

## GRADUATED RESPONSE BY INDUSTRY COMPACT: PIERCING THE BLACK BOX<sup>♦</sup>

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### INTRODUCTION

As illustrated by the worldwide public mistrust of the Anti-Counterfeiting Trade Agreement (ACTA) and Trans-Pacific Partnership (TPP) negotiations, lawmaking processes that lack transparency and provide little opportunity for public participation undermine the legitimacy of the resulting policies. In contrast, as David Levine points out,<sup>1</sup> when lawmaking processes invite broad public participation, problems can be identified and remedied before flawed legislation is enacted.

Such “black box” policymaking can be equally problematic when

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<sup>1</sup> David S. Levine, *Bring in the Nerds: Secrecy, National Security and the Creation of International Intellectual Property Law*, 30 CARDOZO ARTS & ENT. L. J. 105 (2012).

it occurs outside the government process. This Article explores the problems created by the lack of transparency in enforcement mechanisms adopted by the Center for Copyright Information (CCI), the consortium formed by major record companies, film studios, and broadband service providers (ISPs) under the July 2011 Memorandum of Understanding (MOU) in which they collectively agreed to implement a voluntary “graduated response” approach to certain types of online copyright infringement.<sup>2</sup> The existence of this private agreement will be invisible to many consumers who are subject to its rules, and will generally become apparent only to those who run afoul of those rules. While the Copyright Alert program implemented under the MOU claims to have an educational purpose, the fact that the process, and the rules which govern it, will be largely hidden from view contradicts that stated purpose. By joining the MOU, signatory ISPs are protecting themselves against competition from the other signatory ISPs that might otherwise have adopted enforcement measures and dispute resolution methods that are fairer to consumers. This private agreement among businesses affects ISP customers without giving them meaningful input, and constrains their ability to opt out by choosing different providers.

While content owners and ISPs outside the MOU can implement the detection methods and mitigation measures contained therein (or other measures of their choosing), the collusive nature of the MOU gives rise to a distinct set of concerns. By compelling multiple ISPs to conform to a standard of service, thus limiting the opportunities of consumers to choose ISPs that offer a different standard of service, the MOU constitutes a type of hidden lawmaking that deserves appropriate scrutiny.

According to the MOU, the goals of this enforcement program include “providing education, privacy protection, fair warning, and an opportunity for review that protects the lawful interests of consumers.”<sup>3</sup> However, both the Copyright Alert program and the Independent Review process, as described in the MOU, fall short of achieving these goals.<sup>4</sup> This Article suggests several modifications that would increase

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<sup>2</sup> At first, the CCI announced that it would implement the Copyright Alert program by July 2012. Parker Higgins, *Graduated Response Deal Steamrollers On Towards July 1 Launch*, ELECTRONIC FRONTIER FOUNDATION (Mar. 21, 2012), <https://www.eff.org/deeplinks/2012/03/graduated-response-deal-steamrollers-towards-july-1-launch>. Shortly thereafter, however, the CCI’s newly appointed executive director, Jill Lesser, acknowledged that implementation could take another six months. Sarah Lai Stirland, *The Center for Copyright Information’s New Chief Jill Lesser on Top ISPs’ New ‘Copyright Alert’ System*, TECHPRESIDENT (Apr. 5, 2012), <http://techpresident.com/news/22016/interview-center-copyright-informations-new-chief-jill-lesser>.

<sup>3</sup> *Memorandum of Understanding*, CENTER FOR COPYRIGHT INFORMATION 2 (July 6, 2011), <http://www.copyrightinformation.org/sites/default/files/Momorandum%20of%20Understanding.pdf> (sic) [hereinafter *MOU*].

<sup>4</sup> In 2010, Professor Annemarie Bridy suggested certain fundamental principles that should be

the transparency and educational value of the CCI's enforcement and review process, making it more valuable to users, broadband providers, and copyright owners.

While there may be no legal requirement for transparency or public participation in the activities of the CCI, the lack thereof will needlessly undermine the legitimacy of those activities and bring about the same kind of public distrust that has afflicted the ACTA and TPP negotiations. This may cause consumers to resist the CCI's public education efforts, and perversely, to become less respectful of copyright laws. As this Article will show, much of the CCI's secrecy is unnecessary, and can be remedied with some changes to the consortium's method of operation.

#### I. A "BLACK BOX" INDUSTRY COMPACT

The CCI consortium has lacked transparency at its formation stage, and this affliction threatens to grow worse as the consortium implements its key activities—the Copyright Alert program and the Independent Review program.

##### A. *Formation of the Compact*

The CCI was created when the Motion Picture Association of America (MPAA), the Recording Industry Association of America (RIAA), and a group of major film studios and record companies (collectively, the "content owners")<sup>5</sup> forged an agreement with five of the largest broadband providers to create a new system of extrajudicial copyright enforcement. In the July 6, 2011 MOU creating this consortium,<sup>6</sup> the parties agreed to cooperate in implementing a program called the "Copyright Alert" system. Under the Copyright Alert system, ISPs issue individualized warnings to residential wired ISP customers

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incorporated in any graduated response system adopted by an ISP. See Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81, 126–32 (2010). To its credit, the MOU incorporates several of these principles (e.g., graduated sanctions, an opportunity to appeal). While these are necessary elements of a graduated response system, that does not mean they are sufficient.

<sup>5</sup> The participating film studios are: Walt Disney Studios Motion Pictures, Paramount Pictures Corp., Sony Pictures Entertainment, Twentieth Century Fox Film Corp., Universal City Studios, and Warner Bros. Entertainment. The participating record companies are: UMG Recordings, Warner Music Group, Sony Music Entertainment, and EMI Music North America. *MOU*, *supra* note 3, at 2–3.

<sup>6</sup> Considering that one of the stated purposes of the CCI and the Copyright Alert system is to educate consumers, it is surprising that, as this Article goes to press, there is no link to the MOU on the CCI website, [www.copyrightinformation.org](http://www.copyrightinformation.org), even though the MOU is hosted there. See *supra* note 3. However, copies are available at several websites variously devoted to technology, privacy, and information access. See, e.g., *Center for Copyright Information ISP Copyright Alert System Memorandum of Understanding*, PUBLIC INTELLIGENCE (July 8, 2011), <http://publicintelligence.net/center-for-copyright-information-isp-copyright-alert-system-memorandum-of-understanding>.

suspected of P2P copyright infringement,<sup>7</sup> culminating in “mitigation measures” that impede the Internet access of the suspected infringers. Notably, the Copyright Alert system applies only to P2P file-sharing by residential users; it does not apply to any other acts of alleged online copyright infringement, and most businesses are completely exempt. Thus, businesses will not suffer from the same disruptions or degradations of service as individual consumers who are subject to the mitigation measures.

The participating ISPs are AT&T, Cablevision, Comcast, Time Warner Cable, and Verizon.<sup>8</sup> Thus, the consortium includes most of the major broadband providers—with the notable exception of Cox Communications. Ironically, Cox is one of the few ISPs that has gone on record as actually terminating repeat infringers (after multiple warnings).<sup>9</sup> Its decision not to participate in the consortium could reflect any of several motivations. Cox may be unwilling to abide by the restrictions of the MOU, may prefer to maintain flexibility to adapt its enforcement regime to changes in technology, market pressures, and evolving interpretations of the law,<sup>10</sup> or may have concerns about the cost of the Copyright Alert system and the attendant review process. Cox’s nonparticipation in the CCI does not imply that it will be any more or less aggressive in discouraging online infringement than its participating counterparts. Nor does it foreclose Cox from joining the consortium at a later date.

Because the negotiation of the MOU was not publicized, there was no public input at the formation stage. Legally, none was required, as in the case of traditional bilateral trade agreements. As Professor Levine has pointed out, the ostensible reason for the nonpublic nature of the multilateral ACTA and TPP negotiations has been the sensitivity attached to the bargaining positions of the various nations. No such concerns attach to the formation of the MOU, which is a private compact among businesses that will have a direct effect on consumers. However, as Annemarie Bridy has noted, cooperative relationships between copyright owners and ISPs mean that, even without a legislative mandate, “graduated response can effectively become the law for Internet users without ever becoming the law of the land.”<sup>11</sup>

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<sup>7</sup> MOU, *supra* note 3, at 2.

<sup>8</sup> Milton Mueller, Andreas Kuehn, Stephanie Michelle Santoso & Sch. of Info. Studies, Syracuse Univ., *Policing the Network: Using DIP for Copyright Enforcement*, SYRACUSE UNIV. 21 (2012), [http://dpi.ischool.syr.edu/Papers\\_files/MM-AK-SS-CSIEL.pdf](http://dpi.ischool.syr.edu/Papers_files/MM-AK-SS-CSIEL.pdf).

<sup>9</sup> Karl Bode, *Cox Responds to DMCA “Three Strikes” Report*, DSLREPORTS (Oct. 2, 2008), <http://www.dslreports.com/shownews/98149>; Annemarie Bridy, *ACTA and the Specter of Graduated Response*, 26 AM. U. INT’L L. REV. 559, 562 (2011).

<sup>10</sup> For example, the Second Circuit’s recent decision in *Viacom Int’l, Inc. v. YouTube, Inc.*, No. 10–3270–cv, 2012 WL 1130851 (2d Cir. Apr. 5, 2012) is but one in a line of cases interpreting the scope of ISP liability for copyright infringement by users and the scope of the relevant safe harbors under 17 U.S.C. § 512 (2012).

<sup>11</sup> Bridy, *supra* note 9, at 570–71.

Like ACTA and TPP, the MOU has support from the Obama Administration.<sup>12</sup> In contrast to those multilateral trade agreements, however, the Administration's support of the MOU is not unreserved.<sup>13</sup>

### B. Governance

The CCI is governed by a six-person Executive Committee selected by the signatories (three selected by the RIAA and MPAA, and three by the participating ISPs, all serving two-year terms without compensation).<sup>14</sup> The Executive Committee employs an Executive Director.<sup>15</sup>

The MOU also calls for a three-member Advisory Board, with one member selected by the RIAA and MPAA, one member by the participating ISPs, and the third selected by the other two members.<sup>16</sup> Each member should be "drawn from relevant subject matter expert and consumer interest communities."<sup>17</sup> The members can be employees or agents of the RIAA, MPAA or the participating ISPs, if the signatories agree to this in writing.<sup>18</sup> The Advisory Board is to be consulted on "any significant issues the Executive Committee is considering relating to the design and implementation of the Notice Process and the Copyright Alert program."<sup>19</sup> It thus appears that the role and influence of the Advisory Board will essentially be determined by the CCI, which will decide whether and when an issue is "significant" enough to warrant consultation. The MOU does not mandate any regular reporting or other flow of information to the Advisory Board, nor does it require

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<sup>12</sup> Victoria Espinel, the U.S. Intellectual Property Enforcement Coordinator, says of the MOU: The Administration is committed to reducing infringement of American intellectual property as part of our ongoing commitment to support jobs, increase exports and maintain our global competitiveness.

The joining of Internet service providers and entertainment companies in a cooperative effort to combat online infringement can further this goal and we commend them for reaching this agreement. We believe it will have a significant impact on reducing online piracy.

Victoria Espinel, *Working Together to Stop Internet Piracy*, WHITE HOUSE BLOG (July 7, 2011, 12:15 PM), <http://www.whitehouse.gov/blog/2011/07/07/working-together-stop-internet-piracy>. This kind of "state-promoted private ordering," Professor Bridy notes, "represents a species of policymaking that is insulated from public scrutiny." Bridy, *supra* note 9, at 577.

<sup>13</sup> Espinel's statement includes this cautionary note on the MOU: "Our expectation is that the new organization created by it will have ongoing consultations with privacy and freedom of expression advocacy groups to assure that its practices are fully consistent with the democratic values that have helped the Internet to flourish." *Id.*

<sup>14</sup> *MOU*, *supra* note 3, at 3.

<sup>15</sup> *MOU*, *supra* note 3, at 3. The first Executive Director is Jill Lesser, a lobbyist with a background in Internet issues, who also serves on the Board of the Center for Democracy and Technology. See Greg Sandoval, *Hollywood Formally Brings ISPs into the Anti-Piracy Fight*, CNET NEWS (Apr. 2, 2012, 11:40 AM), [http://news.cnet.com/8301-31001\\_3-57408208-261/hollywood-formally-brings-isps-into-the-anti-piracy-fight](http://news.cnet.com/8301-31001_3-57408208-261/hollywood-formally-brings-isps-into-the-anti-piracy-fight); see also Jill Lesser, CENTER FOR DEMOCRACY & TECH., <https://www.cdt.org/personnel/jill-lesser> (last visited Apr. 9, 2012).

<sup>16</sup> *MOU*, *supra* note 3, at 3.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

the CCI to comply with any request for information from the Advisory Board. The Advisory Board apparently has no affirmative right to participate, or to be consulted, in the CCI's decisions, such as the selection of experts to evaluate the copyright owners' detection technologies.<sup>20</sup> The MOU does not specify the term of service for Advisory Board members, nor does it indicate the circumstances under which members may be removed, or how replacements will be selected in the event of a vacancy.

The MOU does not expressly require that the membership of the Advisory Board reflect diverse or unbiased perspectives, or possess an appropriately broad range of expertise, credentials, or experience. Whether the Board will conform to such ideals will depend largely on whether the content owner representatives and the ISPs have sufficiently adverse interests to guarantee a diversity of viewpoints.

The initial Board does seem to reflect such diversity. On April 2, 2012, the consortium released the names of its first Advisory Board.<sup>21</sup> Oddly, notwithstanding the MOU's mandate of three members, four names were announced.<sup>22</sup> These were: Jerry Berman, chairman of the Internet Education Foundation<sup>23</sup> and founder of the Center for Democracy and Technology;<sup>24</sup> Marsali Hancock, president of iKeepSafe.org;<sup>25</sup> Jules Potensky, director of the Future of Privacy Forum;<sup>26</sup> and Gigi Sohn, president and CEO of Public Knowledge,<sup>27</sup> who has stated her intent to use her position "to be an advocate for the rights of Internet users and to provide transparency."<sup>28</sup> These choices seem clearly aimed at reassuring consumers that the Copyright Alert system will be responsive to their concerns about privacy and Internet freedom in order to forestall a wave of protest comparable to the one that derailed the Stop Online Piracy Act (SOPA) and the Protect IP Act

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<sup>20</sup> See *infra* notes 35–36 and accompanying text.

<sup>21</sup> Sandoval, *supra* note 15.

<sup>22</sup> *Id.* No reason has been given for expanding the Advisory Board. Nor has the manner in which the fourth member was selected been disclosed.

<sup>23</sup> The Internet Education Foundation is a nonprofit organization dedicated to educating the public and policymakers on Internet-related issues. See INTERNET EDUC. FOUND., <http://www.neted.org> (last visited Apr. 9, 2012).

<sup>24</sup> The Center for Democracy and Technology is a nonprofit organization devoted to freedom, privacy, and security on the Internet. See CENTER FOR DEMOCRACY & TECH., <https://www.cdt.org> (last visited Apr. 9, 2012).

<sup>25</sup> iKeepSafe.org is the Internet Keep Safe Organization, a nonprofit organization devoted to Internet safety, with a focus on children. See IKEEPSAFE, <http://www.ikeepsafe.org> (last visited Apr. 9, 2012).

<sup>26</sup> The Future of Privacy Forum is an organization focused on data privacy. See FUTURE OF PRIVACY FORUM, <http://www.futureofprivacy.org> (last visited Apr. 9, 2012).

<sup>27</sup> According to its mission statement, Public Knowledge "preserves the openness of the Internet and the public's access to knowledge, promotes creativity through balanced copyright, and upholds and protects the rights of consumers to use innovative technology lawfully." PUBLIC KNOWLEDGE, <http://www.publicknowledge.org> (last visited Apr. 9, 2012).

<sup>28</sup> Sandoval, *supra* note 15.

(PIPA), and which threatens ACTA and TPP.<sup>29</sup> Their selection also seems responsive to Professor Levine's call to "bring in the nerds."<sup>30</sup>

However, because the MOU does not guarantee the Advisory Board a significant role in the consortium's major decisions, there is no assurance that their expertise or diverse perspectives will have a direct impact on the CCI's activities. While they can certainly engage in public criticism of those activities, the Advisory Board members could engage in that same public criticism even if they were not serving on the Board. Without a more well-defined role in the CCI, the Board members may not have sufficient access to "inside" information to influence the direction of the CCI. Suggestions for expanding their role are noted later in this Article.

## II. ACTIVITIES OF THE COMPACT

The lack of consumer participation in the CCI is not limited to formation and governance. It appears that most of the CCI's activities will be closed to public scrutiny. While this may already be true of the activities of individual ISPs, which are free to develop their own policies (which may include termination of service) for dealing with subscribers who engage in repeat infringements, in the absence of an industry compact an individual consumer that is dissatisfied with the manner in which his or her ISP responds to suspected infringement may (depending on the geographic market) have the opportunity to choose a different provider. Because the MOU requires five of the six major providers to conform to certain standardized responses to infringement accusations, however, relatively few consumers will have the opportunity to choose an ISP that employs a different standard.

As discussed below, transparency is lacking in both the Copyright Alert program, which identifies and sends notices to accused infringers, and the Independent Review program, which provides a very limited opportunity for subscribers to avoid service disruptions by proving that they are falsely accused.

While the CCI relies on experts and neutrals to guarantee the fairness and effectiveness of its activities, as discussed below, the system should provide stronger assurances that the advice of experts will be implemented, and that the experts and neutrals will be unbiased.

### A. Copyright Alert Program

The MOU signatories commit to implementing systems designed to detect P2P file-sharing.<sup>31</sup> Specifically, the RIAA and the MPAA will

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<sup>29</sup> Sandoval, *supra* note 15.

<sup>30</sup> Levine, *supra* note 1.

<sup>31</sup> MOU, *supra* note 3, at 4.

develop methodologies “for identifying instances of P2P online infringement that are designed to detect and provide evidence that the identified content was uploaded or downloaded or copied and offered on a P2P network to be downloaded through a bit torrent or other P2P technology.”<sup>32</sup> The ISPs agree to match the IP addresses identified by the RIAA and MPAA to the ISP’s subscriber accounts, to keep a record of alleged repeat infringers, and to apply the “mitigation measures” described in the MOU.<sup>33</sup>

The MOU does not describe how these methodologies might work, nor does it impose any constraints on the methodologies. It acknowledges that they will change over time.<sup>34</sup> Nor does the MOU require the signatories to disclose to ISP subscribers the existence or nature of the detection technologies to which their computers and networks will be exposed. Thus, consumers will be unable to assess whether, and to what extent, any of the technologies might invade the privacy of subscribers, make them vulnerable to security breaches, or otherwise impair the quality of the broadband service they receive.

Public disclosure of these methodologies, of course, would compromise their effectiveness. A suitable proxy for such public disclosures, however, would be to subject the methodologies to inspection by a neutral expert. The MOU recognizes the importance of expert advice, but provides insufficient guarantees that the expert will be competent and neutral, or that the expert’s recommendations will be effectuated.

The MOU requires disclosure of the detection technologies only to the CCI’s own “independent and impartial technical expert or experts” (the “Independent Expert”) who will review the technologies periodically.<sup>35</sup> The MOU does not give the Advisory Board any role in the selection of this expert; he or she will be selected and compensated by a simple majority of the Executive Committee with no consumer input.<sup>36</sup> Thus, based on the makeup of the Executive Committee and the majority rule, the expert could be selected by the three copyright owner representatives and only one of the three ISP representatives.

Although the Independent Expert will consult with “recognized privacy experts,” they too will be selected by a simple majority of the Executive Committee, with no requirement of consumer or Advisory Board input.<sup>37</sup> Although the expert is charged with identifying privacy issues and recommending enhancements to address those issues, signatories are expressly *not* required to adopt those

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 5.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*



recommendations.<sup>38</sup> While the expert is required to disclose the recommendations to the RIAA and MPAA, and to the specific ISP affected, the expert is prohibited from disclosing them to anyone else, including the other signatory ISPs, without the consent of the RIAA, the MPAA, and the affected ISP.<sup>39</sup> There is no provision allowing this information to be disclosed to the affected subscribers. The expert is required to maintain the confidentiality of any proprietary information supplied in the course of this review; even as between the signatories, only “general descriptions” of the detection technologies need to be exchanged, and only upon request.<sup>40</sup>

Using their detection technologies, the RIAA and MPAA will notify ISPs when they detect P2P infringement activity. The ISPs agree to send a series of escalating warning notices, known as “Copyright Alerts,” to the subscribers involved.<sup>41</sup> Each ISP agrees that, after the specified series of warnings, it will take “mitigation measures” against the subscriber, which may include reduction of transmission speeds, restriction of Internet access, or redirection to a landing page that may contain information about copyright infringement; significant discretion is vested in the ISP.<sup>42</sup> The MOU does not require termination of service, or even temporary suspension, but neither does it preclude these sanctions.<sup>43</sup> The ISPs will, on a monthly basis, send the RIAA and MPAA data about subscribers who receive these Alerts, and copyright owners can use this data as a basis for seeking disclosure of the subscribers’ identities through the judicial process.<sup>44</sup>

There is a high risk that these detection technologies will lead to false positives.<sup>45</sup> To address concerns over the accuracy of detection technologies, the RIAA and MPAA agree to send notices of alleged P2P online infringement to ISPs only if the methodology used to detect infringements has been reviewed by the Independent Expert and found not to be “fundamentally unreliable”<sup>46</sup>—a minimalist-sounding, undefined standard.<sup>47</sup> If a detection methodology is so flawed that the expert labels it fundamentally unreliable, then the expert is required to notify the signatory using that technology (the RIAA or MPAA) of this

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 6–12.

<sup>42</sup> *Id.* at 10–12.

<sup>43</sup> Executive Director Jill Lesser has stated that she does not anticipate that terminations will be among the mitigation measures. Stirland, *supra* note 2. Advisory Board member Gigi Sohn has stated that she will ask the participating ISPs to agree that mitigation measures will not include suspension of service. Sandoval, *supra* note 15.

<sup>44</sup> *MOU*, *supra* note 3, at 14–15.

<sup>45</sup> Bridy, *supra* note 4, at 126–27.

<sup>46</sup> *MOU*, *supra* note 3, at 5–6.

<sup>47</sup> *Id.* at 5.

deficiency, but only *on a confidential basis*.<sup>48</sup> Thus, no other signatory—including the ISPs who are receiving the notices—will know that the methodology is fundamentally unreliable. Nor, apparently, will this unreliability be disclosed to the Executive Committee, the Advisory Board, or the neutral arbitrator that subsequently hears the subscriber’s appeal. While the MPAA and RIAA agree not to send ISPs notices of P2P infringement based on such fundamentally unreliable detection methods, the MOU apparently relies on the honor system to enforce this agreement, since no one other than the Independent Expert and the RIAA or MPAA (as applicable) will know that the detection method is fundamentally unreliable. The MOU thus contains no enforcement mechanism for ensuring that the MPAA and RIAA will use reliable technologies.

In generating infringement notices, the RIAA and MPAA agree to “focus on” copying that involves files “consisting primarily of infringing material” or which contain “substantially complete” copies of copyrighted works, and to disregard file-sharing activities in which a de minimis amount of infringing material is included in a “file consisting primarily of non-infringing material.”<sup>49</sup> Apparently it is left to the judgment of the copyright owner representatives to determine where to draw these lines. It is entirely possible that a work qualifying as fair use, such as a parody, satire, mash-up, or commentary, would trigger a Copyright Alert, since a large portion of such a work might consist of copyrighted material.

Many of the details of the Copyright Alert program could be implemented independently by ISPs and content owners, and already have been; online infringement detection technologies are already in use, and consumers do not have access to the details of these technologies. The MOU does not require complete uniformity in approach, and individual ISPs still have some range of choice, especially with regard to mitigation measures. But the MOU does narrow their range of choice. As discussed below, consumers will feel the consequences of this narrowed range of choices when they must choose between service disruptions and a potentially biased dispute resolution process.

### B. *Independent Review*

The non-transparency and potential bias inherent in the Copyright Alert program is especially evident, and potentially of greatest concern, in the so-called Independent Review process. As discussed below, however, these flaws can be addressed by making some adjustments to

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<sup>48</sup> *Id.* at 5.

<sup>49</sup> *Id.* at 6.

the review process. If the consortium does not make these adjustments, ISPs that impose mitigation measures may be perceived as biased and unresponsive to legitimate consumer concerns.

A crucial component of the Copyright Alert program, Independent Review provides an avenue for ISP subscribers to dispute allegations of copyright infringement on an anonymous basis,<sup>50</sup> and thereby to obtain relief from mitigation measures. If a subscriber receives a Copyright Alert that threatens such measures, the subscriber can initiate an appeal for a set fee (currently \$35, but refundable if the user prevails).<sup>51</sup> This triggers a nonjudicial review to determine whether the accusation of infringement was accurate. Subject to the substantive and procedural rules outlined in the MOU, the review will be entrusted to an administering organization selected by the Executive Committee.<sup>52</sup>

The MOU purports to prohibit both the complaining copyright owner and the subscriber from introducing the outcome of the review process as evidence in a judicial proceeding.<sup>53</sup> However, since subscribers are not signatories to the MOU, they cannot be bound by this provision unless they are required to agree to it as a condition of invoking the review or in their user agreement with the ISP.<sup>54</sup> Of course, if the prohibition is buried in a click-through agreement then the subscriber will probably be completely unaware of it.

When examined through the lens of transparency and fairness, the Independent Review process comes up short in several respects: (1) limited defenses; (2) the role of experts; (3) reliance on unwritten, unpublished decisions; and (4) the potential for “captive” neutrals. Each of these concerns is discussed below.

### 1. Limited Defenses

The grounds on which a subscriber may invoke the review process are strictly limited:

- (1) The subscriber’s account was misidentified;
- (2) The subscriber’s account was used without the subscriber’s knowledge or consent by someone outside of the subscriber’s household, and the subscriber could not reasonably have prevented it;

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<sup>50</sup> Anonymity does not apply, however, to defenses that disclose the subscriber’s identity. *Id.* at 14.

<sup>51</sup> *Id.* at 14, 30.

<sup>52</sup> *Id.* at 33. The administering organization is discussed in the text accompanying notes 85–91, *infra*.

<sup>53</sup> *MOU, supra* note 3, at 14.

<sup>54</sup> While the MOU requires signatory ISPs to notify their subscribers, in their user agreements, that receipt of multiple Copyright Alerts may lead to mitigation measures, it does not obligate the ISPs to include the details of the Independent Review process in those agreements. *Id.* at 7.

- (3) The subscriber's use of the work was authorized by the copyright owner;
- (4) The subscriber's reproduction and distribution of the work over a P2P network was fair use;
- (5) The file was misidentified as consisting primarily of the copyrighted material;
- (6) The work was published before 1923 (and thus its copyright had expired).<sup>55</sup>

As a threshold matter, two of these grounds for appeal—(1) subscriber misidentification and (5) file misidentification—assume that either the subscriber or the reviewer knows whether or not the copyright owner's detection methodology is "fundamentally unreliable." The Independent Review standards provide that the detection technology "shall have a rebuttable presumption that it works in accordance with its specifications;" however, this presumption will not apply if the Independent Expert's review of that technology previously found it to be fundamentally unreliable.<sup>56</sup> Unfortunately, the MOU does not provide any mechanism for the arbitrator or the subscriber to determine whether the technology was found to be fundamentally unreliable, since the MOU requires the Independent Expert to communicate this finding only to the copyright owner, on a confidential basis.<sup>57</sup> Nor do the Independent Review procedures, as currently outlined in the MOU, require the copyright owner to disclose this information in the course of the review. The MOU contemplates that, going forward, the rules for information disclosure in the context of Independent Review will be further developed; it also gives the reviewer discretion to request supplementary information that he or she deems to be material.<sup>58</sup> Nonetheless, at this time nothing in the Independent Review process compels the copyright owner to reveal that its technology was found to be fundamentally unreliable. This significant oversight should be remedied before the Independent Review process is implemented, as it undermines the legitimacy of the entire review process.

Beyond this threshold matter, the listed grounds for review do not even come close to encompassing the range of lawful uses for P2P file-sharing, even if the field is limited to plausible lawful uses of commercially distributed sound recordings and audiovisual works. Among the notable omissions are the following:

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<sup>55</sup> MOU, *supra* note 3, at 26–28.

<sup>56</sup> *Id.* at 27–28.

<sup>57</sup> *Id.* at 5.

<sup>58</sup> *Id.* at 32.

- (1) Works that are in the public domain, although published in 1923 or later, consisting of
  - a. Non-renewed copyrights;<sup>59</sup>
  - b. Copyrights forfeited due to publication without notice;<sup>60</sup>
  - c. Works of foreign origin that are not protected by U.S. copyright law;<sup>61</sup>
  - d. Sound recordings fixed in the United States prior to February 15, 1972;<sup>62</sup>
- (2) Fair use as applied to P2P *downloads* and creation and distribution of *derivative works* (because the fair use defense listed in the MOU refers specifically to the act of “reproducing . . . and distributing” a work over a P2P network);<sup>63</sup>
- (3) Authorization by a licensee (as distinguished from a copyright “owner”);<sup>64</sup>
- (4) Oral or implied license (because the MOU requires that “authorization” be evidenced in writing or “other documented evidence”);<sup>65</sup>
- (5) Non-copyrightable subject matter;<sup>66</sup>
- (6) Defective copyright title;<sup>67</sup>

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<sup>59</sup> Until 1992, when renewal became automatic, works published before 1978 entered the public domain if not timely renewed. Copyright Amendments Act of 1992, Pub. L. No. 102–307, 106 Stat. 264 (1992) (current version at 17 U.S.C. § 304(a) (2006)). Some well-known motion pictures lost their copyrights in this way. *See, e.g., Russell v. Price*, 612 F.2d 1123, 1125 (9th Cir. 1979) (demonstrating that the copyright in the 1938 film “Pygmalion” expired in 1966 due to nonrenewal). Even if the underlying literary works are still protected by copyright, those underlying copyrights are typically not owned by the film studios, which would therefore have no standing to enforce them. *See, e.g., id.* at 1124 (noting that studio was mere licensee); *see also* 17 U.S.C. § 501(b) (2006) (only the owner of an exclusive right has standing to sue).

<sup>60</sup> Such forfeitures were possible until March 1, 1989. 17 U.S.C. § 405 (2006).

<sup>61</sup> Published works from some foreign countries are not protected by United States copyright law. 17 U.S.C. § 104 (2006). Certain other foreign works may have entered the public domain in both their countries of origin and the United States. 17 U.S.C. § 104A (2006).

<sup>62</sup> 17 U.S.C. § 301(c) (2006). Some of these recordings may be protected by state copyright laws, but these vary in scope and duration. *See, e.g., Capitol Records, Inc. v. Naxos, Inc.*, 4 N.Y.3d 540 (2005). More importantly, however, the MOU implies that the Copyright Alert program applies only to infringement of *federal* copyrights. *MOU, supra* note 3, at 1 (referring to infringement “under Title 17” in the preamble).

<sup>63</sup> *MOU, supra* note 3, at 26 (emphasis added).

<sup>64</sup> While an exclusive licensee may be considered a copyright owner for certain purposes, a nonexclusive licensee is not. *See Hyperquest, Inc. v. N’Site Solutions, Inc.*, 632 F.3d 377 (7th Cir. 2011).

<sup>65</sup> *MOU, supra* note 3, at 27–28.

<sup>66</sup> For example, a derivative work that is itself infringing may be ineligible for copyright protection. 17 U.S.C. § 103(a) (2006). Some songwriters, for example, have unconsciously copied from existing musical works. *E.g., ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983). A motion picture may infringe a screenplay, treatment, play, or other underlying source material. *See, e.g., Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940).

<sup>67</sup> Mistakes or uncertainty as to copyright title are not uncommon. *See, e.g., Stewart v. Abend*, 495 U.S. 207 (1990) (concerning dispute over ownership of renewal copyright); *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 654 F.3d 958 (9th Cir. 2011) (concerning dispute over chain of

The MOU does not explain why all of these defenses are excluded.<sup>68</sup> Some of them involve largely factual determinations, such as public domain status or defects in copyright title. These factual questions are just as amenable to resolution through nonjudicial review as the question whether a work was published before 1923.<sup>69</sup> They are also more likely to arise in the P2P context, since the CCI's copyright owners are unlikely to bring infringement complaints against subscribers who share copies of pre-1923 films such as *The Birth of a Nation* (1915) or Charlie Chaplin's *The Kid* (1921). Indeed, the defense of pre-1923 publication seems so unlikely to arise under the Copyright Alert program that its inclusion in the MOU, in light of the exclusion of the other public domain defenses, seems ludicrous. It is true that some of the other omitted defenses, such as fair use downloading, fair use distribution of derivative works, or implied license, are less objective than public domain status or defects in title, and thus arguably might be more difficult to resolve through a nonjudicial process. However, the MOU already permits consideration of fair use in "reproducing . . . and distributing" a work. If the Independent Review process is capable of assessing the nuances of a fair use defense in this context, it should be capable of assessing the other defenses that call for a similar degree of judgment.

The defense of unauthorized use of the subscriber's account is also problematic. Each subscriber is permitted to invoke this defense only once, unless he or she can demonstrate that a subsequent unauthorized use occurred "despite reasonable attempts to secure the Internet account."<sup>70</sup> Given the widely varying degrees of technological literacy among Internet users, a substantial number of ISP subscribers may lack the knowledge or skills necessary to secure their wireless routers against unauthorized users. The current version of the MOU does not indicate that signatory ISPs will provide any kind of technical assistance to subscribers who need to secure their accounts. Offering such assistance, however, would further the CCI's stated goals of educating

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title in "Betty Boop" cartoons).

<sup>68</sup> One might conceivably add copyright misuse to this list of defenses. Under this doctrine, certain kinds of anticompetitive conduct by a copyright owner can make the copyright unenforceable until the anticompetitive conduct ceases. See *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928 (9th Cir. 2010). However, there would seem to be few occasions where a legitimate defense of copyright misuse would arise in the context of P2P file sharing, and the complexity and uncertain scope of such a defense would make it difficult to resolve through arbitration.

<sup>69</sup> Even the determination of when a work is "published" can be a close question. See Robert Brauneis, *Copyright and the World's Most Popular Song*, 56 J. COPYRIGHT SOC'Y U.S.A. 335, 378 (2009) (explaining that the uncertainty over the publication date of "Happy Birthday" affects its current copyright status); *Estate of Martin Luther King, Jr. v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999) (questioning whether the "I Have a Dream" speech was publicly distributed in 1963).

<sup>70</sup> *MOU*, *supra* note 3, at 27.

consumers and reducing the incidence of unauthorized file sharing, and would avoid penalizing subscribers for a simple lack of technical expertise.

## 2. Role of Experts

Just as experts are utilized in evaluating the copyright owners' infringement detection technologies, experts also play a significant role in the Independent Review process. The MOU calls for the administering organization selected by the consortium to hire "an accepted, independent expert on copyright law" to prepare an outline of fair use principles "and any other legal principles necessary for resolution of issues within the scope of th[e] Independent Review process."<sup>71</sup> The copyright expert must be approved by the Executive Committee, although the MOU does not specify whether this approval requires a majority vote.<sup>72</sup> The expert's outline is important because it will provide the substantive rules that will govern the Independent Review.<sup>73</sup> Additional experts may be retained by the Executive Committee "[i]f additional material question[s] of law arise."<sup>74</sup> No standards are articulated for determining whether a particular individual qualifies as a copyright expert, or as an expert on any other questions of law. Nor does it appear that the Advisory Board must be consulted in the selection process. The copyright owner and ISP representatives on the Executive Committee may not have sufficiently adverse interests to guarantee an unbiased selection.

While the signatories to the MOU are invited to provide input to these experts, there is no indication that the Advisory Board, despite its consumer orientation and its relevant expertise, will be invited to participate in this process.<sup>75</sup> There is no requirement that the expert's outline of legal principles be made public, or even shared with a subscriber who invokes the review process. Nor does the MOU indicate whether the Executive Committee can reject one expert's work product and retain a different expert if they are dissatisfied. If one goal of the Copyright Alert program is consumer education, then the expert's legal perspectives should be made public. If not, subscribers will have no way to ascertain whether the expert's presentation of the law is accurate and unbiased, and whether it has been updated recently enough to reflect the latest judicial interpretations. If the legal guidance supplied to the reviewer is flawed, then even the most neutral of reviewers may render a flawed decision. Therefore, the expert's outline of legal

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<sup>71</sup> *MOU*, *supra* note 3, at 35.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 33–35.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

principles should be posted prominently on the CCI website.

### 3. Black Box Independent Reviews

While the Independent Review process raises several concerns, perhaps the most significant one is that the decisions will be unwritten, unpublished, and unaccompanied by detailed explanations. The MOU expressly states that, for the most part, “[r]eviewers *shall not* prepare written decisions in the cases they decide.”<sup>76</sup> Even for the subscriber requesting the review, the decision will communicate only the outcome and “a short description of the rationale;” the description of the rationale can be omitted entirely if the decision is favorable to the user.<sup>77</sup>

This is in sharp contrast to the default rules applied by most arbitration organizations, including the American Arbitration Association (AAA). Those rules typically require written explanations, and permit publication with the consent of both parties.<sup>78</sup>

One of the stated goals of the Copyright Alert program is consumer education.<sup>79</sup> Yet the decisions under the Independent Review process, if unpublished, will have no educational value for any member of the public other than the subscriber who sought the review. Even for that subscriber, the absence of a full written explanation undermines the educational value. Because these decisions will be hidden from view,

<sup>76</sup> *Id.* at 34 (emphasis added). Written records are permitted only “to the extent necessary to maintain records of outcomes of proceedings for purposes of operation and review of the Independent Review process.” *Id.*

<sup>77</sup> *Id.* at 33.

<sup>78</sup> See, e.g., SWISS RULES OF INT’L ARBITRATION, § IV, art. 32(2)–(3) (requiring written explanations), § VI, art. 43(3) (allowing publication after identifying material removed, unless a party objects) (2004), available at [https://www.swissarbitration.org/sa/download/SRIA\\_english.pdf](https://www.swissarbitration.org/sa/download/SRIA_english.pdf); AM. ARBITRATION ASS’N, NON-BINDING ARBITRATION RULES § 31 (2009), available at [http://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/mdaw/mda1/~edisp/adrstg\\_010623.pdf](http://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/mdaw/mda1/~edisp/adrstg_010623.pdf) (requiring a writing “with very brief reasons” unless the parties agree otherwise, but not addressing publication); AM. ARBITRATION ASS’N, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES art. 27, §§ 1–2 (requiring written explanation), 4 (allowing publication with parties’ consent) (2009), available at [http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_002037](http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_002037) (last visited Apr. 18, 2012); AM. ARBITRATION ASS’N, AAA EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES art. 39(b)–(c) (2009), available at [http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004362](http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362) (last visited Apr. 18, 2012) [hereinafter AAA Employment Arbitration Rules] (requiring written explanation and publication with names removed); LONDON CT. OF INT’L ARBITRATION, LCIA ARBITRATION RULES art. 30 (requiring written explanation, and awards confidential unless parties consent to publication) (1998), available at [http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Arbitration\\_Rules.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx); UNCITRAL Arbitration Rules art. 34(2)–(5) (Dec. 6, 2010), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>.

<sup>79</sup> MOU, *supra* note 3, at 1–2. The educational purpose is publicly highlighted at the CCI website, which describes the Copyright Alert system as “a progressive system aimed at educating Internet subscribers about digital copyright and the potential consequences of inadvertent or purposeful copyright violations through peer-to-peer networks.” CENTER FOR COPYRIGHT INFORMATION, <http://www.copyrightinformation.org/faq> (last visited Apr. 9, 2012).



the public will also have no opportunity to scrutinize them for possible bias or flawed legal analysis, or to discover whether any copyright owner has engaged in a pattern of abuse by making multiple unfounded assertions of infringement.

To provide education and fair warning both to the subscriber who initiated the review and to the public in general, each review should produce a detailed written explanation, which should be published after removing the subscriber's identifying information.<sup>80</sup> This is consistent with the practice in Uniform Domain Name Dispute Resolution Policy (UDRP) proceedings,<sup>81</sup> which provide nonjudicial resolution of cybersquatting disputes under the terms of a private contract (the domain registration agreement) between ICANN-accredited domain name registrars and domain name registrants.<sup>82</sup> UDRP provides an especially useful analogy, because while the UDRP process arises under a private contract like the MOU, publishing the outcome of UDRP proceedings serves the important purpose of educating the public on the scope of permissible use of trademarks in domain names that are subject to ICANN regulation. It also allows for public evaluation and criticism of the UDRP process.<sup>83</sup> Since the Independent Review process turns on the CCI's interpretations of federal law, publishing the decisions emanating from the reviews would serve similar public purposes.<sup>84</sup>

This aspect of the MOU's transparency problem is easy to remedy. The MOU can be modified to require written explanations, and publication of those explanations once personal identifying information is removed. The MOU can require the signatories to consent to these terms as a condition of their compact, and the consent of subscribers can be obtained at the time they initiate the Independent Review process. This should not add significantly to the cost of conducting the reviews, or introduce undue delays. Failure to take this simple step, however, may undermine consumer perceptions of the legitimacy of the

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<sup>80</sup> The feasibility of removing a user's identifying information prior to publication is illustrated by the Private Letter Ruling practice utilized by the Internal Revenue Service, which balances the goal of public disclosure against the privacy rights of the taxpayer. See also AAA Employment Arbitration Rules, *supra* note 78, art. 39(c) (requiring publication with names removed).

<sup>81</sup> *Uniform Domain Name Dispute Resolution Policy*, INTERNET CORP. FOR ASSIGNED NAMES & NOS. (ICANN) § 4(j) (1999), <http://www.icann.org/dndr/udrp/policy.htm> [hereinafter ICANN UDRP Policy]; *Rules for Uniform Domain Name Dispute Resolution Policy*, ICANN § 15(d) (2009), <http://www.icann.org/dndr/udrp/uniform-rules.htm>.

<sup>82</sup> ICANN UDRP Policy, *supra* note 81 (see Notes 2–3).

<sup>83</sup> See Michael Geist, *Fair.com? An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP*, available at <http://aix1.uottawa.ca/~geist/geistudrp.pdf> (hereinafter Geist, *Fair.com?*); Michael Geist, *Fundamentally Fair.com? An Update on Bias Allegations and the ICANN UDRP*, available at <http://aix1.uottawa.ca/~geist/fairupdate.pdf> (hereinafter Geist, *Fundamentally Fair.com?*).

<sup>84</sup> See Llewellyn Joseph Gibbons, *Private Law, Public "Justice": Another Look at Privacy, Arbitration, and Global E-Commerce*, 15 OHIO ST. J. ON DISP. RESOL. 769, 772–73, 785–89 (2000) (urging publication of online arbitration awards that define public rights; also noting that publication "is a check on arbitral abuse," promotes the appearance of fairness, and helps to level the playing field for inexperienced disputants).

Independent Review process.

#### 4. The Potential for Biased Neutrals

Just how independent is the Independent Review process itself? Under the MOU, the selection of neutrals is entrusted to an “administering organization” designated by the Executive Committee.<sup>85</sup> The MOU provides no guidance as to how the administering organization should be selected, whether it should meet some objective criteria such as accreditation, affiliation, or track record, how its performance will be evaluated, or the circumstances under which its services will be continued or terminated. Thus, on its face, the MOU provides no assurance that this organization will be competent or unbiased in conducting reviews. However, in April 2012, the CCI announced that it had selected the AAA,<sup>86</sup> an established and reputable dispute resolution organization.<sup>87</sup> The selection of the AAA will contribute to the perception of the Independent Review process as fair, even if, as discussed below, it cannot guarantee actual fairness in practice. Of course, the consortium is free to select a different administering organization in the future, and there is no guarantee that its future selections will inspire equal confidence.

According to the MOU, each Independent Review will be conducted by a single reviewer selected by the administering organization from its panel of neutrals.<sup>88</sup> The MOU does not prescribe a process for selecting the panels or the individual reviewers, does not define neutrality, does not indicate how neutrality will be ensured, and provides no standard for evaluating the performance of reviewers; it leaves these matters entirely up to the administering organization.<sup>89</sup> While the reviewers must be lawyers, they need not be copyright experts, and they may even be staff employees of the administering organization. The latter is instructed to “train[]” them in the rules of copyright law *as interpreted by the Executive Committee’s own copyright expert*.<sup>90</sup> If the copyright guidance provided to the reviewers is inaccurate, their decisions are likely to be flawed. The fact that each review is conducted by a single reviewer instead of a three-person

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<sup>85</sup> MOU, *supra* note 3, at 33. The MOU does not specify whether this requires a majority vote.

<sup>86</sup> Sandoval, *supra* note 15.

<sup>87</sup> Neutrals provided by the American Arbitration Association (AAA) have arbitrated disputes involving a wide array of legal issues; AAA neutrals served on Copyright Arbitration Royalty Panels until those panels were superseded by statute in 2004. *See The American Arbitration Association: A Long History of Working with Government*, AM. ARB. ASS’N, (Sept. 8, 2011), available at [http://www.adr.org/aaa/ShowPDF?jsessionid=kbxxPbvFTQmmP8cycYdvILjfxmgYV4dLDBNsfjx1gH347bx1GqLL!-1786312740?doc=ADRSTG\\_004329](http://www.adr.org/aaa/ShowPDF?jsessionid=kbxxPbvFTQmmP8cycYdvILjfxmgYV4dLDBNsfjx1gH347bx1GqLL!-1786312740?doc=ADRSTG_004329); 17 U.S.C. § 802(b) (repealed 2004); 37 C.F.R. § 251 (repealed 2004).

<sup>88</sup> MOU, *supra* note 3, at 31.

<sup>89</sup> *Id.* at 33.

<sup>90</sup> *Id.* at 34.

panel, although cost-effective and not unprecedented, increases the opportunity for a biased or misinformed decision.<sup>91</sup>

The reviewer will also have access to information about any previous reviews that involved the same subscriber, not only to determine whether the subscriber has previously invoked the “unauthorized use” defense, but also for determining general credibility.<sup>92</sup> There is no requirement, however, that the reviewer be informed of any prior false accusations made by the relevant copyright owner. Thus, the reviewer will not know if the copyright owner has engaged in a pattern of unfounded accusations—even though this might indicate that the copyright owner’s detection technology is unreliable, or that it has strayed from the MOU’s invocation to focus on infringements of entire works.

Dispute resolution experts such as Nancy Welsh have called attention to the problem of “embedded neutrals”—neutrals who are associated in some way with one or more of the parties involved in a dispute.<sup>93</sup> While such neutrals are not necessarily problematic in disputes between sophisticated parties or parties with shared norms,<sup>94</sup> they can be problematic in other situations. Welsh might as well be describing the Copyright Alert program when she writes:

[T]he use of embedded neutrals becomes worrisome when the neutrals’ role is due to their special relationship with just one of the parties, usually the more powerful repeat player, in uneven contests between that repeat player and a one-time player. This concern is especially strong when the one-time player is not as sophisticated as the repeat player, has not voluntarily or knowingly chosen the dispute resolution forum that will be used to resolve her dispute, and is either unaware of the special relationship between the neutral and the repeat player or aware of the relationship but effectively unable to challenge it.<sup>95</sup>

Thus, the problem is not limited to situations where the neutral has a formal relationship with one of the parties. It applies any time one party is a repeat player, and the other party is a one-time player, because the repeat player is in a position to give future business to the neutral.<sup>96</sup> For example, in Alexander Colvin’s study of employer-employee

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<sup>91</sup> See Geist, *Fair.com?*, *supra* note 83, at 18–26; Geist, *Fundamentally Fair.com?*, *supra* note 83, at 6, 8.

<sup>92</sup> *MOU*, *supra* note 4, at 34.

<sup>93</sup> Nancy Welsh, *What is “(Im)Partial Enough” in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395 (2010).

<sup>94</sup> *Id.* at 398.

<sup>95</sup> *Id.* at 399.

<sup>96</sup> See Stephen J. Ware, *Domain-Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in, the UDRP*, 6 J. SMALL & EMERGING BUS. L. 129 (2002).

arbitrations, repeat players (the employers) had an advantage in arbitrations against one-time players (the employees), and the advantage increased when the repeat player had used the same arbitrator in the past.<sup>97</sup> Since the RIAA and MPAA will be repeat players under the CCI's Independent Review process, and the consumer will typically be a one-time player, this advantage will go against the consumer.

Professor Welsh identifies four process characteristics that "reliably predict perceptions of fairness" in the arbitration context: "(1) the opportunity for people to tell their stories ('voice'); (2) demonstrated consideration of these stories by the decisionmaker ('being heard'); (3) the involvement of a decisionmaker who is trying to be open-minded and fair; and (4) dignified, respectful treatment."<sup>98</sup> With embedded neutrals, non-repeat players are likely to have "doubts regarding the likelihood of real consideration from arbitrators who are open-minded and fair."<sup>99</sup> These doubts may be well founded in some cases; Professor Welsh recounts the story of Elizabeth Bartholet, whose services as an arbitrator for consumer credit disputes were no longer requested by the National Arbitration Forum (an ostensibly neutral dispute resolution provider) after she ordered a significant award in favor of a consumer.<sup>100</sup> In the UDRP context, Michael Geist found that the dispute resolution providers that produced the most favorable outcomes for complainants received the most repeat business.<sup>101</sup> In addition, the providers assigned more cases to individual reviewers whose track records favored complainants.<sup>102</sup>

Are the interests of copyright owners and ISPs sufficiently adverse to assure the neutrality of the Independent Review process? On its face, the Copyright Alert program is not in the best interests of the ISPs, because it will assist copyright owners in obtaining the information they need to hold ISPs secondarily liable for copyright infringement by their subscribers.<sup>103</sup> This raises the question of why ISPs agreed to the MOU in the first place. There is speculation that ISPs are motivated by their desire to play a greater role in the lawful delivery of motion pictures, television, and sound recordings, and that they accommodated copyright

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<sup>97</sup> Welsh, *supra* note 93, at 421 (citing Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405 (2007)).

<sup>98</sup> Welsh, *supra* note 93, at 424.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 437–41.

<sup>101</sup> Geist, *Fair.com?*, *supra* note 83, at 3, 6; Geist, *Fundamentally Fair.com?*, *supra* note 83, at 5.

<sup>102</sup> Geist, *Fair.com?*, *supra* note 83, at 22–26; Geist, *Fundamentally Fair.com?*, *supra* note 83, at 6–7.

<sup>103</sup> An ISP whose subscribers engage in infringing file-sharing is not eligible for safe harbor protection under the Digital Millennium Copyright Act (DMCA), 17 U.S.C.A. § 512(a) (West 2010), unless it has "reasonably implemented" a policy of terminating "repeat infringers." *Id.* § 512(i)(1)(A). The monthly reporting requirement imposed by the MOU requires ISPs to report the number of Copyright Alerts which each of its subscribers has received, thus building a record of repeat infringers. *MOU*, *supra* note 3, at 14–15.

owners in order to secure favorable licensing deals in the future.<sup>104</sup> ISPs may also fear that their statutory safe harbor protections under the Digital Millennium Copyright Act (DMCA) may be eroded by lobbying pressure from the copyright industries; they may hope that their cooperation in the Copyright Alert program will stave off such pressures. In addition, ISPs may legitimately share the copyright owners' goal of discouraging P2P file-sharing, because of its high bandwidth consumption.<sup>105</sup> Thus, while in some respects the interests of copyright owners and ISPs are adverse, in others they are aligned. Accordingly, the relationship does not seem sufficiently adversarial to assure the neutrality of the review process.

Several of the flaws in the Independent Review process—limited defenses, unwritten and unpublished opinions, inadequate protection against reviewer bias—may reflect, in large part, the desire of the consortium members to minimize cost and maximize efficiency, and the fear that introducing more procedural protections would interfere with these goals. Similar concerns seemingly doomed the European Union's 2011 "Stakeholders' Dialogue on Illegal Up and Downloading."<sup>106</sup> Unlike that attempted agreement, the MOU does not make ISPs directly responsible for hearing customers' appeals. Nonetheless, the MOU makes the ISPs responsible for sending Copyright Alerts, implementing mitigation measures, and providing monthly reports to the copyright owners (and semi-annual reports to the CCI on a "reasonable efforts" basis). The ISPs will also bear the brunt of consumer complaints if these measures involve service disruptions, especially if subscribers believe they have been falsely accused or received unfair treatment in the Independent Review. If the recent experience of British ISPs is any indication, there is likely to be a high incidence of false reporting; when the British Phonographic Industry (BPI) accused British Telecom (BT) of ignoring 100,000 cases of illegal P2P file-sharing, BT found that less than two-thirds of a sample of 21,000 cases were properly matched to BT customers.<sup>107</sup>

As this Article goes to press, the CCI website contains only a truncated description of the Independent Review process. For example,

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<sup>104</sup> See Bridy, *supra* note 9, at 571–72; Richard Koman, *RIAA/ISP deal on filesharing suggests content deals in the offing*, ZDNET (Dec. 22, 2008 1:22 PM), <http://www.zdnet.com/blog/government/riaaisp-deal-on-filesharing-suggests-content-deals-in-the-offing/4234>; Nate Anderson, *RIAA graduated response plan: Q&A with Cary Sherman*, ARS TECHNICA, <http://arstechnica.com/old/content/2008/12/riaa-graduated-response-plan-qa-with-cary-sherman.ars>.

<sup>105</sup> Bridy, *supra* note 9, at 572.

<sup>106</sup> Mueller et al., *supra* note 8, at 11–13 (reporting ISPs' concerns over increased paperwork, appeals, and customer excuses, and the fear that they would be involved in "thousands of procedures per day").

<sup>107</sup> Statement by BT Spokesman to ISPreview (Sept. 28, 2009), <http://www.ispreview.co.uk/story/2009/09/28/bpi-claims-uk-isp-bt-failed-to-tackle-100000-illegal-broadband-downloaders.html>.

it does not list the defenses that are available, nor does it reveal that there will be no written decisions. There is no reason to withhold this information from the general public. Before the Copyright Alert system is implemented, the CCI website should be updated to ensure that consumers are fully aware of what to expect from the review process.

#### CONCLUSION

The activities of the CCI consortium have already attracted considerable public attention. That scrutiny will only intensify once the Copyright Alert program is implemented. Unfortunately, the approach to detection, enforcement, and dispute resolution outlined in the current MOU takes shortcuts that undermine the legitimacy and the educational value of the program. Whether these shortcuts are mere oversights, or attempts to limit costs, the CCI should revisit them before any implementation begins.

At a minimum, the public should be given access to the specific copyright interpretations adopted by the CCI; copyright owners should not be permitted to generate infringement notices based on detection technology found to be fundamentally unreliable; the grounds for subscriber appeals from mitigation measures should be expanded to encompass more categories of lawful activity; neutrals conducting Independent Reviews should be informed whether the copyright owner in question has a pattern of false accusations; decisions resulting from Independent Reviews should include written explanations; and those decisions should be published.

At a more systemic level, the Advisory Board should be given a more active role in CCI governance and in the selection of expert consultants. Because the signatory copyright owners and ISPs are not sufficiently adversarial to guarantee protection of consumer interests, the expertise and diverse perspectives of the Advisory Board are sorely needed.

What a single ISP might undertake on its own becomes a greater concern when undertaken collusively. By acting collectively, and thereby limiting consumer choice, the CCI members take on a greater responsibility to acknowledge the legitimate concerns of their customers. Whatever educational value might be inherent in the Copyright Alert program will be lost so long as it remains hidden inside the black box.