introduce a graduated response scheme (at least, to the extent that they may be required to be exercise judicial power).¹⁹⁹ Since the safe harbours were modelled on the US provisions, it is useful to note that, as the default position, general purpose ISPs

197 Justice Cowdroy explained the novelty of the attempt to introduce a graduated response scheme through the threat of authorisation liability:

In no previous proceeding has any attempt been made to render an alleged authoriser responsible for, or to act as, a conduit to punish those who are responsible for infringing the applicants' copyright directly. In a substantive sense, the applicants seek an extrajudicial scheme for the imposition of collective punishment for those alleged to have committed a tort.

Roadshow Films Pty Ltd v iiNet Limited (No 3) (2010) 263 ALR 215, 310 [439].

198 *Roadshow Films Pty Ltd v iiNet Limited (No 3)* (2010) 263 ALR 215, [441]; cf *Roadshow Films Pty Limited v iiNet Limited* (2011) 275 ALR 1, 58 [257], 60 [265] (Emmett J), 177 [804] (Nicholas J), 114 [496] (Jagot J, dissenting).

199 Cf Jane C Ginsburg and Sam Ricketson, 'Separating Sony Sheep from Grokster (and Kazaa) Goats: Reckoning Future Business Plans of Copyright-Dependent Technology Entrepreneurs' (2008) 19 *Australian Intellectual Property Journal* 10, 37, suggesting that the introduction of the safe harbours could indicate that there was 'a legislative assumption ... that providers of conduits (communications infrastructure) can be liable for authorisation of infringing communications of copyright material, simply on the basis that they provide the means for making such communications.'

in the US are not likely to be liable for the infringing acts of their subscribers.²⁰⁰ Even if a US ISP were found liable, it is unlikely that the US safe harbours require termination of alleged, as opposed to proven, repeat infringers, although this point is not settled law.²⁰¹ In this context, it should be remembered that the US provisions were not drafted with peer-to-peer infringement in mind, which perhaps explains the much more detailed procedures in both the US and Australian legislation for the caching, hosting, and searching safe harbours (Categories B, C, and D activity respectively) than the transmission safe harbour (Category A).²⁰²

The operation of the repeat infringer policy can be much more readily understood – and is much less problematic – when considered in the context of the notice and takedown regime in the other safe harbours for caching, storage, or search facilities. In those cases, it is easy for a service provider to examine the content stored on its servers and identify whether the material is likely to be infringing or not. In the case of transitory network communications, on the other hand, the ISP has no ability to make that determination and no method to determine the veracity of the copyright owner’s allegations.²⁰³ Furthermore, the procedural requirements for notices of infringement are explicitly set out under Categories B, C, and D, and there are explicit safeguards to ensure the accuracy

200 See *Religious Technology Center v Netcom On-Line Communication Services*, 907 F Supp 1361 (ND Cal, 1995), for an ISP to be liable for contributory infringement, it must have knowledge of the infringing activity and cause, induce, or materially contribute to the infringing conduct; *MGM Studios Inc v Grokster, Ltd*, 545 US 913 (2005), requiring some ‘inducement’ of infringement to find contributory liability where a technology has substantial non-infringing uses; Alfred C Yen, ‘Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment’ (2000) 88 *Georgetown Law Journal* 1833; see also *Northern Territory v Collins* (2008) 235 CLR 619, where the High Court supported the staple article of commerce doctrine in patent law, from which the US Supreme Court developed the *Sony* rule in copyright.

201 See LexisNexis, *Nimmer on Copyright*, vol 3 (at May 2011) § 12B.10, arguing that Congress used different language to indicate proven, as opposed to alleged, infringers and that ‘[i]n order to generally exclude someone for the future, Section 512 requires certainty, not allegation, and such certainty is lacking’ where an ISP lacks actual knowledge and infringement has only been alleged; see also Yu, above n 10, 1409, stating that ‘although some in the entertainment industry have suggested that the graduated response system had already been built into the DMCA framework, it is blatantly clear that Congress did not intend the provision to cover *alleged* infringers.’ (emphasis in original).

202 See *Recording Industry Association of America, Inc v Verizon Internet Services*, 351 F 3d 1229, 1233 (DC Cir, 2003), holding that the availability of a subpoena to identify alleged infringers under 17 USC 512 is not available against ISPs in the transitory network communications safe harbour. Justice Ginsburg explained quoting *In re Verizon Internet Services, Inc*, 240 F Supp 2d (DC, 2003), 38, that ‘the legislative history of the DMCA betrays no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works. That is not surprising; P2P software was ‘not even a glimmer in anyone’s eye when the DMCA was enacted’: at 1238.

203 See *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* (2010) 263 ALR 215, 343 [594]:

it could be argued that given that the legislation and the regulations in relation to category C (hosting) are highly prescriptive and that that type of activity allows for a [carriage service provider] to actually access and view the material alleged to be infringing, that would have the consequence that it would be reasonable for the repeat infringer policy in relation to that category to provide for quicker termination of internet users alleged to be repeat infringers than in relation to category A, where, due to the transitory nature of the transmission, a [carriage service provider] cannot independently verify the infringing nature of the transmission.

See also *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 275 ALR 1, 169 [757] (Nicholas J).

of allegations.²⁰⁴ In particular, the notice and takedown provisions in Category C do not raise as significant problems for the rule of law because (a) the legislation provides a greater level of detail about the operation of the scheme and the evidentiary requirements of notices; (b) ISPs are better able to examine and make an initial determination on the validity of allegations; (c) removing allegedly infringing material will usually be a less severe penalty than complete disconnection from the internet; and (d) the regulations provide an appropriate procedure for users to contest allegations and to have material reinstated.

To the extent that the Category A safe harbour provides any utility if authorisation liability does not extend to general purpose ISPs, it can likely be better conceptualised as an extra shield for those ISPs who choose to take a much more active role in transmission of communications. As some ISPs merge and form alliances with entertainment conglomerates, for example, they are likely to take a heightened interest in the content that their users are seeking and viewing online.²⁰⁵ These ISPs may have significant incentives to prioritise certain sources of content over others, in order to provide a more valuable service for their users and push traffic and attention towards favoured providers. Similarly, some ISPs may also voluntarily take a more active role in attempting to identify and filter copyright infringing material. In these circumstances, where an ISP does more than merely provide the facilities for infringement, such as engaging in deep-packet inspection in order to identify, prioritise, track, and filter certain types of content,²⁰⁶ it may accrue potential authorisation liability. Because the ISP would have a greater degree of knowledge about infringements at a time that they are occurring and be in a better position to take steps to stop infringing communications (without necessarily terminating access completely), it may need to rely on the Category A safe harbour in order to avoid monetary damages.²⁰⁷ Since such an ISP might be better able to identify infringing communications than an ISP who is only provided with unverifiable allegations of infringement after the fact, this reduced role for the transmission safe harbour means that the repeat infringer requirement would be somewhat less problematic from a legitimacy point of view than a graduated response scheme applied to general purpose ISPs. It would still, however, raise serious problems unless there was judicial oversight and a well-developed counter notice procedure for subscribers to refute allegations of infringement.

204 *Copyright Act 1968* (Cth) s 116AH(1); *Copyright Regulations 1969* (Cth) Pt 3A.

205 See Yu, above n 9, 1385–7, providing the example of Comcast's deal to acquire a majority stake in NBC Universal and its subsequent licensing agreement to allow Comcast users to watch CBS programming online.

206 See Bridy, above n 10, 104–7; Yu, above n 9, 1387; Rob Frieden, 'Internet Packet Sniffing and Its Impact on the Network Neutrality Debate and the Balance of Power between Intellectual Property Creators and Consumers' (2008) 18 *Fordham Intellectual Property, Media & Entertainment Law Journal* 633, 656.

207 The factors that influence authorisation liability under *Copyright Act 1968* (Cth) ss 36(1A) and 101(1A) include the power to prevent infringement, and whether the person took any reasonable steps to prevent or avoid infringement. If an ISP has greater potential knowledge of infringement and a more subtle power to prevent infringement than only termination of access, it could be more likely to be deemed to have authorised infringement by its customers.

We would argue that the least problematic construction of authorisation liability would be that general purpose ISPs are not liable for the infringing acts of their users merely because unverifiable allegations of infringement are provided (and therefore, have no need to rely on the safe harbours). In these circumstances, we consider that the proper role of the safe harbour for Category A infringement is to provide an additional shield where ISPs assume more risk by obtaining actual knowledge at the time infringements occur or by engaging in 'good Samaritan' filtering or blocking of traffic. Even assuming a general purpose ISP were found liable for authorising copyright infringement, because of the problems associated with lack of due process and lack of judicial oversight, the requirements of the safe harbours should not be interpreted so as to require the ISP to determine allegations of infringement and punish their users. It follows that the least problematic construction of a 'repeat infringer' for whom termination is 'appropriate' is a person who has legitimately been found to have infringed copyright on multiple occasions and whose punishment has been determined in the 'ordinary legal manner before the ordinary Courts of the land.'²⁰⁸

If, on the other hand, authorisation liability is interpreted broadly and the safe harbours are interpreted to require termination without judicial intervention, the resulting de facto graduated response scheme would suffer from a grave lack of legitimacy. It seems likely that a reading of authorisation liability and the safe harbours that would effectively require ISPs to adjudicate upon allegations of infringement and impose punishments could amount to an improper exercise of the judicial power of the Commonwealth. We believe such a result should be avoided as inconsistent with the rule of law requirements of due process and proportionality. At the very least, the rule of law suggests that if Parliament's intention was to introduce a graduated response scheme that 'would overthrow fundamental principles ... or depart from the general system of law' by requiring ISPs to adjudicate upon allegations of infringement and impose punishments, it would most likely have '[expressed] its intention with irresistible clearness'.²⁰⁹ It is readily apparent that the legislature has not done so here.

2 *An Administrative Graduated Response Scheme*

If the movie industry is not successful on appeal to the High Court in *iiNet*, there is likely to be considerable pressure on the government to introduce an administrative graduated response scheme, similar to the recent legislation in the UK and in NZ. If a graduated response scheme is to be introduced, it is likely that a formal scheme that requires non-judicial bodies to determine allegations of infringement and appropriate penalties could only be constitutional if sufficient

208 Dicey, above n 30, 110.

209 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J); see also *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron, McHugh JJ); *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron, McHugh JJ); *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 (Gleeson CJ); *Saeed v Minister for Immigration and Citizenship* [2010] 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan, Kiefel JJ).

judicial oversight were built into the scheme. The role of any administrative body would likely need to be restricted to overseeing the issuance and collation of allegations of infringement and associated regulatory provisions. Such an administrative body would not be able to determine whether allegations were made out and whether the subscriber infringed copyright if those determinations had a binding effect. The approach proposed by New Zealand in this regard, where an application to the Court is required if termination or suspension is to be ordered, would seem to satisfy the requirements of the separation of powers. The model contemplated by the UK, which provides for judicial review of a decision to terminate made by an administrative body, is probably not sufficient, particularly as appeal to the judicial system is only available by leave. If the administrative body must make determinations of infringement according to legal standards and has the ability to immediately enforce its decision that a person's internet connection should be terminated, it is likely that there would be an impermissible exercise of judicial power.²¹⁰

V CONCLUSION: SAFEGUARDS FOR ADMINISTRATIVE AND ISP-ADMINISTERED GRADUATED RESPONSE SCHEMES

The termination of a person's internet connection is a serious penalty that is likely to have a very significant impact over a large range of the activities of members of modern society. In terms of providing a reasonably appropriate and tailored means of deterring copyright infringement, the argument for the introduction of a graduated response scheme does not yet appear to have been sufficiently made out. We have serious reservations whether such a scheme could ever be workable. If, however, such a scheme were to be introduced, there are a number of important safeguards which should be considered in order to ensure that the penalty is legitimately imposed.

Regardless of the form that a graduated response scheme takes, there should be a fair and impartial prior procedure with a presumption of innocence. Allegations of copyright infringement that form part of the scheme should be subject to regular scrutiny and some form of deterrence should be introduced to limit the sending of false or defective notices. At an absolute minimum, a full right of appeal to the judicial system is necessary, and there must be sufficient provision for costs to be awarded to subscribers who are wrongly accused. It seems, however, that the determination of the veracity of allegations of infringement according to copyright law – and any defences raised – is sufficiently complex that it should be left to the judiciary. Finally, and perhaps most importantly, termination or suspension as a penalty should only be imposed in circumstances where it is reasonably proportionate to the harm, which means

210 See *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245, 258 (Mason CJ, Brennan, Toohey JJ).

that there must be judicial discretion as to the determination of an appropriate penalty. This suggests that an administrative scheme such as is proposed in the UK would not be appropriate in Australia; the separation of powers required under section 71 of the *Constitution* would be likely to prohibit the introduction of a formal graduated response scheme that purports to allow non-judicial bodies to determine allegations of infringement and impose appropriate punishments.

We would like to conclude this paper with a warning about the worrying trend emerging in the US and Ireland which sees ISPs entering into contractual agreements to implement graduated response schemes that are not subject to the legitimating strictures of the rule of law. Left unchecked, the resultant lack of legitimacy in the distributed enforcement of copyright is likely to be highly problematic, especially given the central importance of the internet as core infrastructure in modern society. In order to avoid such a situation, we make two final suggestions. First, the construction of authorisation infringement and the safe harbours in copyright doctrine should not be interpreted to provide ISPs with little choice but to implement a non-judicial graduated response scheme. Second, if Australian ISPs otherwise begin to voluntarily introduce graduated response schemes, we should consider, as a matter of policy, an appropriate regulatory approach to ensure that the legitimate interests of Australian citizens are sufficiently protected from the potential abuse of private power.