

November 15, 2011

The Honorable Lamar Smith
House of Representatives
Chairman, Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers
House of Representatives
Ranking Member, Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith and Ranking Member Conyers,

On behalf of TechAmerica, the U.S. technology industry's largest advocacy organization representing over 1,000 leading innovative companies, I am writing to express our concerns specifically about the Stop Online Piracy Act (SOPA), but also more generally about the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PROTECT IP Act).

Fifteen years ago Congress began what would be a lengthy but critically important process of updating copyright law for the new millennium. The end result of that effort was the Digital Millennium Copyright Act (DMCA), which was ultimately informed by hundreds of stakeholders from the newly emerging Internet industry, to Internet service providers, to music and movie companies, to libraries, to civil libertarians, and many more. TechAmerica played a proud and prominent role.

The goals then, as they should be now, were to carefully balance the rights of property holders with the operational realities of "mere conduits," and to directly reach those who infringe or steal other's property. In other words, the goal was to make the rules of the road clear for those who own intellectual property and those who operate service providers or otherwise provide services that may interact with protected intellectual property online – to provide a measured and appropriate approach to intermediary liability.

TechAmerica and our member companies have been quite disturbed by the rise of rogue websites operating offshore, such as The Pirate Bay. These websites detract from the significant technological and commercial innovation ongoing today to help consumers enjoy legally-obtained content on whatever device and in whatever location they want to consume that content. Tools should indeed be provided to challenge the proliferation of such sites that exist to infringe content or to peddle counterfeit goods often to the direct detriment of U.S. companies and our economy. In an attempt to provide such legal tools, both the U.S. Senate and House of Representatives have produced relevant legislation.

Protecting intellectual property must be a cornerstone of U.S. policy as both global trade and e-commerce grow. TechAmerica members are among the most innovative companies in the United States, producing cutting edge electronic components, consumer electronics and industrial systems, jet engines and educational software, for example. The increasing use of e-commerce,

or sale of products over the Internet, has allowed the proliferation of "rogue" websites, sites that are set up outside of the United States to sell counterfeit products that violate the trademarked brands of their rightful owners, and deceive buyers as to the quality and origin of the goods. These counterfeit products are making their way into the supply chain at a loss to the IP owner, but also at a risk to the end user of a wide range of consumer, industrial and defense related products. These rogue sites are exploitive and dangerous to the public and U.S. competitiveness, and policy makers should seek to shut them down.

Sadly, neither chamber of Congress has produced thoroughly acceptable legislation, but SOPA in particular marks a clear retreat from a history of Congressional support of the digital revolution. That support has often come in the form of not imposing regulation on the industry, and certainly never before has such a wholesale shifting of costs and responsibilities of property owners onto technology companies been contemplated -- a shift away from a careful balance and toward legislation that favors one industry over another.

Put another way, the approach taken in SOPA leads one to wonder why the DMCA would even be used in the future. Using SOPA's proposed broad new inducement provision, one could simply ignore the current DMCA safe harbors and use intermediaries to accomplish the end goal, and if damages were warranted, merely later sue for infringement. Moreover, important measures to make sure that the proposals keep pace with technology, such as the DMCA requires with the triennial rulemaking on exceptions to the prohibition on circumvention of access and use controls, are non-existent. Along those same lines we are also dismayed that the proposed legislation relies on "simple" technical measures to address complex international issues that are likely better handled through diplomacy, negotiation, constructive dialog and coordinated action. The proposed "solutions" carry risk, perhaps significant, and are likely to be easily circumvented.

That said, while the DMCA provides a relevant and informative model, it does not cover key challenges such as counterfeiters selling their physical products on the Internet. The potential damage that counterfeit products bring to a company's or industry's reputation and to the integrity of systems dependent on those products is serious and does deserve attention.

Massive cost shift

SOPA merely shifts costs from content owners, the rightful protector of their content, to various other parties, rather than making sure that costs are appropriately placed.

This is a philosophical issue that runs to the heart of both proposals. Do we really want government forcing one industry to subsidize another, to be required by force of law to assist another industry in being successful? More typically we expect industries to operate within a market framework and with the freedom of contract to solve such challenges. In this case, Congress seems determined to step in and force one industry to provide subsistence to another. However, as evidenced by the measured Memorandum of Understanding reached between the content industry and ISPs earlier this year, interested parties can and will work together to combat intellectual property infringement in lieu of government intervention.

So what are the costs? Simply put, they are the costs of stopping bad guys from doing bad things to other people's property – the cost of compliance, liability and distraction from improvement from the products of the technology industry.

Safe Harbor No More

One key factor that allows the economics of many legislative models to work is the inclusion of a clear and dependable safe harbor. This inclusion should make clear to intermediaries that if they are engaged in any wrong doing then they will find no solace in the law, but if intermediaries are acting in good faith then they could step out of the way of the costs and allow the rights holder to bring their claim directly against the alleged infringer.

Under SOPA, a "service provider" will be required by a court order to take, at the instruction of the Attorney General, "technically feasible and reasonable measures...including" DNS redirects. What are those limits? Are there any? And to the extent there may be some, then how many court cases will it take to discover them?

Expansive Definitions

In general, the definitions are sweeping and unclear in nature, sweeping in more than less. For example, in SOPA the definition of "service provider" includes both ISPs and online service providers, which means it could include anyone with a website. In other places, definitions of "ad networks" and "payment processor" are not well defined.

Another example is the definition of a dedicated infringer or sites that were claimed to be "dedicated to the theft of U.S. property." Again, while the thought is right, the definition is sweeping. No one supports those who would steal or attack the very heart of U.S. innovation, but the definition is so broad, going beyond sites that are primarily designed or are marketed for infringing purposes, that many cloud-based services could be implicated even when they would not be recognized as a dedicated infringer under any reasonable definition. The new proposed language also includes sites whose operators "avoid confirming a high probability" that they will be used to infringe or who had at any previous time promoted infringements.

The context set out in the proposals is equally broad as it focuses on "sites" that can be one page or a broader, as they are colloquially known, website. Hundreds, thousands, and even millions of Web "sites," as contemplated in SOPA, make up what might more aptly be called a domain.

Likewise, the proposal to impose felony criminal charges for the illegal streaming of copyrighted works potentially captures a number of parties who offer services or products that primarily are intended to allow consumers to consume legally-obtained content in a variety of different settings. The "rule of construction" proposed in SOPA attempts to rectify this problem, but appears to focus on contract disputes between video distributors and content producers. Unless this carve out is expanded to include companies making a good faith effort to innovate and develop new products and services that give consumers a means to consume content they have obtained legally, Congress runs the risk of hampering innovation, investment, and job creation in this incredibly dynamic space.

Due Process Ignored

One of the more egregious aspects of SOPA is the overbroad standard for secondary liability, the end result of which treats sites as guilty until proven innocent. Under this proposed law, no court would be involved in the process until and unless a site operator filed counter-notice asserting that the site did not fit the broad definition of dedicated infringer. One is hard pressed to think of another place where lawmakers would be comfortable designing a system that allows a mere accusation without any court review to lead to potentially damaging actions against another. Courts do serve a role in our legal system, as a neutral arbiter to balance concerns, rights and responsibilities of several interests.

In this case, one obviously biased party can cause harm without any such review. Network advertisers (which are now largely technology-based and technology-driven companies), credit card companies and other payment processors such as PayPal would be required to stop providing ads or payment services to any site that a copyright or trademark holder claimed was "dedicated to the theft of U.S. property." Again, all without court review. The damage to the business of the wrongly accused would be stifling.

Private Right of Action Difficulty

The PROTECT IP Act also raises concerns regarding the authority vested in rights holders to bring injunctions against sites they accuse of participating in infringing activities. But worse, the private right of action provisions in SOPA go well beyond those in the Senate bill.

As mentioned above, the private right of action is particularly troubling because of the ability of an accuser to wreak havoc outside of the court system. Some will argue that the newly created DMCA-style notice-and-takedown process for ad networks and payment processors is a system that can work; however, the proposed system stands the original notice-and-takedown system on its head by changing up the reason for its being. In the DMCA such a system was designed at the request of all parties to lower costs by moving away from a cease and desist letter tradition. Generating a notice has proved less expensive and removes the intermediary from the conversation, allowing the rights holder to directly engage with the accused wrong doer. Here the system is designed to place intermediaries squarely in the middle of the action, leaving intermediaries holding the cost, liability and compliance bag.

Extra-territorial Problems

The extra-territorial reach of the bill is problematic both for U.S. foreign policy and for those engaged in Internet Governance in the international arena. One of the significant issues is the balkanization of the Internet; an unhealthy fragmentation that could result from blunt technological implementation of well-intentioned policy imperatives. To date, the U.S. has largely avoided extra-territorial reach, and consequently the U.S. can speak authoritatively and forcefully against any such measures. Enacting SOPA or even the Protect IP Act will signal that the United States not only supports these measures, but more importantly, supports imposing restrictions through technical means at the most basic levels of the Internet.

Technology and Security Concerns

While we have many remaining concerns, we are compelled to address the proposal's quick assertion of specific technological fixes. For example, the requirement that ISPs block their customers from reaching an accused infringer site (i.e. DNS filtering), particularly in the voluntary immunity provisions that contain no court review, causes concern. Notably, this approach would undermine important security measures and be technically infeasible with DNS Security Extensions (DNSSEC), which allows secure authentication of Internet assets, is critical for combating the distribution of malware and other problematic behavior, and has high-level US Government support and investment. Further, such filtering requirements would encourage consumers to use alternate servers, which would promote the development of techniques and software that circumvent the use of the DNS and, therefore, undermine the value, security, and resiliency of a single, unified, global communications network.

In the end there is great support for stopping bad actors. The question is how they might be effectively stopped without burdening one industry with the costs more correctly borne by the rights holders. TechAmerica would very happily bring to bear its historical and current intermediary liability expertise in assisting both the House and Senate in moving forward to meet the goals of providing needed tools to stop bad actors, while finding a way to avoid forcing the technology industry into an untenable economic situation.

Only carefully crafted solutions that seek to correctly assign burdens based on who most correctly should bear them, like the owners of property, and that protect the innocent while allowing for pursuit of malcontents will allow the Internet to flourish full of robust content well protected and appropriately used. Unfortunately, SOPA does not meet this threshold and hence TechAmerica cannot support this bill as introduced, but stands ready and willing to work with both chambers of Congress to improve the legislation.

Sincerely,

A handwritten signature in blue ink that reads "Daniel A. Varroney". The signature is written in a cursive style with a large initial 'D'.

Dan Varroney
Acting President and CEO
TechAmerica

cc: Members of Congress