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COMMENT

ARGH, MATEY! THE FAUX-PAS OF THE SOPA (STOP ONLINE PIRACY ACT)

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Earlier, I posted about a network neutrality case, *Verizon v. FCC*,¹ which could have far-reaching consequences for the Internet industry. Another concerted attempt to regulate the Internet, disguised in the form of a piracy protection bill, recently came before the House Judiciary Committee and garnered widespread disapproval. Representative Lamar Smith (R-TX) and a bipartisan group of twelve co-sponsors introduced the “Stop Online Piracy Act” (“SOPA”) on October 26, 2011, which punishes websites that are accused of facilitating copyright infringement. Although touted by its supporters as a weapon against foreign sites that steal and sell American inventions, SOPA is problematic because it also affects U.S. sites that either engage in infringement or have taken “deliberate actions to avoid confirming a high probability” of such infringement.² Because the bill’s lack of procedural safeguards could have deep-seated ramifications that cripple the Internet industry, it should not be reconsidered for passage.

SOPA builds on an earlier Senate bill, the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (“PROTECT IP Act”)—which also purported to fight online piracy—by authorizing the Department of Justice to seek a court order to shut down these “rogue websites.”³ SOPA, however, contains more binding restrictions than the PROTECT IP Act (which, by the way, the Senate Judiciary Committee passed

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1. See *Verizon Commc’n Inc. v. Federal Commc’n Comm’n*, 535 U.S. 467 (2002).

2. See Stop Online Piracy Act, H.R. 3261, 112th Cong. §103 (2011), available at <http://thomas.loc.gov>.

3. Declan McCullagh, *Senate bill amounts to death penalty for Web sites*, CNET NEWS (May 12, 2011, 3:12 PM), http://news.cnet.com/8301-31921_3-20062398-281.html.

but Senator Ron Wyden (D-OR) stopped with a hold).⁴ Under SOPA, a network provider can be ordered to prevent access to its subscribers located within the United States—effectively enacting IP blocking and deep packet inspection. In other words, SOPA could be used to require broadband companies like AT&T, Verizon, Comcast, etc. to block customers from visiting “rogue websites” that distribute copyrighted material or refer to sites that do so.

While SOPA is premised on the admirable goal of protecting copyright holders against pirated content, several concerns regarding Sections 102 and 103 should be addressed if the bill is reconsidered for passage. For example, Section 102 would allow the Attorney General to seek orders barring search engines from linking to the infringing websites, and for domain name registrars to take them down. This provision not only has the potential of imposing significant costs on web companies, but also veers dangerously close to violating individuals’ privacy rights by requiring Internet service providers (ISPs) to inspect all of their users’ Internet traffic. In effect, SOPA would create “a tremendous amount of liability for ISPs ... to become the censorship arm of the Department of Justice, which is not a position [ISPs] want to be in.”⁵ In addition, SOPA would be relatively easy to circumvent. If the regulations become too onerous, it has been suggested that Americans could simply switch to offshore Domain Name System (DNS) providers that offer encrypted links as well as the same reliable service as American DNS providers.⁶

Section 103 presents another, perhaps more controversial, problem.⁷ The provision sets up a “market-based system” that

4. *See Wyden Places Hold on Protect IP Act*, U.S. SENATOR RON WYDEN (May 26, 2011), <http://wyden.senate.gov/newsroom/press/release/?id=33a39533-1b25-437b-ad1d-9039b44cde92>.

5. *See* Declan McCullagh, *OpenDNS: SOPA will be ‘extremely disruptive’ to the Internet*, CNET NEWS (Nov. 17, 2011, 11:51 PM) (quoting Mr. David Ulevitch), http://news.cnet.com/8301-31921_3-57327341-281/opendns-sopa-will-be-extremely-disruptive-to-the-internet/.

6. *See id.*

7. A revised version of the bill, considered in December, 2011, would make the point of this paragraph moot. However, because different versions may still be considered in the future, the problems Section 103 presents are still relevant for discussion. *See* Corynne McSherry, *SOPA Manager’s Amendment: It’s Still a Blacklist and It’s Still a Disaster*, ELECTRONIC FRONTIER FOUNDATION (Dec. 13, 2011), <https://www.eff.org/deeplinks/2011/12/sopa-managers-amendment-sorry-folks-its-still-blacklist-and-still-disaster>.

allows for copyright holders to request payment processors and online advertising networks to cease business relations with any website that “engages in, enables, or facilitates” copyright infringement.⁸ For example, if a small business owner runs a website that uses PayPal to process payments, and any individual believes the website contains copyrighted material, that individual could contact PayPal to cut off its services to the business. Section 103 gives payment processors only five days to comply with the complaint. It is possible to file a counterclaim to the initial complaint. However, the small business owner only has five days to do so, and it is unlikely that he or she will have enough time to procure good legal advice on the matter. Furthermore, Section 104 would protect PayPal from liability even if it does not serve a notice onto the targeted websites, as long as PayPal has a “reasonable belief” that the website has infringed. This poses dangers, as individuals could harass websites by filing fraudulent notices under the semblance of protecting their copyright. In addition, the media could post lists of allegedly infringing sites to put pressure on payment processors to sever ties.⁹

Proponents of SOPA, including the Motion Picture Association of America (MPAA) and Recording Industry Association of America (RIAA), contend that SOPA acts to “spread the message in the digital community and in the entertainment community that [infringing websites] hurt working Americans...”¹⁰ They also claim the legislation is the “first step towards a brighter day when these rogue offshore websites can no longer duck accountability under U.S. laws, all the while providing a critical boost to the marketplace for legal digital music services.”¹¹ Not only do supporters of SOPA conveniently gloss over the fact that it also targets businesses located in the United States, they also fail to address the issue that the bill employs overly broad language that

8. See Stop Online Piracy Act, H.R. 3261, 112th Cong. §103 (2011), available at <http://thomas.loc.gov>.

9. See Trevor Timm, *The Stop Online Piracy Act: A Blacklist by Any Other Name is Still a Blacklist*, ELECTRONIC FRONTIER FOUNDATION (Nov. 7, 2011), <https://www EFF.org/deep links/2011/11/stop-online-piracy-act-blacklist-any-other-name-still-blacklist>.

10. See Chloe Albanesius, *Will Online Piracy Bill Combat 'Rogue' Web Sites or Cripple the Internet?*, PCMAG.COM (Nov. 1, 2011, 11:06 AM), <http://www.pcmag.com/article/2/0,2817,2395653,00.asp#fbid=6r9KNM2HX7x>.

11. See *House Introduces Bipartisan Legislation to Protect American IP Jobs*, RECORDING INDUSTRY ASS'N OF AMERICA (Oct. 26, 2011) (quoting Ms. Cary Sherman), http://www.riaa.com/newsitem.php?content_selector=newsandviews&news_month_filter=10&news_year_filter=2011&id=768C92A5-5B7C-3368-8D5E-92471258F19B.

would, for example, criminalize a YouTube video of a child singing a popular song. Given the lack of protection for targeted websites, SOPA is a dangerous tool that would upset the balance struck by existing digital copyright law, and chill the growth of social media sites that foster free expression.¹² Specifically, SOPA poses a huge threat to websites like YouTube whose business model is based on user-generated content. It would require these sites to actively monitor and filter infringing content—a huge administrative and economic burden.

There are better ways of regulating the internet, and while SOPA is a brave attempt at wrangling with this issue, its sweepingly broad language goes too far and could set a dangerous precedent that forces online communications platforms to control and block content. In contrast, the Digital Millennium Copyright Act (DMCA), under which user-generated sites have thrived, has already furnished clear legal guidelines and safe harbors to protect sites from liability as long as they comply with the DMCA's notice-and-takedown procedures. Unlike SOPA which would hold content-hosting sites accountable for the infringements of others, the DMCA provides safe harbors for these sites as long as three provisions are followed: 1) the content host does not have "actual knowledge" of infringement; 2) the content host does not benefit financially from access to the infringing material; and 3) the host promptly disables access to the material once the copyright owner provides notice of infringement.¹³

The DMCA is the correct framework to which Internet copyright regulation should adhere. If Congress adopts SOPA, it would undermine DMCA principles by forcing content providers to police their users and decide which activities are illegitimate. As indicated in the industry letter sent by a united front of tech companies including Google, eBay, and Facebook, if passed as is, SOPA would rupture the "foundational structure that has...provide[d] certainty to innovators with new ideas for how people create, find, discuss, and share information lawfully

12. See David Sohn & Andrew McDiarmid, *Dangerous Bill Would Threaten Legitimate Websites*, THE ATLANTIC (Nov. 17, 2011, 12:17 PM), <http://www.theatlantic.com/technology/archive/2011/11/dangerous-bill-would-threaten-legitimate-websites/248619/>.

13. See Digital Millennium Copyright Act, H.R. 2281, 105th Cong. §512(c)-(d) (1998).

online.”¹⁴ Because Congress should not meddle with the status quo without the appropriate safe harbors, the SOPA bill should be killed.

14. See Letter from AOL, eBay, Facebook, Google et al. to Pat Leahy & Chuck Grassley, S. Comm. on the Judiciary, Lamar Smith & John Conyers, H.R. Comm. on the Judiciary (Nov. 15, 2011), *available at* <http://www.protectinnovation.com/downloads/letter.pdf>.