

Online Piracy Legislation: Is the Cure Worse than the Disease?

At this point, even the most unplugged among us are tuned in to the controversy surrounding Congress' latest attempts to protect intellectual property on the Internet. The Stop Online Piracy Act (SOPA) in the House of Representatives and the Protect Intellectual Property Act (PIPA), its somewhat lower-profile sister legislation in the Senate, have generated a flood of media coverage and protest actions.

Though many recognize that online piracy of intellectual property is a festering problem, SOPA's opponents have painted the proposed legislation as a treatment that risks killing the patient. So fierce is the opposition that on Jan. 18–19, Wikipedia—a pillar of the World Wide Web—made a marked departure from its policy of positional neutrality and instituted a 24-hour blackout in protest. Other powerful SOPA opponents—Google, Microsoft, Yahoo, Twitter, and Facebook—joined in an open letter to Congress protesting the pending legislation.¹



The protests against SOPA and PIPA were remarkably effective. Despite the array of interests backing the legislation, both bills were put on ice. On Jan. 16, responding to a petition against SOPA, the White House issued an official statement opposing SOPA in its current form.² Days later, both the House and Senate announced that they would postpone consideration of SOPA and PIPA indefinitely until there is wider agreement on an acceptable approach.

So what was it about SOPA that riled its opponents so much? This month's column will take a look at the most recent version of the proposed legislation and highlight some of the details that made it a lightning rod for criticism.

What Is SOPA?

Rep. Lamar Smith (R-Texas) introduced SOPA in the House as H.R. 3261 on Oct. 26, 2011. Following blistering criticism of the bill as originally drafted, Rep. Smith soon offered an amendment that replaced the text of the original bill.³

According to its introductory statement, the objective of SOPA is “to promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property.” Of course, an existing law—namely, the 1998 Digital Millennium Copyright Act—provides for the protection of intellectual property from online piracy⁴ but does little to protect rights holders from infringement by foreign-owned and foreign-operated websites.

SOPA and PIPA were introduced to fill that gap. While the 70-plus pages of SOPA contain other important provisions, the heart of the bill—and the controversy—lies in Sections 102 and 103. Under Section 102, the attorney general is authorized to bring an action against a “foreign infringing site,” defined as a foreign website “directed” toward users in the U.S. and operated in a manner that would subject it to prosecution for copyright infringement if it were a domestic company. The attorney general can seek a court order requiring

- Internet service providers (ISPs) to prevent their subscribers from accessing “foreign infringing sites,”
- search engines to stop providing the domain name of the “foreign infringing site” in response to a query,
- “payment network providers” (PayPal, for example) to stop completing payment transactions related to the “foreign infringing site,” and
- “Internet advertising services” to stop providing ads for “foreign infringing sites” and to stop providing or receiving any compensation to or from those sites.

Section 103 of SOPA is similar to § 102, except that § 103 authorizes private rights of action for any plaintiff with standing to bring a civil action against an “Internet site dedicated to theft of U.S. property,” and the relief it authorizes is limited to the relief provided in §102 regarding “payment network providers” and “Internet advertising services.”

What's the Problem?

The December amendment to SOPA did little to quell the criticism. The attacks came in three basic flavors: philosophical, technical, and procedural.

On a philosophical level, many see SOPA and similar proposed legislation as a grievous breach of long-standing U.S. support for a free and open Internet. One of the enduring critiques is that the legislation would result in “blacklist” orders, which would lead to a balkanized Internet. According to critics like the Electronic Frontier Foundation, under §§ 102 and 103, the government and rights holders would create blacklists of foreign websites.⁵ Once placed on the blacklist, content that allegedly infringes a copyright—and

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perhaps entire websites—would essentially be placed off-limits to U.S. residents.

Moreover, because the legislation offers broad immunity (as provided for in § 105 of SOPA) for “good faith” actions taken in furtherance of the purposes of the legislation, critics argue that SOPA will create an overwhelming incentive for ISPs, search engines, payment network providers, and Internet advertising services to engage in active self-censorship. A fear of overreaching and censorship under SOPA is exacerbated by what critics see as its vague and ambiguous definitions of key terms, such as what it means for a website to be “dedicated” to infringement.

Technical concerns have also animated the protesters. Although the amended SOPA permits ISPs latitude in finding the “least burdensome, technically feasible, and reasonable means” to prevent their subscribers from accessing foreign infringing sites, SOPA offers a “safe harbor” for ISPs that implement domain name system (DNS)-blocking schemes designed to prevent the domain name of a foreign infringing site from resolving to its proper IP address (the long string of numbers found behind the domain name).

DNS-blocking could seriously degrade Internet service. It would certainly cause delay because each time a user tries to access a website, a DNS-blocking system would require determining whether the user was located in the United States and, if so, whether the requested website was on the list of prohibited addresses. Worse than delay, from a security perspective, the creation of a DNS-blocking scheme would create myriad new possibilities for attacking online assets through unauthorized access and tampering with this newly created blacklist.

SOPA came under fire for procedural reasons as well. It was criticized as being the handiwork of Congress members that was sorely lacking input from Internet companies and technical experts. For example, none of the six witnesses invited to an important hearing before the House Judiciary Committee in November possessed technical expertise in Internet architecture and cyber-security. Overall, critics have railed against what they see as a legislative process stacked in favor of SOPA in no small part as a result of the significant lobbying money from the cable, movie, and music industries as well as from manufacturers who rely heavily on their trademarks.

Current Status

No one should think that the fight over anti-piracy legislation is finished or that much time will pass before SOPA and PIPA re-emerge in a new guise. At the same time, interest is beginning to focus on multinational treaties, including the Anti-Counterfeiting Trade Agreement, which address many of the issues at play in the battle over SOPA and PIPA and, according to critics, are even more deeply flawed.⁶

We’ll continue to track these developments and provide future updates in this column as the situation progresses. **TFL**

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Endnotes

¹Open Letter to Hon. Pat Leahy, Hon. Chuck Grassley, Hon. Lamar Smith, and Hon. John Conyers, Jr., signed by AOL Inc., eBay Inc., Facebook Inc., Google Inc., LinkedIn Corp., Mozilla Corp., Twitter Inc., Yahoo! Inc., and Zynga Game Network (Nov. 15, 2011), available at www.protectinnovation.com/downloads/letter.pdf (last visited Jan. 31, 2012).

²See Espinel, Chopra, and Schmidt, “Combating Online Piracy while Protecting an Open and Innovative Internet” (Jan. 14, 2012), available at www.whitehouse.gov/petition-tool/response/combating-online-piracy-while-protecting-open-and-innovative-internet (last visited Jan. 31, 2012).

³Rep. Lamar Smith, Amendment in the Nature of a Substitute to H.R. 3261.

⁴See 17 U.S.C. § 512 et seq.

⁵See McSherry SOPA Manager’s Amendment: It’s Still a Blacklist and It’s Still a Disaster (Dec. 13, 2011), available at www.eff.org/deeplinks/2011/12/sopa-managers-amendment-sorry-folks-its-still-blacklist-and-still-disaster (last visited Jan. 31, 2012).

⁶See *Legally Verified Text of the ACTA* (April 15, 2011), available at www.international.gc.ca/trade-agreements-accords-commerciaux/fo/acta-acrc.aspx?lang=eng&view=d (last visited Jan. 31, 2012).