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Future of the Internet at Stake

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Future of the Internet at Stake

Passage of SOPA, the controversial anti-piracy bill, could result in dire consequences for the tech industry, explains Marc H. Greenberg of Golden Gate University School of Law.

Marc H. Greenberg

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The Stop Online Piracy Act, H.R. 3261, introduced Oct. 26, has generated a firestorm of controversy, with critics assailing it for its chilling effect on the web and the Internet. After deciding to investigate this bill, I waded through piles of critiques, both pro and con. The bill itself, written in 78 mind-numbing pages of dense legislatese, on an initial read-through doesn't contain any "gotcha" terms that immediately support the conclusion of legislative overreach. The ostensible purpose of the bill is to combat the activities of alleged "rogue websites" based outside the U.S., which are engaged in widespread copyright infringement of entertainment content and the sale of counterfeit goods like prescription drugs.

Like many bills the language of the proposed law itself may seem relatively innocuous and reasonable, but the powers it grants to enforcement agencies and the concern that those agencies will abuse those powers fuel most of the criticism.

A companion bill, the "Preventing Real Online Threats of Economic Creativity and Theft of Intellectual Property Act of 2011" Senate Bill 968, which was introduced earlier this year, generated a similar level of concern and criticism. Among other critics of the PROTECT act were more than 100 law professors nationwide, who sent a letter to the Senate objecting to the overbreadth and constitutional issues the bill presents. In the spirit of full disclosure, I was one of the signatories to that letter.

So what's all the fuss about? SOPA, which is sponsored by Reps. Lamar Smith, R-Texas, John Conyers, D-Mich., Bob Goodlatte, R-Va., Howard Berman, D-Van Nuys, and others, contains four key provisions which are generating the most concern.

1. Overbreadth: SOPA allows penalties to be imposed against websites that have any infringing content, regardless of its source (i.e., posted by a third party, such as an item on eBay), forcing the takedown of such a site. Unlike the immunity offered to Internet Service Providers under the current law — the Digital Millennium Copyright Act — ISPs who host sites where third parties post infringing content will also be held liable — a major departure from prior practice, and which, if enforced vigorously, might pose a threat to the operation of these ISPs, which are a key component of the Internet.

A further overbreadth concern is that a claim that a site contains any infringing content (regardless of its amount relative to the rest of the site) can trigger severe and highly expensive penalties, and forms the basis of a right to obtain a court order blocking access to the entire site. Coupled with the use of the vague term "facilitates," as discussed in item three below, there appears to be a valid concern that this broad scope of liability will severely chill online activity at a time when this industry is one of the few bright spots in an otherwise dismal and limited economic recovery.

2. Due process concerns: SOPA's service of process procedure only requires the government to notify a party that content must be removed from the Internet by sending the notice to the domain name's registrant, or the owner or operator of the site, and even then, only if the email and post address are available. Because Federal Rules of Civil Procedure and most, if not all, state procedure rules require personal service of claims, and only allow less direct means of service upon a showing that personal service is not possible, it would seem that SOPA's sponsors should be required to explain why the safeguards inherent in personal service

should not also be required for this law.

3. **Vagueness:** The trigger for any claims under SOPA is that a given site either contains infringing material, or that it "facilitates" such infringement. Missing from the statute is any definition of what is meant by "facilitates." Critics fear that because of this ambiguity, claims could be asserted by law enforcement agencies or by private parties that SOPA has been violated by a site owner who, unintentionally, provides a link to another site in which infringing material may be found, even if it is only one page of an otherwise lawful site. Given the harsh, multimillion-dollar penalties found in SOPA, this ambiguity in definition would appear to support a claim of impermissible vagueness.

4. **Creating more bureaucracy:** Section 205 of SOPA requires an array of agencies in the federal executive branch to begin coordination of efforts with companion agencies in foreign governments to strengthen IP enforcement. Critics of this section argue that it would create a new and unnecessary level of bureaucracy. In a post on [Techdirt](#), Mike Mesnick calls §205 "the creation of the entertainment industry's own copyright police force within the diplomatic core."

In a Nov. 15 statement, Michael Petricone, senior vice president, government and regulatory affairs, of the Consumer Electronic Association, which represents 2,000 of the nation's leading technology companies, offered a cogent critique of the legislation:

"Our message today is simple: Don't kill the Internet with SOPA. We strongly oppose counterfeiting and piracy. But the solution must be smart and targeted to get the bad guys without ensnaring legitimate innovators.

"As drafted, SOPA goes too far — it would promote lawsuits against legitimate companies, discourage innovation and cost jobs. That is why it is opposed by tea partiers, independent musicians, progressives, law professors ... and world-leading American companies like Google, eBay, Yahoo, Amazon, Facebook and Twitter. The innovation industry is creating jobs and driving the American economy. SOPA rewrites the rules of the Internet and gives a small group of litigious copyright owners — Hollywood, record labels and others — the power to put legitimate companies out of business."

What is perhaps one of the most regrettable aspects of this dispute is that it once again pits the creative community, demonized as the big Hollywood conglomerates, against the online distribution community. If ever two adversaries were actually parties whose individual existence may depend on their mutual continued survival, it is these two communities. Pushing through poorly drafted, sledgehammer style legislation is not a solution to the difficult, but not impossible to solve, problem of rogue international websites. In an open letter to Congress dated Nov. 8, Rep. Zoe Lofgren, D-San Jose, and Rep. Darrell Issa, R-Vista, urged Congress to reject SOPA, asserting, "We also believe that a consensus on the issue between the content and technology industries is achievable. ... HR 3261 unfortunately does not follow a consensus-based approach."

I hope these congressional leaders are right — the problems of international piracy and copyright infringement have increased during this digital age. However, the effective solutions will come from the voices of moderation, working to create consensus-focused solutions which will capture the hearts and minds of both the creators' community and the online/distribution community. Stay tuned on these issues — the debates over the next few months will be critical to the future of the Internet.

Marc H. Greenberg is professor of law, founding director and currently co-director of the intellectual property law center and program at Golden Gate University School of Law. A member of the faculty since 2000, he teaches intellectual property survey, Internet and software law, intellectual property and new technology, and entertainment law in the IP curriculum.

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