

**Statement of
Maria A. Pallante
Register of Copyrights**

**Before the
Committee on the Judiciary
United States House of Representatives
112th Congress, 1st Session**

November 16, 2011

H.R. 3261, the “Stop Online Piracy Act”

Introduction

Thank you Chairman Smith. Let me begin by expressing my appreciation to you and Ranking Member Conyers and to the many co-sponsors of the Stop Online Piracy Act (SOPA) for introducing this comprehensive proposal to combat copyright infringement on the Internet. I appreciate the opportunity to testify today.

As we all know, the Internet harbors a category of bad faith actors whose very business models consist of infringing copyright in American books, software, movies, and music with impunity. Frequently located offshore, these operators of rogue websites target American consumers and facilitate transactions using the services of search engines, advertising networks, and credit card companies. I would observe, Mr. Chairman, that this is a dark side of the Internet. In effect, we have asked American authors, publishers, and producers to invest in online commerce, but in critical circumstances we have left them to compete with thieves.

Mr. Chairman, I would like to be very clear at the outset. It is my view that if Congress does not continue to provide serious responses to online piracy, the U.S. copyright system will ultimately fail. The premise of copyright law is that the author of a creative work owns and can license to others certain exclusive rights – a premise that has served the nation well since 1790. Congress has repeatedly acted to improve enforcement provisions in copyright law over the years, including in the online environment.¹ SOPA is the next step in ensuring that our law keeps pace with infringers.

Copyright law promotes culture and free expression in the United States and is a major economic incentive. Here is how it works:

An author spends years working on a novel. As the copyright owner of that book, if she is fortunate, she may license some or all of her exclusive rights to a publisher. In editing, printing, distributing, and marketing the book, the publisher makes an investment. The publisher may offer the book to consumers through traditional bookstores or through online businesses, including those that deliver a hard copy to one’s doorstep or an e-format to one’s Kindle, Nook, or iPad.

Perhaps the book is timeless and universal in its appeal, making the global marketplace a possibility. The publisher may license translations of the book into multiple languages and enter into sublicenses with foreign distributors. These global distribution agreements rely upon a strong international framework for copyright protection, including reciprocal protection measures in foreign countries.

¹ See No Electronic Theft (NET) Act, Pub. L. 105-147, 111 Stat. 2678 (1997) (providing remedies for electronic infringement following reproduction or distribution in the absence of a commercial purpose or profit move); Artists’ Rights and Theft Prevention Act of 2005 (ART Act), Title I of the Family Entertainment and Copyright Act of 2005, Pub. L. 109-9, 119 Stat. 218 (2005) (providing remedies for distribution on the Internet of pre-release works being prepared for commercial distribution).

Let us say the novel has big screen potential. An independent producer purchases the adaptation rights, and seeks investors to make a movie possible. If the movie gets made, it will lead to additional creative authorship. For example, the producer may commission songwriters, composers, and musicians to create original musical scores and sound recordings for use in the motion picture. The film will also support multiple secondary markets, including platforms offering movies on demand, television programming, DVDs, and access through online subscriptions. There may be software adaptations, such as Wii games or other interactive products based upon the book or film, or both.

All of these licenses and business models stem from the exclusive rights that our Copyright Act provides to authors – and seeks to protect from infringers. To be clear, infringement, including at the criminal level, has been around for centuries and we will never be rid of it entirely, but this does not mean that Congress should fail to respond. Indeed, when infringers blatantly distribute, stream, and otherwise disseminate copyrighted works on the Internet, they often do so because they have no expectation of enforcement. Unfortunately, the more these kinds of actions go unchecked, the less appealing the Internet will be for creators of and investors in legitimate content. In other words, Internet piracy not only usurps the copyright value chain for any one work, it also threatens the rule of copyright law in the 21st century.

The response provided by SOPA is serious and comprehensive. It requires all key members of the online ecosystem, including service providers, search engines, payment processors, and advertising networks, to play a role in protecting copyright interests – an approach I endorse. Combating online infringement requires focus and commitment. It should be obvious that we cannot have intermediaries working at cross-purposes.

SOPA is also measured. It appropriately provides much broader tools and flexibility to the Attorney General than it provides to copyright owners. This is a sound policy choice at this time. The Department of Justice has experience fighting online infringers, will use resources carefully, must exercise prosecutorial discretion in bringing actions, and must plead its case to the court and obtain a court-issued order before proceeding. Put another way, while the copyright industries are extremely important (and certainly a point of pride with respect to the U.S. economy), SOPA recognizes that many sectors rely on, invest in, and contribute to the success of the Internet.

It is for this reason that SOPA puts only limited tools in the hands of copyright owners, and provides the Attorney General with the sole authority to seek orders against search engines and Internet service providers. This is not to say that we should not continue to assess Internet piracy and the impact of SOPA or whether additional measures or adjustments may be needed. Indeed, SOPA assigns ongoing studies to the Copyright Office and the Intellectual Property Enforcement Coordinator for these very purposes. But I do think SOPA provides the right calibration at this time.

As with any legislation, SOPA deserves and can only benefit from a robust discussion. As the Committee works to further improve and refine the bill, I know it will fully consider a variety of perspectives and suggestions, including from my fellow

witnesses. This said, I believe that Congress has a responsibility to protect the exclusive rights of copyright owners, and I urge the Committee to move forward with this in mind.

I have provided below my analysis of some of the major sections of the bill.

Attorney General: Section 102

SOPA provides 21st century tools to the Department of Justice with respect to foreign infringing websites. It allows the Attorney General to stop the participation of service providers, search engines, payment processors, and advertising networks with respect to the infringers, by obtaining court orders that are not readily available under current law. In my view, such tools are essential to stopping the economic devastation caused by rogue websites. Through SOPA, the Attorney General may also request court approval to serve orders that would require search engines to disable direct hyperlinks and service providers to block access to infringing websites, both of which could substantially reduce the number of Internet users visiting the websites, minimizing harm to the legitimate copyright owners. This does not mean that those who actively seek or wish to purchase infringing content will not be able to obtain it if they try hard enough, but SOPA would properly redirect those who erroneously believe they are purchasing copies or streams from legitimate sites.

I understand that some would prefer to limit SOPA to provisions that would allow the Attorney General to “follow the money,” that is, those provisions that would starve rogue sites by severing relationships with advertising networks and payment processors. I agree that this approach is an important part of the strategy. At the same time, I note that it has some limitations in the context of the foreign infringing sites at issue in this section of the bill. Starving websites by denying them access to American commerce does not allow the Attorney General to obtain immediate relief, even when the evidence is overwhelming and the damage is imminent – such as situations involving live sporting events or sales of pre-release films. Nor will it be effective against willful infringers who cause immense damage by allowing users to download and stream copyrighted works for free.

My own view is that there will be times when blocking access to websites may be the only quick and effective course of action and that providing this tool to the Attorney General is therefore a critical part of the equation. Likewise, I believe that search engines should be fully within the reach of the Attorney General and should be ordered in appropriate circumstances to dismantle direct hyperlinks that send unwitting consumers to rogue websites. As I explained in my previous testimony, this does not mean that blocking should be conducted in a manner that would jeopardize the operation of the Internet.² However, in working to perfect these particular aspects of SOPA, I would encourage Congress to continue to consult experts who can objectively evaluate any

² *Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites, Part I Before the Subcomm. on Intellectual Property, Competition, and the Internet*, 112th Cong. (2011) (statement of Maria A. Pallante, Acting Register of Copyrights), available at <http://judiciary.house.gov/hearings/pdf/Pallante03142011.pdf>.

technical concerns and who appreciate the goal of providing law enforcement with sufficiently flexible tools.

By way of illustration, these kinds of “irreversible” infringements have been the focus of the “Operation In Our Sites” initiative by which U.S. Immigration and Customs Enforcement (ICE) has seized domestically registered domain names using existing seizure and civil forfeiture laws, thereby rendering the infringing sites temporarily dysfunctional. Since launching the operation in June 2010, ICE has seized 200 domain names and redirected users to a banner³ stating that the domain names were seized and that willful copyright infringement and intentionally and knowingly trafficking in counterfeit goods are criminal offenses. Eighty-six of the 200 domain names have been forfeited to the U.S. government thus far.⁴

Seizure and civil forfeiture laws have been effective for criminal infringements because they allow ICE to pursue the source of infringing activity. Specifically, 18 U.S.C. § 981 allows the Attorney General to seize certain property subject to forfeiture in the United States. Section 2323 of Title 18 allows forfeiture of, among other things, articles prohibited by 17 U.S.C. § 506 (criminal copyright infringement), 18 U.S.C. § 2319 (criminal copyright infringement for violations of 17 U.S.C. § 506(a)), 18 U.S.C. § 2319A (unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), and 18 U.S.C. § 2319(B) (unauthorized recording of motion pictures in a motion picture exhibition facility). Section 2323 also authorizes forfeiture of property used to commit or facilitate such infringements.

SOPA incorporates these standards by reference: the definition of a “foreign infringing site” for purposes of the Attorney General action includes the requirement that the site would “be subject to seizure in the United States in an action brought by the Attorney General if such site were a domestic Internet site.” The legislation essentially protects American consumers from the actions of bad actors who have a direct impact on American copyright businesses and consumers, but who are located outside the borders of the United States.

Some have stressed, and I agree, that due process is important in the context of legislating a solution to rogue websites. Due process is a bedrock foundation of our nation’s legal system, even for those who violate the law. Any remedy that impedes or obstructs access to a website must be consistent with this core American principle. The affected parties should receive notice as well as an opportunity to be heard.

SOPA includes general principles of due process by incorporating Federal Rule of Civil Procedure 65. Rule 65 provides that an adverse party is entitled to notice and an opportunity to be heard before issuance of a temporary restraining order unless “(A) specific facts in an affidavit or a verified complaint clearly show that immediate and

³ See ICE announces results of ‘Operation Strike Out’ - Protects consumers from counterfeit sports paraphernalia on the Internet and on the streets, Oct. 31, 2011, *available at* <http://www.ice.gov/news/releases/1110/111031washingtondc.htm>.

⁴ *Id.*

irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.” Thus, the rule limits *ex parte* orders to extraordinary circumstances.

Stopping infringement at the borders is not a new concept of American copyright law. Customs and Border Protection (CBP) has long had the authority to prevent infringing physical goods from entering U.S. commerce, even without advance notice or a hearing under certain circumstances.⁵ International standards are also instructive. The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement provides that governments should have the ability to seize infringing hard goods at the border based on evidence provided by the right holder.⁶ An importer must receive notice of the seizure (or suspension as it is referred to in international law), but not before the suspension takes place.⁷

It also bears repeating that injunctions are not at odds with the First Amendment. As noted First Amendment scholar Floyd Abrams has observed, they are “a longstanding, constitutionally sanctioned way to remedy and prevent copyright violations.”⁸ In fact, “no court has ever denied [] [that] injunctions are a valuable and constitutional response to copyright violations.”⁹ At the same time, Mr. Abrams has noted that a “zero tolerance” policy – “where an entire website could be blocked or seized for a single, or just a few, offenses – would plainly raise the most troublesome First Amendment concerns.”¹⁰ I share the same concerns about a “zero tolerance” approach, but that is not SOPA.

Marketplace Notification and Injunctive Relief: Section 103

Section 103 of SOPA would allow copyright owners who have suffered harm to seek relief against foreign and domestic infringing websites, serving as a complement to the authority of the Attorney General. Unlike the Attorney General, however, copyright owners would not be able to block domain names or websites or otherwise affect the underpinnings of the Internet. Nor does SOPA permit monetary relief for copyright owners. By targeting sites dedicated to infringement and permitting injunctive relief only, it limits the incentive for copyright owners to overreach.

⁵ See 19 U.S.C. § 1595A; 19 C.F.R. §§ 133.42, 133.43.

⁶ See TRIPS Art. 51.

⁷ See *id.* Art. 54.

⁸ *Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites, Part II Before the Subcomm. on Intellectual Property, Competition, and the Internet*, 112th Cong. (2011) (statement of Floyd Abrams).

⁹ *Id.* (emphasis in original); see also *N. Y. Times v. United States*, 403 U.S. 713, 731 n. 1 (1971) (White, J. concurring) (“no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another.”).

¹⁰ Floyd Abrams Statement, *supra* n. 8.

Under this section, SOPA defines an infringing website as one: (1) that “is primarily designed or operated for the purpose of, has only limited purpose or use other than, or is marketed by its operator or another acting in concert with that operator for use in, offering goods or services in a manner that engages in, enables, or facilitates” a violation of 17 U.S.C. §§ 501, 1201 or certain trademark law provisions; (2) where the operator “is taking, or has taken, deliberate actions to avoid confirming a high probability of the use of the [site] to carry out acts that constitute [infringement];” or (3) where the site is operated “with the object of promoting, or has promoted, its use to carry out [infringement] as shown by clear expression or other affirmative steps to foster infringement.”

I would like to underscore that subsection 103(a)(1)(B)(ii)(I) in the definition described above sets forth a willful blindness standard. This is important because it would encompass situations where an infringer takes deliberate action to avoid knowledge of the infringement, in cases where there is a high probability of infringement.¹¹ At the same time, it provides a blueprint for companies that build their businesses in good faith, by confirming that those who respect copyrighted content will not be put at a competitive disadvantage for doing so.

As a procedural matter, SOPA permits copyright owners to bring *in personam* actions against the registrant of a domain name or the operator of a rogue website, or, in certain circumstances, an *in rem* action against that website or the domain name used by such site, and to serve copies of those orders on payment processors and advertising networks. They may only do so, however, if they first send notices to the payment processors and advertising networks pursuant to the notification system SOPA creates. The notices must identify the infringing Internet site and describe the specific facts supporting the claim that the site is infringing as well as the irreparable injury, loss, or damage that would result if timely action were not taken. A site owner or operator can immediately challenge this notification by serving a counter notification stating that the site is not in fact an infringing site. Upon receipt of an effective counter notification, an advertising network or payment processor need not take any further action unless and until it has been served with a court order.¹²

SOPA’s notification process is innovative in spirit. It empowers copyright owners, but potentially limits the need for litigation by providing a mechanism for them to work directly with payment processors and advertising networks. It also provides incentives for the latter to cooperate voluntarily when notified that they are dealing with a site dedicated to infringement, rather than being compelled to do so by court order.

¹¹ See *Global-Tech Appliances v. SEB S.A.*, 131 S.Ct. 2060 (2011) (setting forth willful blindness standard as meeting the knowledge requirement for inducing infringement of a patent case, a doctrine closely related to inducing infringement of a copyright).

¹² SOPA requires advertising networks or payment processors to take action within five days of receiving an initial notice, but it does not require them to wait the full five days and thus there is no set time frame during which a payment processor or advertising network must wait to see if a counter notification is filed.

Whether the notification process will ultimately be effective may in large part depend on the volume of notices received and whether payment processors and advertising networks will feel compelled to process and respond to them in the absence of a court order. If it appears likely that some may respond while others may not, I would encourage Congress to consider further refinements. Congress will want to ensure that those who are less conscientious do not emerge with a marketplace advantage over those who choose to work with copyright owners in good faith, and it will want to ensure that the businesses of the websites are not unduly affected. The goal is to achieve the participation of payment processors and advertising networks in shutting down infringers while also ensuring general due process protections for all involved.

As introduced, SOPA provides a good start in this regard. For example, the copyright owner must include a statement that the notification is made in good faith, is accurate, and the signatory to the notification is authorized to act on behalf of the holder of the intellectual property right. Indeed, copyright owners are often in a good position to ascertain useful and reasonably detailed information about infringing websites and it is my view that they should share as much information as reasonably possible with the intermediaries whose help is sought. SOPA also provides significant penalties for misrepresentations contained in a notification, including damages, costs, and attorneys fees. As stated above, SOPA also provides for a counter notification, and at this stage of the process does not create consequences if the intermediary fails to act.

Once the copyright owner commences an action with the court, Rule 65 of the Federal Rules of Civil Procedure applies. As noted above, that Rule generally requires notice and an opportunity to be heard, unless the movant satisfies the stringent requirements for an *ex parte* order. In addition, the plaintiff cannot serve copies of the orders on payment processors or advertising networks without court approval. Again the consequences are limited, even at this stage of the process. If the intermediary fails to sever ties with the website, there is no infringement liability, only an order from the court to comply and possible penalties if they refuse and are held in contempt.

Nor, contrary to the assertions of some critics of SOPA, does this notification affect the safe harbors that Internet service providers enjoy under the Digital Millennium Copyright Act (DMCA). Section 512 of Title 17 provides safe harbors from liability for damages and limits the scope of injunctive relief for service providers who comply with its requirements. Nothing in SOPA subjects service providers to liability for their acts or their failures to act. No monetary relief may be obtained against a service provider pursuant to SOPA, apart perhaps for sanctions for contempt of court if a service provider does not comply with a court order. The injunctive relief permitted by SOPA is within the scope of the limitations in section 512(j), which provides, in the case of “transitory digital network communications,” that a service provider may be restrained “from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States” (compare to Section 102(c)(2)(A)(i) of SOPA), and that an Internet search engine may be subject to such injunctive “relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location,

if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.” (Compare to Section 102(c)(2)(B) of SOPA.)

Streaming

Mr. Chairman, I would also like to say how pleased I am that SOPA would harmonize the options available to prosecutors in cases of willful, criminal infringement, as between the exclusive rights of reproduction, distribution, and public performance. As I have previously testified, the right of public performance is of growing importance in the marketplace, because the streaming of copyrighted works is an increasingly important means by which copyright owners provide access.

Unfortunately, prosecutors are placed at a disadvantage and have a disincentive to pursue cases of willful, criminal streaming because (unlike instances of willful reproduction or distribution) the maximum possible penalty is a misdemeanor. This lack of parity neither reflects nor serves the marketplace. Video streaming traffic is among the fastest growing areas of the Internet and now accounts for more than one quarter of all Internet traffic. Consumers now have numerous ways to enjoy streamed content legally through legitimate video streaming websites like Hulu or Netflix, user generated content sites like YouTube, and streaming music services. Streamed content, including sports programming, is also often provided legally by content owners through their own websites and Internet portals such as ABC.com and HBO GO. And today users can even stream content through applications on their smart phones or their video game consoles. Indeed, in a very real sense, the innovative technology companies that contract with creators in good faith and pay licensing fees as a cost of doing business are as victimized by piracy as those who create the content in the first instance.

I am particularly pleased that SOPA would update the provisions that govern pre-release scenarios (scenarios where infringers offer a television program, sporting event, movie, or other copyrighted work prior to the date of public release, causing especially egregious harm). SOPA recognizes that streaming is a major means of pre-release infringement and provides prosecutors with a clear basis to take action.

While it should be clear from my statements here that the streaming provisions of SOPA are based on longstanding legal principles, I would like to address some of the concerns and misunderstandings these proposals have generated. First, not all streaming is at issue. The provisions at issue are criminal provisions. They are not applicable to innocent activity or activity that might legitimately be categorized as fair use. Criminal copyright infringement requires a finding that the offender acted “willfully,” which courts generally interpret as meaning a “voluntary intentional violation of a known legal duty.”¹³ SOPA does not alter that standard. Similarly, it would not negate the innocent infringement doctrine in civil actions nor subject a party to any liability that it does not already have with respect to reproducing or distributing a copyrighted work. I believe

¹³ See 4 Melville B. Nimmer and David Nimmer, Nimmer on Copyright 4 § 15.01[A][2] (Matthew Bender, Rev. Ed.) (“[T]he better view construes the ‘willfulness’ required for criminal copyright infringement as a ‘voluntary, intentional violation of a known legal duty.’”).

this is clear in SOPA, but if necessary, the distinction between criminal and innocent infringement could be clarified.

Copyright Office

Finally, I note that SOPA would bestow a number of important responsibilities on the Copyright Office, including a study of the legislation once implemented and an ongoing obligation to work with the Secretary of State and Secretary of Commerce to ensure that the protection in foreign countries of U.S. persons’ intellectual property rights is a significant component of U.S. foreign and commercial policy. We will of course be very pleased to undertake these responsibilities and more, so that creators and intermediaries alike can flourish in the online environment.

Thank you Mr. Chairman.