

“Sentence First—Verdict Afterwards”: The Protect IP and the Stop Online Piracy Acts

In 2011, two bills were introduced into Congress that had the potential to restrict the growth and development of web services. The intent of each bill was to prevent the use of the web to link to or transmit copyrighted material without the permission of or compensation to copyright holders. Both bills in particular targeted foreign “rogue websites,” but the nature of the web is such that numerous companies and organizations based in the United States would have been affected by the bills—including many that were not themselves copyright infringers. Less than a year after the introduction of the first of the two, both bills had been withdrawn, having been vigorously opposed by powerful corporations whose business models depend upon an open web, by organizations and individuals that raised questions about the impact of the bills on First Amendment rights, and by organizations and individuals concerned about the cultural and educational impact of the bills. There was, in addition, a mobilization via the web of consumers/creators of the content in question, a phenomenon that is dealt with in Laurie Cubbison's report in this issue of the *IP Annual*.

PIPA

The first of the two bills was introduced in May of 2011 by Vermont Senator Patrick Leahy and a bipartisan group of eleven co-sponsors (An amended version, introduced later that month with additional sponsors, will be referenced in this report.) Cited variously as the “Preventing Real Online Threats Economic Creativity and Theft of Intellectual Property Act of 2011” and the “Protect IP Act of 2011,” it became universally known by the acronym of PIPA. A major goal of PIPA was to combat the activities of internet sites that were supposedly “dedicated to infringing activities” (PIPA 33). In particular, the intent of the bill was to counter “rogue websites” in foreign territory. To achieve this goal, once such a website had been identified, operators of “domain name systems,” broadly defined, would be required by court order to

take the least burdensome technically feasible and reasonable measures designed to prevent the domain name described in the order from resolving to that domain name’s Internet protocol address. (PIPA 38)

Although not itself an infringer, a web-service provider would be responsible for enforcing the court order targeting the alleged rogue website by cutting off access to the site. The inclusion of the phrase “least burdensome technically feasible and reasonable measures” may have been intended to reassure service providers that the impact on their operations would be minimized, but the mitigating effect of that language may have been undercut by the subsequent

statement that a service provider “shall not be required *other than as directed under this subparagraph*, to modify its network, software, systems, or facilities” (PIPA 38-39; italics added). The implication of the italicized language was that a court or its agents might be empowered to make decisions that would have an impact on the development of hardware, software, and services, placing legal rather than technical limitations on growth and innovation. Also not reassuring: language stating that the Attorney General could take action against “any party [...] that knowingly and willfully fails to comply” with an order to block access to alleged rogue sites (PIPA 43). In sum, according to this bill, the service provider is responsible for cutting off access to the allegedly infringing site, the service provider potentially faces third-party oversight of what had hitherto been technical and business-model decisions, and the service provider risks legal action if its actions are perceived by the Attorney General as less than fully compliant with the terms of a court order.

The bill also placed a considerable onus upon each alleged infringing site. The bar for an injunction is set low, and the cost of fighting an injunction may in many cases have been prohibitive. A situation might have developed similar to that of the mass filings by the Recording Industry Association of America (RIAA) against music downloaders, most of whom did not have the resources to go up against a powerful and well-funded organization. Moreover, even if a site is ultimately able to refute claims of misappropriation of intellectual property, the bill incorporated no mechanism for recouping damages for the time during which a site is inaccessible or for the time it may take to rebuild traffic after removal of the virtual blockade. Furthermore, although the bill specified that action could be taken against a service provider who failed to fully comply with a court order, no provision was made for action to be taken against copyright claimants who make arguably frivolous claims. In order to encourage service providers to vigorously enforce court orders, the bill did grant those providers immunity against suits by sites that turned out to be non-infringing (PIPA 42-43); the flip side of that protection, however, is that those sites are left without recourse against any party at all, service providers explicitly and copyright claimants by omission.

SOPA

Taken as a whole, PIPA would have placed the interests of copyright holders above those of all other parties and would have placed a burden not only the alleged infringers but also upon web-service providers. The same could be said of the second bill, which was introduced into the House of Representatives in October of 2011 by Representative Lamar Smith of Texas. It had twelve co-sponsors, and as in the case of the Senate bill, support was bipartisan. The bill was titled the Stop Online Piracy Act, and it became known as SOPA. Like PIPA, it was intended to curtail the activities of “foreign infringing sites” (SOPA 10). Also like PIPA, the legislation would have mandated that a service provider, upon receipt of a court order, take action to block access to a site. Although particular steps are not specified in the bill, they were to be, in language echoing that of PIPA,

technically feasible and reasonable measures designed to prevent access by its subscribers located within the United States to the foreign infringing site (or portion thereof) that is subject to the order, including measures designed to prevent the domain name of the foreign infringing site (or portion thereof) from resolving to that domain name's Internet Protocol address. (SOPA 13-14). SOPA also includes the language that implies that a court or its agents may be given oversight over a service provider ("A service provider shall not be required *other than as directed under this subparagraph*, to modify its network, software, systems, or facilities" [SOPA 14; italics added]), as well as the language that states that action can be taken against a service provider "that knowingly and willfully fails to comply with the requirements" outlined in a court order (SOPA 18). A service provider could attempt to defend itself against such a charge "by showing that [it] does not have the technical means to comply [...] without incurring an unreasonable economic burden" (SOPA 19); however, the onus is placed upon the service provider to prove its case. Although not accused of infringement itself, the service provider may therefore be drawn into litigation, potentially at great cost.

As in the case of PIPA, a service provider is immune to suits that otherwise may be brought by sites that proved to be non-infringing but that have been injured by steps taken by a service provider attempting to apply with a court order (SOPA 21). Sites may attempt to have a virtual blockade lifted. As a result of such attempts, courts may find that "the foreign Internet site subject to the order is no longer, *or never was*, a foreign infringing site" (SOPA 23; italics added). The italicized phrase testifies to the fact that injunctions may be issued on little more than the representation of a copyright claimant. The harm to a site that is blocked is self-evident. Even though the service protector would never face the risk and expense of a lawsuit, the procedure outlined in the bill would mean that the provider may be forced to take steps, with accompanying expenses, that in the end are not warranted by facts. With apologies to the Queen in *Alice's Adventures in Wonderland*, this approach is a case of "Sentence first—verdict afterwards."

Reaction to the Two Bills

In the business community, reactions to PIPA/SOPA were divided along lines that represented different business models. Among the champions of each model were business behemoths with large war chests. Only one side, however, was able to mobilize the web in support of its viewpoint, and this is the side that eventually prevailed.

Supporting PIPA/SOPA were companies that publish copyrightable material in digital forms that are vulnerable to infringement; industry groups representing those companies; and organizations representing individuals, such as musicians and actors, who participate in the creation of that material and who might be subject to the loss of royalties and residuals as a result of its distribution without the sanction of the copyright holders. Marvel Entertainment, HarperCollins, and MCA Records, for example, represent the first category; the Motion Picture Association of America (MPAA) and the

International Trademark Association (INTA) represent the second; and the American Federation of Musicians (AFM) and the Screen Actors Guild (SAG) are examples of the third (“List of SOPA-PIPA Supporters”). Collectively, all of the above could be considered to be representative of the ‘old media’.

Prominent among opponents of PIPA/SOPA were companies whose business models depend upon serving as conduits for web-based content, a group sometimes designated as the ‘new media’. The list of new media opponents included well-known names such as Mozilla, creator of the web browser Firefox; Facebook, host of a hugely successful social network; Yahoo!, one of the first successful web portals; eBay, a major locus of web commerce; Reddit, a social network that functions as a link aggregator; and Google, originally a web search engine and now in effect a content aggregator that provides links to music, videos, and text. These companies were joined by others that design and market both the hardware and the software that allow the continued existence and the further development of web-based services (“List of Those Expressing Concern”).

A letter representing the interests of new media companies and allied businesses was sent to the House Judiciary Committee by Daniel A. Varroney, acting president and CEO of TechAmerica, whose website describes it as an “advocacy organization” that speaks on behalf of more than one thousand technology companies, among them such content conduits as Facebook, eBay, and Google, as well as hardware and software companies such as IBM, Dell, and Apple. In his letter, Varroney mentions the Senate bill, PIPA, but he has some especial concerns about SOPA. He argues that a fundamental flaw of the proposed legislation was that it represented “a wholesale shifting of costs and responsibilities of property owners onto technology companies” (Varroney 2). He also objects that web-service providers would no longer be certain of having a “safe harbor”: a guarantee that conduit companies (assuming they were “acting in good faith”) would not bear the financial burden of enforcement. According to the current model, in place since the passage of the Digital Millennium Copyright Act in 1998, companies serving as content conduits can “step out of the way of the costs and allow the rights holder to bring their claim directly against the alleged infringer” (Varroney 3). Under the proposed legislation, however, the onus would be on the content intermediaries to take steps against the infringers, and what those steps would be was not clear from the language of the bill, which merely mandated that content conduits take those “technically feasible and reasonable measures” without specifying what those measures would be. Potentially the conduits would be drawn into an indeterminable, and interminable, number of court cases as the nature of alleged infringements was hashed out on a case-by-case basis.

Lack of specificity was a problem at several points in the proposed legislation, Varroney argues. He found, for example, the definition of “service provider” to be so broad—covering both internet service providers (ISPs) and online service providers—that it might cast a net over “anyone with a website” (Varroney 3). Similarly, the definition of a “dedicated infringer” might be applied to the providers of the cloud-based services that are an emerging web phenomenon, potentially stifling innovation. Varroney also mentions the risks to

service providers that might arise from imprecise language in SOPA that addressed illegal streaming, objecting that

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. (Varroney 3)

Varroney also raises due process issues—the “Sentence first—verdict afterwards” nature of the provisions for procuring court orders. The standards for “secondary liability,” he writes, were much too broad and likely would result in sites being judged “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. (Varroney 4)

Many of these accusations would be raised under a provision for “private right of actions.” Varroney finds this provision especially troublesome because a complainant would have the ability “to wreak havoc outside of the court system.” To those who might compare the procedure with a “DMCA-style notice-and-takedown process,” he replies that the DMCA “removes the intermediary from the conversation, allowing the rights holder to directly engage with the accused wrong doer.” SOPA, however, would “place intermediaries squarely in the middle of the action” so that new media would be left “holding the cost, liability and compliance bag” (Varroney 4). Varroney is of course writing as a representative of an industry group, and his letter is seconded both by other industry consortia and by individual companies, all fearful of the effect that the costs and uncertainties introduced by PIPA/SOPA would have upon their business models (see, e.g., “Internet and Technology Companies’ Opposition Letter.”)

However, the new media and their allies were not the only ones to weigh in on the proposed legislation. Varroney’s arguments regarding due process and the fettering of the web are echoed in letters submitted by groups with a deep interest in civil rights, including the right both to communicate one’s ideas and to access the communications of others. To give one example, the Electronic Freedom Foundation, the Human Rights Watch, and the American Library Association, along with ten other signatories, object that SOPA would discourage innovation and hamper freedom of expression (“Public Interest Organizations’ Opposition Letter”). These concerns were also foremost in the minds of educators, numerous of whom weighed in as individuals or banded together to express their concern over the potential for harm represented by the proposed legislation. One letter represents the collective opinion of 110 professors from throughout the United States with backgrounds in intellectual property and First Amendment issues (“Professors’ Letter in Opposition”). Although their letter initially addressed only PIPA, a copy of it was later

forwarded to the House of Representatives, the cover letter stating that SOPA, the House bill, was likewise flawed and was indeed in some respects “even worse” than the Senate version (“An Open Letter to the House of Representatives”). PIPA (and by extension SOPA) would result in the “[s]uppress[ion of] speech without notice and a proper hearing” (“Professors’ Letter in Opposition”). It would also destroy the infrastructure of the internet. Finally, it would “[u]ndermin[e] United States’ leadership in supporting and defending free speech and the free exchange of information on the Internet” (“Professors’ Letter in Opposition”).

The motives for opposition to PIPA/SOPA may have ranged from the self-interested to the altruistic. It is indisputable, however, that the two bills provoked resistance that was both intense and wide-ranging. Whether they were impressed by the arguments contained in the numerous letters that were submitted to Congress—or whether, like meteorologists, they had begun to see which way the wind was blowing—Senators and Representatives began to withdraw their support for their respective bills as January 18, 2012, the date for a web blackout in protest of the bill approached. By January 20, 2012, a little more than half a year since the introduction of PIPA, and barely three months since the introduction of SOPA, both bills had been withdrawn. Certainly other legislation will be introduced to address what PIPA/SOPA opponents acknowledged to be the very real problem of “rogue websites,” but for this round, the new media and other interested parties have succeeded in making it clear that their needs and concerns cannot be ignored in the course of addressing even the legitimate concerns of media operating under previous business models.

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