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## An Analysis of the Stop Online Piracy Act

Pratyusha Challa  
December 10, 2012

### I. INTRODUCTION

In this new era of the digital age, the Internet is slowly becoming less and less an image of the Wild West that it once was and is gradually succumbing to governing laws and regulations.<sup>1</sup> Nonetheless, both technologically-savvy and inexpert Internet users will admit that chief among the biggest issues that still plague the World Wide Web are the application and enforcement of intellectual property rights. A significant number of U.S. adults, whether they have personally made use of one or not, have at least heard of a website where they can stream free television shows or download movies without paying for the content or even copy entire albums without recourse.<sup>2</sup> Though these activities are blatant violations of copyright law, such actions go largely unchecked due to their sheer volume, the imperfect methods of deterrence, or simply because the websites that facilitate such activities lie outside the jurisdictional reach of any American law.<sup>3</sup> As one recent article put it, at every turn, “technology has outpaced the law.”<sup>4</sup>

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<sup>1</sup> Ryan Kapsar, *The Internet Is Not The Wild West*, URBANTIMES (Feb. 24, 2012), <http://urbantimes.co/2012/02/the-internet-is-not-wild-west/>.

<sup>2</sup> Amy Schatz, *What Is SOPA Anyway? A Guide to Understanding the Online Piracy Bill*, WALL ST. J., Jan. 18, 2012, <http://online.wsj.com/article/SB10001424052970203735304577167261853938938.html> (“The Motion Picture Association of America, the legislation's main backer, estimates 13% of American adults have watched illegal copies of movies or TV shows online.”); Letter from Business & Trade Associations to Members of Congress (Sept. 22, 2011) (available at <http://www.theglobalipcenter.com/sites/default/files/pressreleases/letter-359.pdf>) [hereinafter Letter from Business & Trade Associations] (“A study examined approximately 100 rogue sites and found that these sites attracted more than 53 billion visits per year, which average out to approximately nine visits for every man, woman, and child on Earth.”).

<sup>3</sup> Among other reasons – not the least of which is that people still believe engaging in those activities on the Internet is somehow not illegal. See generally Annemarie Bridy, *Why Pirates*

One proposed solution, the Stop Online Piracy Act (“SOPA” or the “Bill”), was introduced to address the onslaught of copyright infringement plaguing American intellectual property rights holders.<sup>5</sup> The Bill aims to curtail intellectual property theft through a variety of methods targeting specifically foreign “rouge” websites.<sup>6</sup> Though lawmakers undoubtedly acted with good intentions in proposing the Bill, the unintended consequences of SOPA may in fact be more far-reaching and detrimental than first imagined. When the delicate balance between the artists’ rights and public’s access is tilted heavily in the favor of one or the other, the system designed to protect intellectual property will unravel in a way that provides no benefit to either side: creators will be sitting on meaningless or economically unviable rights, while the majority of Internet users will be effectively barred from content while others devise ways to access protected material by engaging in a tremendous amount of circumvention.<sup>7</sup> Therefore, effective legislation that is aimed at putting a significant dent in piracy and copyright infringement needs

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*(Still) Won't Behave: Regulating P2P in the Decade After Napster*, 40 RUTGERS L.J. 565, 565-84 (2009) [hereinafter Birdy, *Why Pirates (Still) Won't Behave*] (discussing the birth and legal demise of Napster); Nancy McKenna, *SOPA—Not Another Instance of Government Regulation of Business*, 8 No. 2 Quinlan, COMPUTER CRIME AND TECHNOLOGY IN LAW ENFORCEMENT art. 5 (Feb. 2012) [hereinafter McKenna, *SOPA—Not Another Government Regulation*] (“[T]heft of American intellectual property costs the U.S. economy an estimated \$1 billion a year plus the consequent loss of jobs.”); *See also* Brennon Slattery, *RIAA Stops Suing Individuals: Are We Home Free?*, PCWORLD (Dec. 19, 2008, 7:41 am) (“[T]he RIAA has put its hands up in surrender and backed away from [prosecuting individuals.]”); Sarah McBride and Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. (Dec. 19, 2008) <http://online.wsj.com/article/SB122966038836021137.html>.

<sup>4</sup> Brandi M. Bennett, Esq., *SOPA Reveals Ideological Divide*, IGDA PERSPECTIVES NEWSLETTER March 28, 2012) <http://www.igda.org/newsletter/2012/03/28/sopa-reveals-ideological-divide/>.

<sup>5</sup> The Stop Online Piracy Act, H.R. 3261, 112<sup>th</sup> Cong. (2011); *see also Bill Summary and Status*, THE LIBRARY OF CONGRESS (last visited Dec. 8, 2012), <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR03261:@@@D&summ2=m&>.

<sup>6</sup> Though it is primarily associated with preventing copyright infringement and piracy on the Internet, the Bill also aims to prevent foreign websites from selling counterfeit pharmaceutical and beauty products. H.R. 3261, 112<sup>th</sup> Cong. (2011).

<sup>7</sup> Nick Bilton, *Internet Pirates Will Always Win*, NY TIMES (Aug. 4, 2012), available at [http://www.nytimes.com/2012/08/05/sunday-review/internet-pirates-will-always-win.html?\\_r=0](http://www.nytimes.com/2012/08/05/sunday-review/internet-pirates-will-always-win.html?_r=0) [hereinafter Bilton, *Internet Pirates Will Always Win*].

to provide writers, artists, filmmakers and other creators the necessary infrastructure and ownership rights to produce works of art, but must balance the public's right to access that work on the Internet.

This paper addresses the efficacy of SOPA's impact on copyright infringement and its unintended effect on Internet users' right to access websites and engage in free speech. Part II of this paper provides the background for this analysis by briefly exploring the origins of intellectual property protection on the Internet starting with the Digital Millennium Copyright Act. The section describes various provisions of digital intellectual property protection currently in effect and also considers the missing elements in the law. Part III begins by discussing how the proposed SOPA bill was aimed at filling in the gaps in current Internet intellectual property protection and provides the legislative history as well as specific elements of the most controversial language. Part IV dissects the impact of the proposed legislation, both positive and negative, and considers the potential impact of the bill on three popular sites. In addition, the section provides a discussion about the bill's impact on free speech on the Internet. Part V discusses one proposed alternative to SOPA with a brief discussion about the alternate bill's positive and negative provisions.

It is clear that legislation protecting artists' rights should evolve in light of evolving technology that serves to facilitate copyright infringement, but such legislation should not result in draconian measures that violate other rights all Internet users share. The balance between artists' rights and public access must be maintained to achieve an arena where creativity is rewarded but public rights are also protected.

## II. CURRENT INTERNET COPYRIGHT PROTECTION

Piracy and copyright infringement in digital media have existed since the proliferation of digital files themselves.<sup>8</sup> In the early days of digital storage, many people (perhaps unwittingly) engaged in piracy by borrowing a friend's CD and copying the contents to their personal computer or by sharing the files through the Internet. Today, the analogous act is mirrored by hundreds of users downloading entire albums from a torrent site to their individual file storage devices.<sup>9</sup> The act of sharing digital media has not changed much, but the means of doing so have changed dramatically.<sup>10</sup> To address copyright infringement in digital media, and specifically on the Internet, congress enacted the Digital Millennium Copyright Act ("DMCA" or the "Act").<sup>11</sup>

First introduced in July 1997, the DMCA was passed in the House in August 1998, in the Senate by unanimous consent in September 1998, and was signed into law by President Bill Clinton on October 28, 1998.<sup>12</sup> Through its five overarching titles, including the Online Copyright Infringement Liability Limitation Act ("OCILLA") and two treaties of the World Intellectual Property Organization, the DMCA aims to prevent and criminalize the illegal spread of copyrighted material in digital format.<sup>13</sup> Specifically, the Act targets both activities that

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<sup>8</sup> See Birdy, *Why Pirates (Still) Won't Behave*, *supra*, note 3.

<sup>9</sup> See generally Paul McGinness, *How to Save the Music Business*, ROLLING STONE, Sept. 30, 2010, at 43. (Discussing music piracy through torrent sites generally.)

<sup>10</sup> See *A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1011 (9th Cir. 2001).

<sup>11</sup> PUB. L. NO. 105-304, 112 Stat. 2860 (Oct. 28, 1998); United States Digital Millennium Copyright Act, 17 U.S.C. § 512 (1998).

<sup>12</sup> PUB. L. NO. 05-304 (1998); Randy Alfred, *Oct. 28, 1998: President Signs a New Law*, WIRED.COM (Oct. 28, 2008), [http://www.wired.com/science/discoveries/news/2008/10/dayintech\\_1028](http://www.wired.com/science/discoveries/news/2008/10/dayintech_1028).

<sup>13</sup> *Digital Millennium Copyright Act, Guidelines for Students, Staff and Faculty*, UC RIVERSIDE (last visited Dec. 1, 2012), <http://dmca.ucr.edu/background.html>.

directly infringe on copyrights and activities that circumvent measures aimed at preventing copyright infringement, even if no actual copyright infringement occurs.<sup>14</sup>

In enacting the DMCA, the legislature worked to strike a balance between public access and artists' rights in a number of ways including, for example, by providing exceptions to otherwise valid violations such as circumvention of copyright protection for libraries and educational institutions.<sup>15</sup> The Act provides that these exceptions are to be reviewed and supplanted on an ongoing basis.<sup>16</sup> In a similar vein, the DMCA encourages compliance while balancing rights by providing safe harbor measures to website operators and Internet service providers (ISPs) who remove infringing content as it is flagged on the Internet.<sup>17</sup> These "notice and takedown" provisions, codified in Section 512 of OCILLA, provide guidelines for Internet users uploading content, ISPs or websites that host content, and copyright owners.<sup>18</sup> For instance, if a copyright owner believes that content hosted by a website infringes on her rights, she can file a complaint with website or ISP pursuant to the requirements in the Act.<sup>19</sup> Once the website receives the valid complaint, the infringing content must either be quickly removed, or access to the content must be disabled.<sup>20</sup> After the removal occurs, the Act requires the website to send the user who uploaded the content a notice about the takedown.<sup>21</sup>

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<sup>14</sup> 17 U.S.C. § 1201 (2010).

<sup>15</sup> *DMCA Exceptions*, UW COPYRIGHT CONNECTION (last visited Dec. 9, 2012), available at [http://depts.washington.edu/uwcopy/Copyright\\_Law/DMCA/Exceptions.php](http://depts.washington.edu/uwcopy/Copyright_Law/DMCA/Exceptions.php).

<sup>16</sup> 17 U.S.C. § 1201 (2010).

<sup>17</sup> 17 U.S.C. § 512 (2010); see generally Craig W. Walker, *Application of the DMCA Safe Harbor Provisions to Search Engines*, 9 VA. J.L. & TECH. 2 (2004).

<sup>18</sup> 17 U.S.C. § 512 (2010); *The Digital Millennium Copyright Act of 1998*, U.S. COPYRIGHT OFFICE SUMMARY (last visited Dec. 1998), <http://www.copyright.gov/legislation/dmca.pdf>.

<sup>19</sup> 17 U.S.C. § 512 (c)(3).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

In order to ensure that legitimate content is not erroneously removed, the Act provides the user who uploaded the material an opportunity to send a written counter-notice to the website stating that the material has been wrongly removed.<sup>22</sup> The website must then promptly notify the alleged copyright owner of the user's objection.<sup>23</sup> If the copyright owner does not bring a lawsuit within 14 days, the website can then restore the content it had taken down to its original location.<sup>24</sup> Provided that the complaint and the content in question were handled in accordance with Section 512, the ISP or website is protected from liability and cannot be sued for money damages.<sup>25</sup>

This safe harbor provision ensures websites' compliance with the provisions of the DMCA. Indeed every major website has now implemented a DMCA policy in their terms of service.<sup>26</sup> Some websites even offer sample templates to aid smaller original content creators operating without the support of a full legal staff to submit valid complaints.<sup>27</sup> Nowhere is this better illustrated than YouTube, where due to the nature of the content the website hosts and the number of users it reaches, the threat of copyright infringement has a high probability and

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<sup>22</sup> 17 U.S.C. § 512(g) (2010); *See also* NEW MEDIA RIGHTS, [http://www.newmediarights.org/guide/legal/copyright/dmca/What\\_to\\_do\\_when\\_youve\\_received\\_a\\_DMCA\\_section\\_512\\_takedown\\_notice\\_from\\_your\\_ISP\\_webhost\\_or\\_a\\_website](http://www.newmediarights.org/guide/legal/copyright/dmca/What_to_do_when_youve_received_a_DMCA_section_512_takedown_notice_from_your_ISP_webhost_or_a_website) (last visited Nov. 26, 2012).

<sup>23</sup> 17 U.S.C. § 512(g)(2) (2010).

<sup>24</sup> 17 U.S.C. § 512(g)(2)(C) (2010).

<sup>25</sup> Specifically, the ISPs or web hosts should not have received any "direct financial benefit" from the infringing content and they should not have had any "knowledge of the infringement." 17 U.S.C. § 512(c)(1) (2010).

<sup>26</sup> *See generally* *Copyright Infringement Notification*, YOUTUBE (last visited Nov. 25, 2012), [http://www.youtube.com/t/dmca\\_policy](http://www.youtube.com/t/dmca_policy); *Removing Content from Google*, GOOGLE (last visited Nov. 25, 2012), <http://support.google.com/bin/static.py?hl=en&ts=1114905&page=ts.cs>; *Facebook Community Standards*, FACEBOOK (last visited Nov. 25, 2012), <http://www.facebook.com/communitystandards>; *DMCA Notice & Takedown Procedure*, CREATIVE COMMONS (last visited Nov. 25, 2012), <http://creativecommons.org/dmca>; *Copyright & Trademark*, PINTREST (last visited Nov. 25, 2012), <http://pinterest.com/about/copyright/>.

<sup>27</sup> *DMCA Notice of Copyright Infringement – Sample Template*, DIGITAL INSPIRATION, Sept. 12, 2007, <http://labnol.blogspot.com/2007/09/dmca-notice-of-copyright-infringement.html>.

impact. Thus, as any regular user of the site can confirm, YouTube handles copyright infringement claims very seriously and removes the infringing content with an accompanying notice (“This video is no longer available due to a copyright claim...”) very shortly after it gets flagged by the original creator.<sup>28</sup> Needless to say, not all consequences of the streamlined notice and take down provisions are positive. In 2009, Google provided that DMCA takedown notices are so easy to administer and are so prevalent that “more than half (57%) of the takedown notices it ha[d] received under the US Digital Millennium Copyright Act 1998, were sent by business targeting competitors and over one third (37%) of notices were not valid copyright claims.”<sup>29</sup>

Nonetheless, the DMCA offers comprehensive protection to copyright holders by way of essential safeguards against infringement and other violations. It also provides ISPs and web hosts the clear guidelines they need to avoid liability for their users’ infringing actions but remain vigilant about actions that fall under their responsibility. And finally, it provides Internet users with unambiguous statutory language to encourage the free use of the Internet while avoiding inadvertently infringing on copyright. The Act even provides for the processing of erroneous takedown notices and, in the case of those users purposely engaged in piracy or infringement, the Act operates to discourage such behavior with criminal and civil penalties.

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<sup>28</sup> See *Copyright Infringement Notification*, YOUTUBE, *supra* note 26; WHAT IS COPYRIGHT INFRINGEMENT, YOUTUBE (last visited Nov. 25, 2012), [http://www.youtube.com/t/copyright\\_what\\_is](http://www.youtube.com/t/copyright_what_is).

<sup>29</sup> Ted Gibbons, *Google Submission Hammers Section 92A*, PCWORLD (New Zealand) (March 16, 2009), <http://pcworld.co.nz/pcworld/pcw.nsf/feature/93FEDCEF6636CF90CC25757A0072B4B7>.



Despite its far-reaching scope, the Digital Millennium Copyright Act's one main gap is its jurisdictional inability to reach foreign companies or foreign websites.<sup>30</sup>

Hence SOPA was introduced to fill that gap.

### **III. THE STOP ONLINE PIRACY ACT**

#### **A. Legislative History**

The Stop Online Piracy Act is a sweeping piece of legislation with over seventy pages of provisions targeting various issues that affect unauthorized use of copyright material.<sup>31</sup> Per its introduction, SOPA's objective is: "to promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property."<sup>32</sup> U.S. Representative Lamar Smith, backed by thirty-one cosponsors, introduced the Bill in the House of Representatives on October 26, 2011.<sup>33</sup> Immediately, the Bill came under substantial attack for being too expansive, so Representative Smith drafted a "manager's amendment" to replace the original text of the bill.<sup>34</sup> The House Judiciary Committee held hearings about the proposed Bill on November 16, 2011 and December 15, 2011 and planned to continue its review and take a vote in January 2012.<sup>35</sup>

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<sup>30</sup> Jared Newman, *SOPA and PIPA: Just the Facts*, PCWORLD (Jan. 17, 2012, 6:00 PM), [http://www.pcworld.com/article/248298/sopa\\_and\\_pipa\\_just\\_the\\_facts.html](http://www.pcworld.com/article/248298/sopa_and_pipa_just_the_facts.html) [hereinafter Newman, *SOPA and PIPA: Just the Facts*].

<sup>31</sup> H.R. 3261, 112<sup>th</sup> Cong. (2011).

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

<sup>33</sup> Jack C. Schecter, *Online Piracy Legislation: Is the Cure Worse Than the Disease?*, 59 FED. LAW. 20 (Apr. 2012) [hereinafter Schecter, *Online Piracy Legislation*].

<sup>34</sup> 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> [hereinafter McSherry, *SOPA Manager's Amendment*].

<sup>35</sup> Newman, *SOPA and PIPA: Just the Facts*, *supra* note 30.

The main impetus behind SOPA's proposal was the need to reach "rogue" foreign websites.<sup>36</sup> As previously mentioned, though media companies have attempted to curb piracy by suing individuals or by targeting domestic sites through the DMCA, their efforts have no impact on those websites located outside the United States.<sup>37</sup> Proponents of SOPA argue that the Bill will provide domestic copyright holders with valuable protections if passed.<sup>38</sup> In fact, as a result of criminalizing piracy on the Internet in this way, the Bill is seen as protecting all American financial incentives by ensuring that profits generated by domestic innovators are retained by the same innovators and not lost to overseas pirates.<sup>39</sup> Support for the Bill comes from some obvious sources including the Motion Picture Association of American and the Recording Industry Association of America, but also from the U.S. Chamber of Commerce.<sup>40</sup> It is further backed by major Hollywood unions and guilds "that represent more than 400,000 craftspeople, actors technicians, directors, musicians, recording artists... whose creativity is at the heat of the American entertainment industry."<sup>41</sup> As such, SOPA's goals were highlighted and lauded in a letter to Congress from over 350 signatories from small and large businesses that wrote:

IP-intensive industries are a cornerstone of the U.S. economy, employing more than 19 million people and accounting for 60 percent of exports. Rampant online counterfeiting and piracy presents a clear and present threat to American jobs and innovation... Global sales of counterfeit goods via the Internet from illegitimate retailers reached \$135 billion in 2010. The theft of American IP is the theft of American jobs.<sup>42</sup>

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<sup>36</sup> Newman, *SOPA and PIPA: Just the Facts*, *supra* note 30.

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

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

<sup>39</sup> McKenna, *SOPA—Not Another Government Regulation*, *supra* note 3.

<sup>40</sup> Declan McCullagh, *SOPA's most aggressive defender: U.S. Chamber of Commerce*, CNET.COM (Nov. 30, 2011 11:57pm), [http://news.cnet.com/8301-31921\\_3-57334409-281/sopas-most-aggressive-defender-u.s-chamber-of-commerce/](http://news.cnet.com/8301-31921_3-57334409-281/sopas-most-aggressive-defender-u.s-chamber-of-commerce/).

<sup>41</sup> Joint Statement from SAG, AFM, AFTRA, DGA, IATSE and IBT Regarding Stop Online Piracy Act (HR 3261) (Oct. 26, 2011) (available at <http://www.sagaftra.org/joint-statement-sag-afm-aftra-dga-iatse-and-ibt-regarding-stop-online-piracy-act-hr-3261>).

<sup>42</sup> Letter from Business & Trade Associations, *supra* note 2.

On the other side of the divide, one of the early negative responses to the proposed legislation came from nine of the biggest names on the Internet who joined together to write a letter in opposition to the bill.<sup>43</sup> AOL, eBay, Facebook and Google, among others, laid out the reasons why they did not support the passing of SOPA, citing as one of the main reasons the proposed Bill's erosion of the DMCA's safe harbor provisions:

We are concerned that these measures pose a serious risk to our industry's continued track record of innovation and job-creation, as well as to our Nation's cybersecurity... One issue merits special attention. We are very concerned that [SOPA] as written would seriously undermine the effective mechanism Congress enacted in the [DMCA] to provide a safe harbor for Internet companies that act in good faith to remove infringing content from their sites.<sup>44</sup>

By January 2012, an overwhelming number of websites joined together to protest the bill; many instituted a blackout of their websites for a 24-hour period to illustrate the potential negative effects of the bill in protest.<sup>45</sup> Even one of the most neutral websites, Wikipedia, took a stance against the bill and joined the blackout on January 18-19, stating that the passing of the bill "would be devastating to the free and open web."<sup>46</sup>

Though the House had originally planned to convene in early 2012 to discuss and take a final vote on the Bill, due to the vehement opposition, the Bill's passage has been postponed, but has not been entirely eliminated.<sup>47</sup> Even as recently as September 2012, with the return of

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Rob Waugh, *U.S Senators Withdraw Support for Anti-Piracy Bills as 4.5 Million People Sign Google's Anti-Censorship Petition*, MAIL ONLINE (Jan. 20, 2012 10:49am), <http://www.dailymail.co.uk/sciencetech/article-2088860/SOPA-protest-4-5m-people-sign-Google's-anti-censorship-petition.html> (stating that by some estimates, up to 7,000 websites elected to black-out in protest of the bill).

<sup>46</sup> *English Wikipedia Anti-SOPA Blackout*, WIKIMEDIA FOUNDATION, [http://wikimediafoundation.org/wiki/English\\_Wikipedia\\_anti-SOPA\\_blackout](http://wikimediafoundation.org/wiki/English_Wikipedia_anti-SOPA_blackout) (last visited on Nov. 12, 2012).

<sup>47</sup> Jasmin Melvin, *Congress Withdraws SOPA, PIPA Anti-Piracy Measures*, MSNBC, (Jan 20, 2012, 2:37 PM), [http://www.msnbc.msn.com/id/46072484/ns/technology\\_and\\_science-](http://www.msnbc.msn.com/id/46072484/ns/technology_and_science-)

Congress following the summer recess, there have been renewed discussions by SOPA supporters urging the passing of certain portions of the Bill.<sup>48</sup>

## **B. Relevant Portions of the Bill**

SOPA's goals are ostensibly important and its main targets have no supporters in any legitimate online community or business, but the debate surrounding the Bill's passage has been nonetheless ferocious. In order to give context to the firestorm, it is important to read some of its key provisions; specifically these four sections provide the most ambiguous language and create the most controversy.<sup>49</sup> Sections 102, 103, 104 and 105 of the Bill touch upon the powers conferred upon the Attorney General, rights of private copyright holder, and the effect of the Bill's safe harbor provisions.<sup>50</sup>

Under Section 102, the Attorney General is authorized to bring an action against any website that is (or a portion of which is) "U.S.-directed," which is defined by the Bill as "used by [Internet] users in the United States."<sup>51</sup> And the site must be "committing or facilitating the commission of criminal violations" in contravention of U.S. copyright law.<sup>52</sup> This means that every foreign site that is accessible by U.S. Internet users will fall under SOPA's purview if they

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security/#.TxnDUBxQl8k; *see also* James G. Sammataro, *Copyright and Digital Distribution, FILM AND MULTIMEDIA AND THE LAW* § 3:10 ("Expect to see renewed attempts to accomplish what [SOPA] could not: restricting access to foreign piracy sites by precluding American search engines like Google and Yahoo from directing users to these sites or PayPal from consummating infringing transactions.").

<sup>48</sup> Ed Black, *Another Fall, Another Push by SOPA Supporters As Congress Returns*, FORBES (Sept. 11, 2012 10:16am), <http://blogs.forbes.com/edblack/page/2/>.

<sup>49</sup> *See generally* Julianne Pepitone, *SOPA Explained: What It Is and Why It Matters*, CNN MONEY (Jan. 20, 2012, 12:44 PM), [http://money.cnn.com/2012/01/17/technology/sopa\\_explained/index.htm](http://money.cnn.com/2012/01/17/technology/sopa_explained/index.htm) [hereinafter Pepitone, *SOPA Explained*] (providing context to the debate surrounding the Stop Online Piracy Act).

<sup>50</sup> McSherry, *SOPA Manager's Amendment*, *supra* note 34.

<sup>51</sup> H.R. 3261, 112<sup>th</sup> Cong. § 102 (2011).

<sup>52</sup> *Id.*

are seen as “facilitating” infringement – a vague and undefined concept. Furthermore, the bill goes on state:

If through due diligence the Attorney General is unable to find a person described... or no such person found has an address within a judicial district of the United States, the Attorney General may commence an *in rem* action against a foreign infringing site or the foreign domain name used by such site.<sup>53</sup>

In more concise terms this means the Attorney General can bring an action against the site – not the owner or operator – and deem the infringing website itself to be in violation of the law *with no advocacy from the other side*.<sup>54</sup> This is because the Bill provides that such hearings can be conducted *ex parte*.<sup>55</sup> Similarly, Section 103 provides for private rights of action with standing to bring a civil action against an “Internet site dedicated to theft of U.S. property,” again a very broad grant of power.<sup>56</sup>

In addition, the Attorney General can require ISPs prevent their subscribers from accessing foreign infringing sites; he can also prevent search engines from showing the domain name (or web address) of the foreign infringing site in response to a web search.<sup>57</sup> Furthermore, the Attorney General can require payment providers to stop completing payment transactions for or on behalf of the infringing site, and can even require Internet advertising services to stop providing ads for the sites and stop providing or receiving any compensation to or from those sites.<sup>58</sup>

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<sup>53</sup> H.R. 3261, 112<sup>th</sup> Cong. § 102(b)(2) (2011).

<sup>54</sup> *Id.*

<sup>55</sup> H.R. 3261, 112<sup>th</sup> Cong. § 102(b)(5) (2011) (“[T]he court may issue a temporary restraining order, a preliminary injunction, or an injunction, in accordance with rule 65 of the Federal Rules of Civil Procedure.”).

<sup>56</sup> H.R. 3261, 112<sup>th</sup> Cong. § 103 (2011).

<sup>57</sup> H.R. 3261, 112<sup>th</sup> Cong. § 102(c)(2)(A), (B) (2011).

<sup>58</sup> H.R. 3261, 112<sup>th</sup> Cong. § 102(c)(2)(C), (D) (2011); *see also* Schecter, *Online Piracy Legislation*, *supra* note 33 (internal citations omitted).

Finally, under Sections 104 and 105, the legislation also offers immunity for “good faith” actions on the part of private corporations or individuals “for taking voluntary action against sites dedicated to the theft of U.S. property” and those “that endanger public health,” otherwise referred to as the SOPA vigilante provision.<sup>59</sup> These provisions encourage the takedown of entire sites – not just individual content – and unlike the DMCA’s Section 512, there are no counter-notice provision or any method of recourse for flagged websites.<sup>60</sup> In essence, SOPA bestows an enormous amount of power to the Attorney General and intellectual property rights holders, but does not counter that grant by balancing the rights of users who upload content or the public who want to access those sites.

#### **IV. IMPACTS OF THE PROPOSED LEGISLATION**

##### **A. Protecting Artists’ Rights**

SOPA has been heralded as “innovation designed to protect the American intellectual property industries.”<sup>61</sup> As Representative Smith himself posited, “[b]ecause the U.S. produces the most intellectual property, our nation has the most to lose if we fail to address the problem of rogue sites.”<sup>62</sup> The Bill was written to help domestic intellectual property rights holders retain their due earnings.<sup>63</sup> In addition, the Bill is supposed to protect against “rouge” foreign websites that aim to undermine U.S. cyber security by installing viruses on visitors’ computers.<sup>64</sup>

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<sup>59</sup> H.R. 3261, 112<sup>th</sup> Cong. §§ 104, 105 (2011); *see also* Schecter, *Online Piracy Legislation*, *supra* note 33.

<sup>60</sup> *Id.*

<sup>61</sup> McKenna, *SOPA—Not Another Government Regulation*, *supra* note 3.

<sup>62</sup> Lamar Smith, *Law Needed to Control Cyber Piracy*, STATESMAN.COM (Nov. 28, 2011, 11:54am), <http://www.statesman.com/news/news/opinion/smith-law-needed-to-control-cyber-piracy/nRhYk/>.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

In order to assuage those who are worried about the over-reaching scope of SOPA, the legislators who support the Bill state that legitimate websites that operate within the confines of the law do not need to worry about the negative effects of the Bill.<sup>65</sup> They suggest that even foreign websites will not come under attack without rhyme or reason: the Attorney General needs to present his case in front of a judge in order to be able to shut down a website – it cannot happen overnight.<sup>66</sup> SOPA supporters further argue that “prophecies of a broken Internet are overblown” because “SOPA clearly defines infringing sites based on Supreme Court holdings and the [DMCA]... [f]alse claims... can result in damages, including costs and attorneys' fees.”<sup>67</sup> In fact, these doomsday visions were brought up in previous iterations of Internet copyright law – and yet the Internet is not broken, rather, technology has since flourished.<sup>68</sup>

SOPA’s goals are very simple: since the law is currently unable to force overseas sites to take down copyrighted work, this Bill would at least stop U.S. companies from providing their services to those sites and makes it harder for U.S. Internet users to find and access the sites.<sup>69</sup> The Bill’s supporters also dismiss the idea that SOPA is censorship, instead, they concentrate on the fact that it is necessary to “revamp a broken system that doesn’t adequately prevent criminal behavior.”<sup>70</sup>

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<sup>65</sup> Richard Bennett, Op. Ed., *Protecting Americans from Web scams*, NEW YORK POST (Dec. 29, 2011 3:58am), [http://www.nypost.com/p/news/opinion/opedcolumnists/protecting\\_americans\\_from\\_%20web\\_scams\\_1vOOEKJEzpjGIAW43mIXP](http://www.nypost.com/p/news/opinion/opedcolumnists/protecting_americans_from_%20web_scams_1vOOEKJEzpjGIAW43mIXP).

<sup>66</sup> *Id.*

<sup>67</sup> Newman, *SOPA and PIPA: Just the Facts*, *supra* note 30.

<sup>68</sup> *Id.*

<sup>69</sup> Julianne Pepitone, *SOPA Explained: What it is and Why it Matters*, CNN MONEY (Jan. 20, 2012 12:44pm), [http://money.cnn.com/2012/01/17/technology/sopa\\_explained/index.htm](http://money.cnn.com/2012/01/17/technology/sopa_explained/index.htm).

<sup>70</sup> *Id.*

## B. Curtailing Public Access

Though the bill was well-intentioned, it is clear to see that SOPA is like a sledgehammer. If whole websites are at risk of being shut down based on the finding of one minor infringing content, then “the users who want to reach [those sites]...may... gravitate towards alternative, unregulated domain name addressing systems, making it even harder for governments to exercise their legitimate regulatory role in Internet activities.”<sup>71</sup> In addition to completely subverting the government’s goal of regulating and filtering domain names, this serves to destroy the individual’s first amendment free speech rights – one infringing video, quote or picture on a website could shut the whole site, including all the other non-infringing content, down.<sup>72</sup>

Similarly, the call to action foisted upon Internet service providers, credit card companies and other online money transfer agents to “prevent, prohibit or suspend” anyone in violation of SOPA encourages action over reasoned consideration.<sup>73</sup> An IP rights holder need only notify a payment provider of the facts supporting its “good faith belief” that a website is “primarily designed or operated for the purpose of” infringement in accordance with the Bill.<sup>74</sup> The payment provider will then have five days to stop doing business with that site by taking “technically feasible and reasonable” steps to prevent it “from completing payment transactions” with customers.<sup>75</sup> But unlike what the proponents of SOPA claim, all of this can actually occur

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<sup>71</sup> Mark Lemley, David S. Levine & David G. Post, *Don't Break the Internet*, 64 STAN. L. REV. ONLINE 34 (2011), available at <http://www.stanfordlawreview.org/online/dont-break-Internet> (last visited Nov. 15, 2012) [hereinafter Lemley, *Don't Break the Internet*].

<sup>72</sup> Steve Crocker et al., *Security and Other Technical Concerns Raised by the DNS Filtering Requirements in the PROTECT IP Bill*, DOMAININCITE.COM (May2011), <http://domainincite.com/docs/PROTECT-IP-Technical-Whitepaper-Final.pdf> [hereinafter Crocker, *DNS Filtering*].

<sup>73</sup> H.R. 3261, 112<sup>th</sup> Cong. § 102 (2011); Lemley, *Don't Break the Internet*, *supra* note 71.

<sup>74</sup> H.R. 3261, 112<sup>th</sup> Cong. § 102(c)(2)(A) (2011).

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



simply based upon a notice delivered by the rights holder, not based upon a judgment from a court of law.<sup>76</sup> This has been referred to as the "shoot first, ask questions later" approach.<sup>77</sup>

The Electronic Frontier Foundation<sup>78</sup> (the "EFF") offered three concrete examples of websites that could be affected by the passing of SOPA: Etsy, Flickr and Vimeo.<sup>79</sup> In their assessment, the EFF found that the online marketplace for handmade goods, Etsy,<sup>80</sup> could be shut down entirely due to the website's inability to proactively peruse and monitor the "15 million buyers and creative businesses"<sup>81</sup> transacting in over hundreds of thousands of goods.<sup>82</sup> The sheer volume and turnover of the online marketplace makes it impossible for even the most vigilant of website operators to actively scrutinize each and every shop and object, but in not doing so, the website operator would be in violation of Section 103 and the intellectual property rights holder could demand that "Etsy's payment processors.... suspend Etsy's service within 5 days."<sup>83</sup> Again, keep in mind that in contrast to the DMCA notices discussed earlier, where only the alleged trademark infringement in one of the stores or copyright violation by one of the sellers would be taken down by Etsy, these notices could *shut down the entire website* including all other non-infringing content by other users.<sup>84</sup>

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<sup>76</sup> Lemley, *Don't Break the Internet*, *supra* note 71.

<sup>77</sup> Pepitone, *SOPA Explained*, *supra* note 49.

<sup>78</sup> The Electronic Frontier Foundation is a donor-funded non-profit founded in 1990 to champion the public interest in legal battles affecting digital rights. *About EFF*, ELECTRONIC FRONTIER FOUNDATION (last visited Nov. 15, 2012), <https://www.eff.org/about>.

<sup>79</sup> Parker Higgins, *What's On the Blacklist? Three Sites That SOPA Could Put at Risk*, ELECTRONIC FRONTIER FOUNDATION (Nov. 15, 2011), <https://www.eff.org/deeplinks/2011/11/whats-blacklist-three-sites-sopa-could-put-risk> [hereinafter Higgins, *Three Sites SOPA Could Put at Risk*].

<sup>80</sup> *About Etsy*, ETSY.COM (last visited Dec. 4, 2012), [http://www.etsy.com/about?ref=ft\\_about](http://www.etsy.com/about?ref=ft_about).

<sup>81</sup> *What Can You Sell*, ETSY.COM (last visited Dec. 4, 2012), [http://www.etsy.com/sell?ref=so\\_sell](http://www.etsy.com/sell?ref=so_sell).

<sup>82</sup> Higgins, *Three Sites SOPA Could Put at Risk*, *supra* note 79.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

Similarly, in the case of Flickr, the online photo-storage mechanism where original images are uploaded and used or shared via licensing agreements, claims of copyright violation are taken seriously and handled on a case by case basis as reported by rights holders.<sup>85</sup> Flickr is known to “compl[y] with DMCA safe harbor requirements by taking down photos when it gets a valid complaint, [and by] establishing a repeat infringer policy.”<sup>86</sup> Nonetheless, under SOPA, Flickr’s lack of proactive monitoring could be seen as “taking ... deliberate actions to avoid confirming a high probability of the use of the ... site to carry out acts that constitute a violation.”<sup>87</sup> Again, and the pattern here is becoming starkly evident: the entirety of Flickr could potentially be shut down or, in a less dramatic but nonetheless disruptive and dangerous fashion, the payment processors could refuse to transact with Flickr users in response to a complaint and all advertising revenue could be pulled.<sup>88</sup> The unintended consequence here is that if the website is shut down, all the previously uploaded pictures would also be lost without any warning.<sup>89</sup>

In the third example, the EFF article considers the case of Vimeo, a video-sharing website akin to Youtube, but whose hallmark is that it was founded by filmmakers who wished to share their work online to a community of like-minded individuals.<sup>90</sup> In as much as the site is fueled by creative uses of original content, many of Vimeo’s filmmakers rely on fair use claims, which have come under the scrutiny of the law in recent years.<sup>91</sup> Capitol Records, for example, in their suit against Vimeo for copyright infringement claimed that “[t]he reproduction,

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<sup>85</sup> *Flickr Community Guidelines*, FLICKR.COM (last visited Dec. 4, 2012), <http://www.flickr.com/help/guidelines/>.

<sup>86</sup> Higgins, *Three Sites SOPA Could Put at Risk*, *supra* note 79.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> <http://www.bricoleur.org/2011/12/overbroad-censorship-users.html>

<sup>90</sup> <http://vimeo.com/about>

<sup>91</sup> *Capitol Records LLC v. Vimeo LLC*, 2009 WL 4918771 (S.D.N.Y. 2009); Higgins, *Three Sites SOPA Could Put at Risk*, *supra* note 79.

adaptation, public performance, and distribution of [Capitol Records'] recordings by Vimeo are precisely the types of commercial uses licensed... to, for example, television shows and other Internet services. However, unlike those licensed uses, Vimeo has never obtained the consent of Plaintiffs to use their works or paid plaintiffs any compensation” instead, the pleading claimed, “Vimeo not only is aware of the copyright infringement taking place on its system, but actively promotes and induces that infringement, including by showcasing audiovisual works containing [Capitol Records'] copyrighted recordings.”<sup>92</sup> Such accusations under SOPA would lead to an almost-automatic shutdown of the site and, again, would halt any advertising revenue and payment processing.<sup>93</sup>

As the EFF article goes on to state, the importance of highlighting these cases is not only to provide an illustration of how some of our favorite websites would fare in a world with SOPA but also serves to underscore a much more dangerous issue: Vimeo, Flickr and Etsy may have the funds available to fight these allegations and stave off complete shutdown as Vimeo had done in the Capitol Records case,<sup>94</sup> but smaller websites (and especially foreign websites) will not have the money or the legal resources to counter these attacks and will most certainly go down.<sup>95</sup> Remember, all three of these websites were much smaller when they first began, if

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<sup>92</sup> Capitol Records v. Vimeo, pleading, pg 1; *See also* Higgins, *Three Sites SOPA Could Put at Risk*, *supra* note 79.

<sup>93</sup> Higgins, *Three Sites SOPA Could Put at Risk*, *supra* note 79; Charles S. Simms, *YouTube, Google Find Safe Harbor in New York Court*, 27-SEP Comm. Law. 3, 2010 (citing Football Ass'n Premier League Ltd. v. YouTube, Inc., No. 07-cv-3582 (LLS) (S.D.N.Y. May 4, 2007) (Docket Entry No. 166, Figueira declaration exhibits 47, 63)).

<sup>94</sup> Capitol Records LLC v. Vimeo LLC.

<sup>95</sup> Higgins, *Three Sites SOPA Could Put at Risk*, *supra* note 79

SOPA had shuttered its progress in those early days, none of them would never have the ability to reach the heights they now have attained.<sup>96</sup>

### C. Constitutionality

Constitutional law expert Floyd Abrams, after reviewing the proposed Bill, concluded, “[t]he notion that adopting legislation to combat the theft of intellectual property on the Internet threatens freedom of expression and would facilitate... the end of the Internet is... insupportable. Copyright violations have never been protected by the First Amendment and have been routinely punished wherever they occur; including the Internet. This proposed legislation is not inconsistent with the First Amendment; it would protect creators of speech, as Congress has done since this Nation was founded, by combating its theft.”<sup>97</sup>

Even if the doomsday scenario of unopposed takedown of websites is avoided or, most likely, restricted to foreign websites, it still does not mean that U.S. Internet users are not harmed or that their Constitutional rights are not affected.<sup>98</sup> According to the case of *Lamont v. Postmaster General*, the Supreme Court provided that First Amendment rights applied to mail received from a foreign sender.<sup>99</sup> As such, shutting down American access to a foreign website

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<sup>96</sup> *Protecting the Safe Harbors of the DMCA And Protecting Jobs*, AVC (Oct. 29, 2011), [http://www.avc.com/a\\_vc/2011/10/protecting-the-safe-harbors-of-the-dmca-and-protecting-jobs.html](http://www.avc.com/a_vc/2011/10/protecting-the-safe-harbors-of-the-dmca-and-protecting-jobs.html) [hereinafter *Protecting the Safe Harbors of the DMCA*].

<sup>97</sup> Letter from Floyd Abrams to Chairman Lamar Smith (Nov. 7, 2011), (available at <http://www.mpa.org/Resources/1227ef12-e209-4edf-b8b8-bb4af768430c.pdf>); Paul Hortenstine, *First Amendment Expert: Stop Online Piracy Act Upholds Free Speech*, BLOG.MPAA.ORG (Nov. 10, 2011), <http://blog.mpa.org/BlogOS/post/2011/11/10/First-Amendment-Expert-Stop-Online-Piracy-Act-Upholds-Free-Speech.aspx>.

<sup>98</sup> Lemley, *Don't Break the Internet*, *supra* note 71; Marvin Ammori, *SOPA/PIPA Copyright Bills Also Target Domestic Sites*, AMMORI.ORG (Dec 31, 2011), <http://ammori.org/2011/12/31/sopapipa-copyright-bills-also-target-domestic-sites/>.

<sup>99</sup> *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

is tantamount to censorship under the First Amendment, and more specifically, is prior restraint.<sup>100</sup>

It is a well-understood concept in constitutional law, supported by Supreme Court decisions, that any governmental action preventing or suppressing free speech taken prior to the speech occurring is unlawful and presumptively unconstitutional as prior restraint.<sup>101</sup> “The Constitution requires a court to make a final determination that the material in question is unlawful after an adversary hearing *before* the material is completely removed from circulation.”<sup>102</sup> However, shutting down websites that are unilaterally determined to have violated SOPA without offering the website provider a chance to defend himself would go against the face of these constitutional protections. This is made especially clear when considering that under SOPA “websites can be ‘completely removed from circulation’—rendered unreachable by, and invisible to, Internet users in the United States and abroad—immediately upon application by the government, without *any* reasonable opportunity for the owner or operator of the website in question to be heard or to present evidence on his or her own behalf.”<sup>103</sup> Furthermore, the Supreme Court has also provided that restrictions on free speech only acceptable if less restrictive means of achieving the stated goals are not available or would not be as effective.<sup>104</sup> This is clearly not the case here.

Furthermore, search engines would never be the same. As one analysis put it, even though search engines are already fairly biased, “by burying certain sites... deem[ed] inappropriate or irrelevant[,] SOPA would put this bias on steroids.” In fact, any site that

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<sup>100</sup> Lemley, *Don't Break the Internet*, *supra* note 71.

<sup>101</sup> *Id.*; *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70.

<sup>102</sup> Lemley, *Don't Break the Internet*, *supra* note 71.

<sup>103</sup> Crocker, *DNS Filtering*, *supra* note 72.

<sup>104</sup> See generally *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

potentially contained copyright-infringing material or material that facilitates copyright infringement, could be banned from search results.<sup>105</sup> SOPA makes it such that even a direct search for a website name or domain name can turn up blank pages.<sup>106</sup> And again, SOPA does not have a method of recourse for the website owner to fight the shutdown.<sup>107</sup>

This restraint on speech also applies to websites' popular comments sections. Due to the fact that any infringing content on a website could cause the entire site to be shut down, no blogger or website want to take on the additional risk. Instead, in order to avoid having one commenter post an infringing article from another site, the ability to comment would likely be removed from most small websites "for self-preservation... effectively ending online exchanges and conversations."<sup>108</sup> Other similarly, original content websites would be scrapped because of their potential liability. In this way, SOPA would curb free speech on the Internet due either to prior restraint or self-preservation of website proprietors. Either way, the result is a censored, closed Internet.

## V. ALTERNATE OPTIONS

There are other ways of achieving what the legislature intends, but without curtailing the public access to the Internet. One such option, though not perfect, is the Online Protection & Enforcement of Digital Trade Act (the "OPEN Act") which was first introduced in House on January 18, 2012 amid the overwhelming push against SOPA discussions.<sup>109</sup> Republican

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<sup>105</sup> Nona Willia Aronowitz, What Would a Post-SOPA Internet World Look Like?, Good.is (Jan. 18, 2012), <http://www.good.is/posts/what-would-a-post-sopa-internet-look-like/>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Online Protection & Enforcement of Digital Trade Act*, KEEP THE WEB OPEN (last visited Dec. 4, 2012), <http://www.keepthewebopen.com/open> [hereinafter Keep The Web Open].

Representative Darrell Issa of California and Democratic Senator Ron Wyden of Oregon first proposed the bipartisan bill as an alternative to combat the problematic portions of SOPA and opened the language up to crowd-sourced comments at their website.<sup>110</sup> This serves to address one of the biggest issues with SOPA – specifically, that the bill never requested nor accepted input from members of the technology community, going so far as to exclude website operators from the House discussions.<sup>111</sup> This is being done before the bill is being considered for a vote – in fact, before the bill is even introduced to the House or Senate.<sup>112</sup> This approach underscores the significant impact of the Internet today and highlights the importance of using it as a tool rather than attempting to control or censor it.<sup>113</sup>

Furthermore, the two self-stated fundamental principles upon which the OPEN Act rests is the belief that “First, Americans have a right to benefit from what they've created. And second, Americans have a right to an open Internet.”<sup>114</sup> This is underscored by the bill’s open and clear statement that it only applies to foreign infringing sites and will not impact U.S. based websites or websites that have agreed to U.S. jurisdiction.<sup>115</sup> As repeatedly discussed before, these sites are already subject to the DMCA which does an effective job of preventing and addressing

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<sup>110</sup> *Id.*

<sup>111</sup> *Hearing Information*, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY (last visited on Dec. 9, 2012), [http://judiciary.house.gov/hearings/hear\\_11162011.html](http://judiciary.house.gov/hearings/hear_11162011.html).

<sup>112</sup> *The OPEN Act: The Good, The Bad, and a Practice in Participatory Government*, ELECTRONIC FRONTIER FOUNDATION (Nov. 15, 2011), <https://www.eff.org/deeplinks/2011/12/open-act-good-bad-and-practice-participatory-government> that states the same idea [hereinafter *The Good, The Bad*].

<sup>113</sup> Tanveer Ali, *The OPEN Bill and the Future of Crowdsourced Legislation*, GOOD.IS (Jan. 18, 2012 2:00am), <http://www.good.is/posts/the-open-bill-and-the-future-of-crowdsourced-legislation>; Newman, *SOPA and PIPA: Just the Facts*, *supra* note 30; Mike Masnick, *Why PROTECT IP/SOPA Is The Exact Wrong Approach To Dealing With Infringement Online*, TECHDIRT (Nov. 8, 2011 11:22am), <http://www.techdirt.com/articles/20111108/00553216676/why-protect-ipsopa-is-exact-wrong-approach-to-dealing-with-infringement-online.shtml>.

<sup>114</sup> Keep The Web Open, *supra* note 109.

<sup>115</sup> *Id.*

copyright infringement on U.S. websites while providing safe harbors for those sites that act to rectify infringement issues as they arise or are brought to the operators' attention.<sup>116</sup>

The OPEN Act submits the oversight and judiciary functions of infringement claims to the International Trade Commission (the "ITC").<sup>117</sup> This serves to rectify the *in rem* jurisdiction issues that SOPA had raised and provides a forum in which international sites can turn to fight the claims a rights holder brings against them under the OPEN Act.<sup>118</sup> In addition, and quite possibly the most important thing the OPEN Act does, is to provide the website operators with an ability to cure the alleged issue and prevent the website from being shuttered completely.<sup>119</sup>

Of course one of the biggest gripes with SOPA – the vigilante provision – still lives on in the OPEN Act, with the provision that online service providers receive immunity if they act to report websites with alleged infringing material faster, rather than slower.<sup>120</sup> Nonetheless, this proposal is a vast improvement on what SOPA has offered and it is clearly a step in the right direction. With the incorporation of open-sourced comments from all individuals impacted by the law,<sup>121</sup> it is clear that what is eventually taken to the floor will maintain a balance between the rights of intellectual property holders and the public interest.

## VI. CONCLUSION

It is clear that artists' rights should be protected in the face of evolving technology that makes copyright infringement easier, but that does not mean that the solution is draconian

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<sup>116</sup> *Id.*; 17 U.S.C. § 512 (2010).

<sup>117</sup> Keep The Web Open, *supra* note 109.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*; *The Good, The Bad*, *supra* note 112.

<sup>121</sup> Carolyn Brajkovich, *The People Are Speaking: Free Internet Act*, URBANTIMES (Feb. 8, 2012), <http://urbantimes.co/2012/02/free-internet-act/>.



legislature that violates other constitutionally protected rights. As discussed before, the law on copyright protection on the Internet is quite thorough as it is, with the caveat that foreign websites can avoid prosecution on U.S. soil.<sup>122</sup> As such, the complete defeat of SOPA would not necessarily *weaken* exclusive rights. Rather, it would maintain exclusive rights as they are, but free access would not curtailed. Targeting the new face of unauthorized use of copyrighted material, should be achieved through smarter, more specific laws instead of frenzied, sweeping laws that may or may not further prevent any copyright infringement. That is to say, instead of fighting against the changes in technology, the law needs to adapt to and embrace them.<sup>123</sup> What one author said in 1997 still rings true to this day: “If you can't figure out how to afford it without charging, you may be doing something wrong.”<sup>124</sup>

As many have previously stated, SOPA’s goals are laudable and receive universal support, “[u]nfortunately, the bills as drafted would expose law-abiding U.S. Internet and technology companies to new uncertain liabilities [and] mandates that would require monitoring of web sites” making the Bill simply impractical.<sup>125</sup> There is no doubt that intellectual property rights holders are legally entitled to protections of their work and should have every safeguard in place to prevent and punish those that engage in blatant stealing. At the same time, however, we need to ensure that rights holders are not given carte-blanche permission to shut down whole websites with alleged infringing material and essentially act as Internet censors – something SOPA would allow them to do.

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<sup>122</sup> *Protecting the Safe Harbors of the DMCA*, supra note 96.

<sup>123</sup> Arguably, large intellectual property rights holders should stop their crusade against piracy in this form, but approach it in a different one. Bilton, *Internet Pirates Will Always Win*, supra note 7 (“Piracy won’t go away... companies should stop trying to fight piracy and start experimenting with new ways to distribute content that is inevitably going to be pirated anyway.”)

<sup>124</sup> Michael H. Goldhaber, *The Attention Economy and the Net*, Vol. 2 FIRSTMONDAY 4 (Apr. 7, 1997), available at <http://firstmonday.org/article/view/519/440>.

<sup>125</sup> [http://money.cnn.com/2012/01/17/technology/sopa\\_explained/index.htm](http://money.cnn.com/2012/01/17/technology/sopa_explained/index.htm)

Perhaps the White House provided the best response to a petition against SOPA in January 2012: "all sides [need] to work together to pass sound legislation... that provides prosecutors and rights holders new legal tools to combat online piracy originating beyond U.S. borders while staying true to the principles... that [will not] lead to Internet censorship, squelching of innovation, or reduced Internet security."<sup>126</sup> In other words, the balance between artists' rights and public access must be maintained to achieve an arena where creativity is rewarded but public rights are also protected.

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<sup>126</sup> Victoria Espinel, Aneesh Chopra, & Howard Schmidt, The White House Blog, Obama Administration Responds to We the People Petitions on SOPA and Online Piracy, (Jan. 14, 2012, 8:09 AM). Available at: [http:// www.whitehouse.gov/blog/2012/01/14/obamaadministration-responds-we-people-petitions-sopa-and-online-piracy](http://www.whitehouse.gov/blog/2012/01/14/obamaadministration-responds-we-people-petitions-sopa-and-online-piracy).<https://petitions.whitehouse.gov/response/combating-online-piracy-while-protecting-open-and-innovative-Internet>.