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by MELIS ATALAY*

"The Internet [is] the 'first thing that humanity has built that humanity doesn't understand, the largest experiment in anarchy that we have ever had.'"

– Erick Schmidt[1]

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I. Introduction

Exactly how far the regulation of digital technologies should extend in order to protect copyrights has been a point of contention since the Internet's inception.[2] Because the most recent legislative attempts to curb copyright infringement on the Internet have largely failed, Congress has yet to find an appropriate and balanced means to safeguard copyrighted material on the Internet.[3]

The Stop Online Piracy Act ("SOPA") and the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act ("PIPA") are two of the most recent bills that have failed to strike the appropriate balance needed to further copyright goals in light of internet usage under the framework presented in Section I of this note.[4] While proponents of SOPA/PIPA argued that the bills were needed as a broad limit of peer-to-peer ("P2P") content sharing mechanisms in order to prevent online piracy and to protect U.S. jobs in content-related industries, opponents ultimately prevailed with arguments that SOPA/PIPA constricted speech, innovation, and the integrity of speech to an unreasonable degree in a way that was inconsistent with Congress's aims of copyright law rendering it unconstitutional.[5]

The Online Protection and Enforcement of Digital Trade Act ("OPEN") was another attempt at combating copyright infringement

1. Net Founders Face Java Future, CNET (Apr. 2, 1997), http://news.cnet.com/Netfound ers-face-Java-future/2100-1001_3-278526.html.

2. See generally Bill Herman, A Political History of DRM and Related Copyright Debates, 1987-2012, 14 YALE J.L. & TECH. 162, 215 (2012); Mark McCarthy, What Payment Intermediaries are Doing About Online Liability and Why it Matters, 25 BERKELEY TECH. L.J. 1037 (2010) (discussing what the proper amount liability is appropriate for online payment service providers); Todd G. Hartman, The Marketplace vs. the Ideas: The First Amendment Challenges to Internet Commerce, 12 HARV. J. LAW & TECH 419 (1999); Craig McTaggart, A Layered Approach to Internet Legal Analysis, 48 MCGILL L.J. 571 (2003).

3. Alan Fram, *SOPA and PIPA Bills: Online Companies Win Piracy Fight*, HUFFINGTON POST, Jan. 21, 2012, http://www.huffingtonpost.com/2012/01/21/sopa-and-pipa-bills-anti-piracy-legislation_n_1220817.html.

4. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2011).

5. Annemarie Bridy, Copyright Policymaking as Procedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA, and PIPA, 30 CARDOZO ARTS & ENT. L.J., 153, 154 (2012); Jeffrey Lindenbaum & David Ewen, Catch Me if You Can: An Analysis of New Enforcement Measures and Proposed Legislation to Combat the Sale of Counterfeit Products on the Internet, 32 PACE L. REV. 567, 630, (2012).

on the Internet that was met with much less resistance.[6] It was introduced very shortly after SOPA/PIPA failed.[7] Though OPEN also attempted to provide copyright owners more protection on the Internet, it learned from the mistakes of SOPA/PIPA and was much more limited in scope.[8] The drafters of OPEN envisioned a federal commission to investigate claims of infringement from content owners and pursued a scheme in which money was cut off to copyright infringers.[9] OPEN focused solely upon international rogue websites that allowed users to illegally access and download copyrighted material, and avoided the regulation of domestic activity.[10] The drafters of OPEN, though, failed to gain much traction after the forceful debate of SOPA/PIPA subsided. OPEN was never scheduled for hearing and it died.[11]

Though all of these recent measures failed, the problem they attempted to address remains strong: because it is easy to infringe copyrights via online P2P file sharing and downloading, because those infringers remain anonymous, because they may download at virtually no cost, there results a vast volume of counterfeit activity that negatively impacts copyright owners and potentially deters the creation of music and movies.[12] The question still remains: what is the ideal scope and extent of a legislative measure to combat those anonymous and unknown copyright infringers without unduly compromising the legal rights or free access to the Internet?

This note seeks to critically evaluate the current trend of copyright legislation, and use the response for legislation to hypothesize what sort copyright legislation for the Internet may be successful in the future. The SOPA/PIPA legacy provides evidence for today's legislature that broad reforms will not work. Indeed the

6. The Online Protection and Enforcement of Digital Trade Act, H.R. 3782, 112th Cong. (2012); Hayley Tsukayama, Issa on the OPEN Act's Strengths and Weaknesses, WASHINGTON POST BLOG (Dec. 14 2011), http://www.washingtonpost.com/blogs/post-tech/post/issa-on-the-open-acts-strengths-and-weaknesses/2011/12/13/gIQAaXJCuO_blog.html.

7. Grant Gross, *Issa Introduces SOPA Alternative in the House*, MACWORLD (Jan. 18, 2012), http://www.computerworld.com/s/article/9223541/Issa_introduces_SOPA_alternative_in_the_House.

8. Aaron Sekhri, *Rep. Issa discussed SOPA/PIPA*, STANFORD DAILY (Apr. 10 2012), http://www.stanforddaily.com/2012/04/10/sopa.

9. OPEN, *supra* note 6, § IV.

10. Id.

11. *Online Protection and Enforcement of Digital Trade Act*, GOVTRACK.US (Feb. 17, 2013), http://www.govtrack.us/congress/bills/112/hr3782.

12. Lindenbaum & Ewen, *supra* note 5, at 567.

reigning in seen in OPEN was a reflection of SOPA/PIPA progeny being responsive to public outcry over SOPA/PIPA. I conclude that OPEN would have been an appropriate balance of constriction and Internet availability. If passed, OPEN would have been a step in the right direction to combat the illegal access and the download of copyrighted works on the Internet. Therefore, should there be copyright reform in the near future, it will certainly resemble OPEN more than it will resemble SOPA/PIPA.

In Section I, I define the problem of P2P downloading and other copyright infringement that is made easier because of the Internet. In Section II, I describe the pitfalls of SOPA/PIPA, then explain why OPEN would have been more effective in espousing copyright law's goals. Finally, in Section III, I provide a brief explanation of why OPEN failed as well, and briefly summarize where copyright on the Internet is today.

II. Background

Copyright law is about attaining a proper balance that will promote an increase in the number of works that are created.[13] Shyamkrishna Balganesh calls copyright "an instrumentally driven entitlement," and therefore should be limited to purposing its end.[14] The balance has an implicit need to ensure the inducement of creators to produce original works by giving them a monopolistic intellectual property right in their works while minimizing the social costs that the inducement entails to keep information available to the public.[15]

Copyright infringement occurs any time a plaintiff can show a valid copyright in his/her material, and that the defendant has reproduced, performed, distributed, publically displayed, or made a derivative work of the material without consent of the owner.[16] Though copyrighted material viewed on the Internet should theoretically enjoy the same protection as the content accessible by any other medium, qualities of the Internet make traditional

13. *See* RAYMOND T. NIMMER, 1 INFORMATION LAW, § 2:18, (8th ed. 2006).

14. Shayamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1572 (2009); *see also* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEXAS L. REV. 1031 (2005).

15. Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 244 (2012).

16. Infringement of Copyright, 17 U.S.C. § 501.

copyright enforcement mechanisms very difficult to enforce.[17] Copyrighted material is often infringed because the Internet is a forum through which both copyrighted and uncopyrighted works may be found and copied quickly, anonymously, with virtually no cost, and without a loss of quality in reproduction.[18]

Indeed, content like music and movies is heavily downloaded via Internet channels: Nimmer reports that the MP3 is the "most popular digital audio compression algorithm in use on the Internet, used predominantly for trafficking in illicit audio recordings."[19] Similar studies show that there are about ten million users of P2P technology at any given time.[20] Another study reports that forty billion music files were shared illegally in 2008, which amounted to ninety-five percent of all music downloads worldwide, and that three-quarters of the video games released in late 2010 and early 2011 were shared illegally.[21]

Such rampant infringement of copyright is a disincentive for authors to create, as they are robbed of the ability to control access to their work. This correspondingly limits their ability to reap the monetary reward of their creation.[22] Therefore, there needs to be a solution that restores balance. A proper piece of copyright legislation that protects copyrighted material on the Internet must simultaneously balance the need to efficiently forestall illegal downloads and preserve users' rights to access the Internet freely, especially public domain materials. This is obviously a tall order and the reason why it has been so difficult to find an appropriate solution.[23]

Because there are overwhelming reasons proving why directly suing directly P2P users or other individual Internet users is

17. Eric Schlachter, The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet, 12 BERKELEY TECH. L.J. 15, 19–20 (1997).

18. Id.

19. 3-12 Raymond Nimmer, Nimmer on Copyrights, § 12B.05 (2012).

20. John Boudreau, *Illegal File Sharing Showing No Letup,* SEATTLE TIMES, July 3, 2006, http://seattletimes.com/html/businesstechnology/2003101281_btfilesharing03.html (cited by Ben Depoorter, Sven Vanneste, & Heil Van, *Copyright Backlash*, 84 S. CAL. LAW REV. 1251, 1253 (2011)).

21. *Going After the Pirates*, N.Y. TIMES, Nov. 26 2011, http://www.nytimes.com/2011/11/27/opinion/sunday/going-after-the-pirates.html.

22. See Dotan Oliar, The Copyright-Innovation Tradeoff: Property Rules, Liability Rules, and Intentional Infliction of Harm, 64 STAN. L. REV. 951, 953 (2011).

23. Id.

inadequate, the law has taken a different direction.[24] Copyright owners in most situations prefer holding Internet Service Providers ("ISP") accountable because they are much easier to find than the anonymous internet user and because they have "deep pockets."[25] ISPs are entities that provide their subscribers "connections for digital online communications . . . of material of the user's choosing", and work to provide search facilities of both "in-house and third-party produced content."[26] They therefore may in fact house links to illegally downloadable copyrighted material, even though they are not aware of doing so.[27]

Before the Digital Millennium Copyright Act ("DMCA"), an ISP could have been potentially liable for copyright infringement, under *Playboy Enterprises, Inc., v. Frena,* by providing "bulletin board" access to infringing works.[28] The DMCA was enacted to limit this sort of contributory liability by providing safe harbor provisions for internet operators.[29] Section 512 of the DMCA provides four safe harbors for ISPs that (1) provide transitory digital network communications, (2) "cache" content, (3) store content at the direction of a user, and (4) provide information location tools (provided the ISPs meet certain notice and take-down requirements).[30] For the relevant safe harbor provision for P2P intermediaries to apply, the intermediary must satisfy three conditions: (1) lack of knowledge of the infringing activity, (2) lack of compensation, and (3) disable access when given the opportunity to do so.[31] The DMCA safe harbor provisions have largely stopped suits against ISPs, though what follows makes it clear that content providers were still not willing to give up on pursuing website operators.

24. *See generally*, Ben Depoorter, Alain Van Hiel & Sven Vanneste, *Copyright Backlash*, 84 S. CAL L. REV. 1251 (2011) (proving that the deterrence-based approach of suing directly individual users is ineffective and may in fact be counterproductive).

25. Greg Teran, *ISP Liability for Copyright Infringement,* http://cyber.law.harvard.edu/ property99/liability/main.html (last updated Feb. 11, 1999).

26. Limitations on Liability Relating to Material Online, 17 U.S.C. § 512(k)(1)(A); Lillian Edwards & Charlotte Waelde, *Online Intermediaries and Liability for Copyright Infringement*, AHRC Centre for Studies into Intellectual Property and Technology Law, School of Law, University of Edinburgh, 6 (2011), *available at* http://hdl.handle.net/1842/2305.

27. *Id*. at 14.

28. 839 F. Supp. 1552 (M.D. Fla. 1993).

29. The DMCA, H.R. 2281, 105th Cong. § 512 (1998).

30. NIMMER, *supra* note 19, § 12B.02-05, (citing DMCA § 512).

31. Id. (citing Commerce Rep., DMCA).

The landmark case that precipitated the landslide of intermediary liability lawsuits was *A&M Records, Inc. v. Napster, Inc.*[32] Napster offered registered users the ability to share the MP3 files on their computer with other Napster-registered users when they were logged into Napster's website; the specific content remained stored on the user's computer and was not uploaded onto the website.[33] The court held that Napster had been contributorily negligent as the site did not have significant noninfringing uses (eighty-seven percent of music shared had copyright protection) and Napster had specific knowledge of infringing uses. The circuit court, however, declined to pronounce a blanket rule that contributory infringement status necessarily renders a party ineligible for 512 DMCA safe harbor provisions.[34]

Since *Napster*, other websites have decentralized the structure of their P2P networks, in order to avoid liability as intermediaries. BitTorrent is now a very popular approach that is not technically P2P, but allows similar action.[35] BitTorrent sites allow users to find other users who are sharing content, and users can download from those identified users, in part or in whole.[36] BitTorrent sites are still responsible for hosting links to copyrighted material, albeit through more complex network configurations.[37] The evolution of P2P proves that as liability increases for websites hosting links to access download mechanisms, the shape, form, and exact mechanics of intermediaries change as they try to escape liability. Today there is an ever-increasing number of different sorts of configurations.

Yet another challenge posed by the Internet is its international nature. It is very difficult for American plaintiffs to bring international site operators to American courts.[38] Therefore, many "rogue websites" have sprung up to avoid domestic takedown measures.[39] One famous example of a rogue website is Pirate Bay of

32. 114 F. Supp. 2d 896 (N.D. Cal. 2000).

33. *Id*. at 905.

34. NIMMER, *supra* note 19, (citing *Napster,* 114 F. Supp. at 902-03, 918).

35. 2-13 Lester Horowitz & Ethan Horowitz, Intellectual Property Counseling and Litigation, § 13.10 (2013).

36. Id.

37. Sean B. Karunarante, The Case Against Combating BitTorrent Piracy Through Mass John Doe Copyright Infringement Suits, 111 MICH. L. REV. 283, 290 (2012).

38. Todd Ryan Hambidge, Containing Online Copyright Infringement: Use of Digital Millennium Copyright Act's Foreign Site Provision to Block U.S. Access to Infringing Foreign Websites, 60 VAND. L. REV. 905, 909 (2007).

39. Mark Elliott, *Rogue Web Sites*, N.Y. TIMES, Nov. 18, 2011, http://www.nytimes.com/ 2011/11/19/opinion/rogue-web-sites.html?_r=0

Sweden.[40] Critics of DMCA point to the uncertainty of foreign sites hosting P2P downloading services to meet the DMCA Foreign Site Provision's "specific, identified, online location outside the United States" requirement, as many of the peer users may in fact operate from within America.[41] A 2012 Forbes story reports that "just about 25% of all web traffic violates intellectual property laws [including copyright laws], and roughly 53 billion page visits per year flow through rogue websites."[42]

Though the U.S. legislature has recognized the need to regulate websites' illegal practice of including P2P downloading, they have failed to find that legislation's proper scope.[43] But what form should that legislation take?

Preliminarily, any piece of legislation that attempts to place restrictions on the Internet must take into account the First Amendment's free speech guarantees.[44] Laws that restrict the free use of the Internet implicate Free Speech constitutional concerns because the Internet is a forum for communication.[45] Therefore, only exceptional instances (like hate speech and child pornography) spur the necessity for the government to regulate free speech on the Internet, and generally in the absence of such necessities, the Internet should remain an unfettered forum to facilitate free speech.[46]

Professor Pamela Samuelson takes the following two-fold approach in considering whether copyright reforms are sound, which I have applied to the present problem: first, how much societal harm is actually caused by the problem of P2P downloading capabilities;

40. Attorney General Jim Hood, *Congress Needs to Pass Rogue Sites Bill to Protect the Internet*, THE HILL (Nov. 9 2011), http://thehill.com/blogs/congress-blog/technology/192605-congress-needs-to-pass-rogue-sites-bill-to-protect-the-internet.

41. Hambidge, *supra* note 38 (citing DMCA § 512(j)(1)(B)(ii)).

42. Doug Schoen, *Continuing the Fight Against Rogue Websites Post-SOPA*, FORBES (Mar. 26, 2012), http://www.forbes.com/sites/dougschoen/2012/03/26/continuing-the-fight-against-rogue-websites-post-sopa/2/.

43. Id.

44. Erwin Chemerinksy, Constitutional Law: Principles and Policies, 1163 (Wolters Kluwer Ed., 4th ed. 2011).

45. William Fisher, *Freedom of Expression on the Internet*, BERKMAN CENTER FOR INTERNET AND SOCIETY (June 14, 2001), http://cyber.law.harvard.edu/ilaw/Speech/; *see also,* Matthew C. Nisbet, *AU Students Debate the Internet's Impact on Society, Part B,* BIG THINK (Nov. 27, 2007), http://bigthink.com/age-of-engagement/au-students-debate-the-internets-impact-on-society-part-b, (quoting Bill Gates) ("The Internet is becoming the town square for the global village of tomorrow," which further endorses the view that the Internet should be seen as a public forum that enjoys free speech protections).

46. See generally John F. McGuire, When Speech is Heard Around the World: Internet Content Regulation in the United States and Germany, 74 N.Y.U. L. REV. 750, 791 (1999).

and second, insofar as the harm exists, are there more modest ways available to address the problem?[47] This reflects the balanced approach that copyright often entails.[48] Any legislation therefore must be proportional to the actual harm it seeks to address by not excessively restricting speech and not excessively opening internet access. So, how do SOPA, PIPA, and OPEN fair given this framework?

III. Analysis: Examining the Respective Scopes of SOPA, PIPA, and OPEN

A. SOPA and PIPA

1. Problematic Features of SOPA/PIPA

In 2011, the House introduced SOPA, and the Senate introduced PIPA.[49] Under Pamela Samuelson framework's first prong,[50] SOPA and PIPA were introduced in an effort to combat a substantial and unsolved legitimate problem: rampant online copyright infringement, especially by foreign websites.[51] However, the two bills clearly fell outside of the framework of Pamela Samuelson's recommended second prong because the procedures introduced were by no means the least restrictive and would have had broadly felt restrictive repercussions for all internet users. In general, those Acts would have allowed copyright owners to directly force payment providers, operators of a non-authoritative domain name system server, and advertising networks to cut off business with an accused infringing site, thus prompting a "black out" chilling effect.[52] Accused websites could have been shut down with no ruling on whether or not their material was actually infringing or not.[53] SOPA/PIPA failed in part because: the definitions were overly vague and broad; had insufficient

47. Pamela Samuelson, *Is Copyright Reform Possible?,* 126 HARV. L. REV. 740, 759–760 (2013).

48. Dotan Oliar, The Copyright-Innovation Tradeoff: Property Rules, Liability Rules, and Intentional Infliction of Harm, 64 STAN. L. REV. 951, 953 (2011).

49. SOPA, PIPA, *supra* note 4.

50. Samuelson, *supra* note 47.

51. Julianne Pepitone, *SOPA Explained: What It Is and Why It Matters*, CNN MONEY (Jan. 20, 2012), http://money.cnn.com/2012/01/17/technology/sopa_explained/index.htm.

52. David Kravets, *A SOPA/PIPA Blackout Explainer*, WIRED (Jan. 18, 2012), http://www.wired.com/threatlevel/2012/01/websites-dark-in-revolt/.

53. Eric Goldman, *The OPEN Act: Significantly Flawed, But More Salvageable Than SOPA/Protect-IP*, ARS TECHNICA (Dec., 11, 2011), http://arstechnica.com/tech-policy/2011/12/ the-open-act-significantly-flawed-but-more-salvageable-than-sopaprotect-ip/.

notice provisions; and unjustly compelled monitoring responsibilities. Those issues, coupled with a massive and heated media-covered debate, helped ensure the eventual defeat in January 2012.

a. Unconstitutionally Vague

A law must not be vague in order to comport with the Constitution's Due Process Provision.[54] Professor Gillian K. Hadfield provides a useful definition: "when a law is vague, there is uncertainty about who and what will come within the law's proscription."[55] A law must avoid being vague in order for "individuals to know the bounds of legal activity and [for them to be able to] adjust their behavior to these bounds."[56]

The text of SOPA and PIPA was unconstitutionally vague. The definition portion of PIPA demarcates that an internet site "dedicated to infringing activities" (i.e., a site that is liable under PIPA) is one that "has no significant use other than engaging in, enabling, or facilitating [infringement of copyrighted works] or, is designed, operated or marketed by its operators . . . primarily as a means for [infringing copyrighted works]."[57] The definition does not make clear how to determine what a "significant use" is, nor how to determine when a site has as its primary use infringing copyrighted works. The problem with the vagueness here is that Internet operators would not know whether they are liable under PIPA. The vagueness was even more dangerous for those sites that perhaps feature a single means to access and read copyrighted material, yet host a myriad of other and noninfringing uses.

PIPA also requires financial transaction providers to take "reasonable measures, as expeditiously as reasonable . . . to prevent, prohibit or suspend its service from completing payment transactions" with infringing sites.[58] What is meant by "reasonable measures," and what is "as expeditiously as possible?" Without more concrete answers to these questions, these portions of PIPA are unconstitutionally vague.

54. *See generall,* Musser v. Utah, 333 U.S. 95, 97 (1948).

55. Gillian K. Hadfield, Void for Vagueness: Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law, 82 CALIF. L. REV. 541 (1994).

56. *Id*. at 543.

57. PIPA, *supra* note 4, § 2(7)(A–B).

58. *Id*. at § 3(d)(2)(b).

b. Unconstitutionally Broad

The Internet should be regulated in a way that comports with the First Amendment.[59] A law that constrains free speech must not be overbroad to comport with the First Amendment.[60] Determining whether a law is overbroad involves a determination of whether its "illegitimate applications are too numerous 'judged in relation to the statue's plainly legitimate sweep and no constitutionally narrowing construction suggests itself."[61] Therefore, a law that regulates free speech or a free speech forum will be unconstitutional via the over-breadth doctrine if it regulates more speech than it has to.[62]

The SOPA and PIPA bills are overly broad. Under SOPA, once a person brings an order with an allegation that a certain site is "infringing," the Attorney General may issue an order for a service provider, to prevent access to the site.[63] The bill merely mentions infringing use, but does not delineate what amount of infringing use must be present before the site is deemed to be dedicated to that infringing use.[64] Does a mere 0.01% of infringing use merit an entire takedown? The way the bill is currently written, there is no definite answer. If 0.01% of use is considered to be sufficient for a takedown, then this standard would undercut the First Amendment. This is again in contraposition to Supreme Court precedent, which requires that First Amendment free speech restrictions to be not overly inclusive.[65] A less restrictive means in this situation would be to simply take down the infringing portion of the site and leave the non-infringing speech intact.[66]

c. Lack of Notice Requirements.

The lack of notice requirements is also unconstitutional.[67] The Fifth and Fourteen Amendments ensure due process that requires some form of notice and some form of hearing before the government

59. CHEMERINKSY, *supra* note 44.

60. Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991).

61. *Id*. at 862, (quoting Osborne v. Ohio, 110 S. Ct. 1691, 1697 (1990)).

62. CHEMERINSKY, *supra* note 44, at 972.

63. SOPA, *supra* note 4, § 102(C)(2)(a).

64. *Id.* at § 102(A)(2).

65. PIPA, *supra* note 4.

66. Reno v. ACLU, 521 U.S. 844, 882 (1997), (cited by *Law Professors' Letter on SOPA*, 2, 3 (Nov. 15 2011), https://www.eff.org/document/law-professors-letter-sopa).

67. *See generally* CHEMERINKSY *supra* note 44, at 557.

takes a particular action that will deprive an individual of their property.[68]

Because SOPA/PIPA have the potential to deprive site owners of their websites and the content on those sites, there should be at the very least minimal notice requirements before the issuance of takedowns. Under the SOPA/PIPA regime, a court can issue a temporary restraining order, a preliminary injunction, or an injunction against the registrant of the site's domain name at the moment that the Attorney General commences an action.[69] From there, a credit card company, service provider, etc., would be directed by the court to halt its business with the accused site.[70] The only notice provision is an effort by the Attorney General to contact the "registrants (if any) of the domain name Internet site" via postal or electronic mail.[71] It is likely unrealistic that there will be any notice given by the Attorney General, especially since it is often hard to track down overseas operators because of language problems and differing business practices in developing countries.[72]

Professor Lawrence H. Tribe explains that SOPA/PIPA's lack of notice requirements would have the effect of allowing "complaining [private] parties the power to stop online advertisers and credit card processors from doing business with a website, merely by filing a unilateral notice . . . even if not court has found any infringement."[73] He explains that this is in direct contraposition to the First Amendment's provisions prohibiting restraint of speech without court determination mandated by *Freedman v. Maryland.*[74]

Notice requirements and the First Amendment Free Speech Doctrine of Prior Restraint intersect.[75] Professor Tribe further describes these takedown measures that occur without notice as prior restraint issues.[76] Prior restraint is when there is a state issued order

68. See generally Daniel O. Conkle, Three Theories on Substantive Due Process, 85 N.C. L. REV. 63, 65 (2006).

69. SOPA, *supra* note 4, § 102(C)(3); PIPA *supra* note 4, § 3B.

70. SOPA, *supra* note 4, § 102(C)(2)(A–D).

71. *Id.* at § 102(B)(3)(A).

72. David H. Freedman, *A Higher-Tech Way to Find Overseas Supplier*, N.Y. TIMES (Feb. 28, 2012), http://boss.blogs.nytimes.com/2012/02/28/a-higher-tech-way-to-find-overseas-supp liers/.

73. Lawrence H. Tribe, *The "Stop Online Piracy Act" (SOPA) Violates the First Amendment*, 1, (2012), http://www.scribd.com/doc/75153093/Tribe-Legis-Memo-on-SOPA-12-6-11-1.

74. *Id.* (quoting Freedman v. Maryland, 380 U.S. 51, 58 (1965)).

75. *Infra* note 76.

76. Tribe, *supra* note 73, at 8.

that prevents speech from circulating.[77] The Supreme Court has continuously held that when there are government restrictions on future speech and those governmental proceedings entail no notice given regarding the proceedings, there is a prior restraint violation of the First Amendment.[78] The Supreme Court held that when there are free speech restrictions:

> [T]he order must be tailored as narrowly as possible to the exact needs of that case. The participation of both sides is necessary for this purpose. Certainly, the failure to invite participation of the party seeking to exercise First Amendment rights reduces the possibility of a narrowly drawn order, and substantially imperils the protection which the Amendment seeks to assure.[79]

Certainly the issues of prior restraint are present in SOPA/PIPA protocol. The Attorney General is provided the power to order ex parte injunctions to take down whole websites, without notice, and without providing website owners the opportunity to proffer countervailing evidence.[80] It is especially problematic considering the possibility that a website can feature simultaneously infringing and noninfringing material and that potentially non-infringing content can be taken down, thus making it more likely to false positives.

d. Monitoring Requirements Forced on Internet Service Providers and Other Practical Problems Posed by SOPA/PIPA.

Another major problem with SOPA/PIPA was the considerable monitoring responsibility imposed upon websites, online ISPs, internet advertising services, and financial transaction providers.[81] Under PIPA's text, for example, a service provider of an information location tool (like the search engine Google),[82] is required to take "measures, as expeditiously as possible, to – (i) remove or disable access to the Internet site associated with the domain name set

77. *See generally*, THOMAS I. EMERSON, *The Doctrine of Prior Restraint,* FACULTY SCHOLARSHIP SERIES, Paper 2804 (1955).

78. *See* Carroll v. President & Comm'rs of Princess Anne*,* 393 U.S. 175, 181 (1968); Marcus v. Search Warranty, 367 U.S. 717 (1961); Bantam Books v. Sullivan, 372 U.S. 58 (1963).

79. Carroll*,* 393 U.S. at 184.

80. CHEMERINKSY, *supra* note 44.

81. PIPA, *supra* note 4, § 3.

82. *Protect-IP Act*, http://en.wikipedia.org/wiki/PROTECT_IP_Act#cite_ref-18 (last visited Jan. 12, 2013).

forth . . . or (ii) not serve a hypertext links to such Internet site" once being serviced with a copy of a court order.[83] There are similar requirements set up for operators of websites, Internet advertising services and financial transaction providers.[84] This is a huge burden.[85] The large requirements, coupled with the vague qualities of SOPA/PIPA, mean that perhaps more than necessary content will be monitored and blocked.[86] Therefore, sites with *any* user-generated content (including sites like YouTube and Facebook with both domestic and foreign users)[87] that could potentially be infringing would have to continuously monitor their own sites, which would impose costs on these companies.[88] The entities that would have been forced to comply with these requirements would likely have been dis-incentivized to work with any foreign or new website.[89]

Professor Tribe explains other troubling "chilling effects": "[t]he threat of such a cutoff [of revenue from online advertising] would deter Internet companies from adopting innovative approaches to hosting and liking to third party content and from exploring new kinds of communication."[90] Because society currently looks to the Internet to form new and innovative ways for communication,[91] SOPA and PIPA would have produced a large-scale chilling effect on communications throughout.

Speaking before the Congress, SOPA/PIPA-critic DeFazio explained the potential ramifications: because user-content sites are going to have to police allegedly infringing sites, and because there is no provision that allows for a sort of supervisory board that could guide sites when or when not to censor, these sites might be left in the dark.[92] And because there are provisions in the bill that allow a site in good faith to censor something when in fact the suspicion is wrong

83. PIPA, *supra* note 4, § 3(D)(2)(D).

84. *Id*. § 3(D)(2)(A–C).

85. Trevor Timm, *How PIPA and SOPA Violate White House Principles Supporting Free Speech and Innovation*, EFF (Jan. 16, 2012), https://www.eff.org/deeplinks/2012/01/how-pipa-and-sopa-violate-white-house-principles-supporting-free-speech.

86. *Id.* (citing Marvin Ammori, *SOPA/PIPA Copyright Bills Also Target American Sites* (Dec. 31, 2011), http://ammori.org/2011/12/31/sopapipa-copyright-bills-also-target-domestic-sites/).

87. Id.

88. Id.

89. Tribe, *supra* note 73, at 2–3.

90. Id.

91. Matthew J. Wilson, *E-Elections: Time for Japan To Embrace Online Campaigning,* 2011 STAN. TECH. L. REV. 4, 1 (2011).

92. 158 CONG. REC. H33 (daily ed. Jan. 18, 2012) (statement of Rep. DeFazio).

and no censorship was in fact needed, there would be a problem of over-censorship, which DeFazio calls "the black screen of death" which could "crash the . . . entire productivity of the Internet."[93]

Limiting Domain Name Systems ("DNS") would also threaten the viability of an open and universal Internet on more technical grounds.[94] The forced takedown of websites via SOPA/PIPA protocol would additionally damage the DNS.[95] The DNS works by simultaneously providing users access to the same website by providing them with multiple and differing IP addresses.[96] Under the SOPA/PIPA protocol, websites engaged in alleged infringing activities are removed from the Internet's DNS,[97] so that through the interference with DNS the allegedly infringing sites will not be found in search engines.[98] One negative consequence of DNS blocking is that the SOPA/PIPA-induced takedowns will interfere with legitimate internet traffic: "DNS resolvers do not act in isolation [as they work with multiple IP addresses at once] . . . [and therefore] blocking orders will affect more than those targeted sites, and may impact users of domains who are committing no infringing behavior."[99] These issues may even have ramifications in national security, as national security and law enforcement often use DNS to combat crime conducted over the Internet.[100] Indeed, the issue of creating such "cybersecurity risks" by discouraging an unencumbered DNS system contributed to the White House's recent pronouncement on why SOPA/PIPA would not be beneficial to America.[101]

Additionally, SOPA and PIPA are extremely long, have numerous substantive proposals that are difficult to parse through,

93. Id.

94. *Professors' Letter*, *supra* note 66 at 4 (citing Crocker, et al., Security and Other Technical Concerns Raised by the DNS Filtering Requirements in the Protect IP Bill, 3 (2011), *available at* http://www.circleid.com/pdf/PROTECT-IP-Technical-Whitepaper-Final.pdf).

95. United States Public Policy Council of ACM, *An Analysis of PIPA's Impact on DNS and DNSSEC*, 2 (2011), http://usacm.acm.org/images/documents/DNSDNSSEC-Senate.pdf.

96. *Id*. at 1.

97. Guy W.C. Huber, *Unfriending the Internet,* 15. TUL. J. TECH & INTELL. PROP. 243, 246 (2011).

98. An Analysis, supra note 95.

99. *Id*. at 5.

100. *Id*. at 6.

101. Victoria Espinel, Aneesha Chopra, & Howard Schmidt, *Combating Online Piracy While Protecting an Open and Innovative Internet: Official White House Response*, (2012), https://petitions.whitehouse.gov/response/combating-online-piracy-while-protecting-open-and-innov ative-internet.

and create requirements for a number of different subject areas.[102] For example, SOPA covers not just foreign infringing sites, but additionally creates new requirements for related areas of: "trafficking in inherently dangerous goods or services," "protecting U.S. businesses from foreign and economic espionage," "denying U.S. capital to notorious foreign infringers," and "defending intellectual property rights abroad." The new appointments by the Secretary of State and the Secretary of Commerce on "intellectual property attaches . . . in each geographic region covered by a regional bureau of the Department of the State", which makes it seem like the drafters of SOPA just added every they could think of that had a tangential though negligible relationship.[103] PIPA has a similarly expansive text as it provides measures to at once prevent the importation of counterfeit products and infringing goods, as well as to stop the use of infringing rogue websites.[104] Likewise problematic is SOPA/PIPA's creation of requirements for the following numerous entities: the Attorney General,[105] courts,[106] operators of nonauthoritative DNS servers,[107] financial transaction providers,[108] internet advertising services,[109] service providers of an information location tool,[110] the United States Immigration and Customs Enforcement,[111] the Secretary of Commerce,[112] the Secretary of Homeland Security,[113] the Register of Copyrights,[114] the Comptroller General,[115] and so on. Obviously, the two bills proposed much too many requirements. In the words of Professor Susan Crawford, the bills drafters have "drastically overreached."[116] The vagueness in the text and definitions sections, coupled with the difficulty for each of

102. Goldman, supra note 53.
103. *SOPA*, *supra* note 4, § 103, § 202-205(b)(1).
104. PIPA, *supra* note 4, § 8; § 3.
105. Id. § 3.
106. *Id.* § 3(b)(2).
107. *Id.* § 3(d)(2)(A).
108. *Id.* § 3(d)(2)(B).
109. *Id.* § 3(d)(2)(C).
110. PIPA, *supra* note 4, § 3(d)(2)(D).
111. *Id.* § 7(A)(1).
112. *Id.* § 7(B)(1).
113. Id.
114. *Id.* § 7(B)(2).
115. *Id.* § 7(B)(4).
116. Susan Crawford, *A Compromise Makes Sense*, N.Y. TIMES (Jan. 18, 2012) http://www.nytimes.com/roomfordebate/2012/01/18/whats-the-best-way-to-protect-against-online-piracy/a-compromise-makes-sense.

the entities to parse through its specific roles, would likely diminish the ability of each group to follow the text and therefore comply with the bills. This is why SOPA/PIPA fail under Pamela Samuelson's model.[117]

2. Response

Because SOPA/PIPA had the potential to limit the freedom of the Internet, would block forums for discussion,[118] and would eviscerate notice safeguards for ISPs,[119] the bills met great opposition from ISPs and Internet users.[120] Opposition was framed in fervent terms; one prominent news agency called the battle "nothing less than a referendum on who controlled the evolution of digital life" with the Internet on one side, versus the music and motion picture industries on the other.[121] Though the Senate-led PIPA was first introduced and passed committee without any debate in May, 2011, Internet users took to the blogs like Reddit and Techdirt, then to Facebook and Twitter once the movement picked up steam, using the very forum they were trying to protect to get the message out there.[122] On January 18, 2012, there was a web-wide protest that included the shutdown of the English-language Wikipedia and Google sites where anyone using those sites would be redirected to a page detailing the opposition to the bill in an attempt to show that free knowledge and unfettered use of the internet were at stake should SOPA and PIPA have passed.[123] Online petitions prompted 10,000,000 signatures, and Congress received about 3,000,000 emails.[124]

A free Internet ultimately prevailed.[125] Through the inundation of calls of opposition to Congress, many of those who initially had co-sponsored SOPA/PIPA backed down and renounced the bills.[126] On

117. Samuelson, *supra* note 47.

118. CHEMERINKSY, *supra* note 44.

119. Tribe, *supra* note 73.

120. Espinel, Chopra & Schmidt, *supra* note 101.

121. Larry Downes, *Who Really Stopped SOPA, and Why?,* FORBES (Jan. 25. 2012), http://www.forbes.com/sites/larrydownes/2012/01/25/who-really-stopped-sopa-and-why/.

122. Id.

123. Jenna Wortham, *A Political Coming of Age for the Tech Industry*, N.Y. TIMES, Jan. 17, 2012, http://www.nytimes.com/2012/01/18/technology/web-wide-protest-over-two-antipiracy-bills.html.

124. Downes, *supra* note 121.

125. Id.

126. Jonathan Weisman, *In Fight Over Piracy Bills, New Economy Rises Against Old*, N.Y. TIMES, Jan. 18, 2012, http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html.

January 20, the Senate's majority leader called off a vote on PIPA, and the House shelved SOPA as well.[127] Among SOPA/PIPA's most staunch and vocal opponents was Senator Ron Wyden, who, along with Darrell Issa, would reformulate the entire discussion with their drafting of OPEN.[128]

B. OPEN's More Acceptable Scope

OPEN was introduced formally before Congress on January 18, 2012.[129] It was a bipartisan bill that shared with SOPA/PIPA the aims of combating online copyright infringement, but differed with SOPA/PIPA on the means used.[130] Christina DesMarais succinctly stated the key differences of SOPA/PIPA with OPEN: "OPEN [gives] oversight to the International Trade Commission (ITC) instead of the Justice Department, focuses on foreign-based websites, includes an appeals process, and [applies] only to websites that 'willfully' promote copyright violation."[131] All of these differences, coupled with an innovative drafting procedure, helped quell the overbroad and unconstitutional components of SOPA/PIPA, therefore making it a much closer fit in terms of the Pamela Samuelson balancing mechanism used for analyzing copyright reform.[132] Although OPEN was ultimately not enacted,[133] it was met with wide praise,[134] and therefore it is useful to examine its provisions for future attempts at drafting copyright reform.

127. Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES, Jan. 20, 2012, http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html?_r=1&ref=global.

128. *Ron Wyden statement on Senate Floor,* YOUTUBE, http://www.youtube.com /watch? v=tK145BSPAj4 (last visited Oct. 29, 2013).

129. OPEN: Online Protection & Enforcement of Digital Trade Act, From the Office of Congressman Darrell Issa, http://www.keepthewebopen.com/open (last visited Jan. 12, 2013).

130. *Wyden, Morgan, Cantwell Introduce IP Protection Bill that Will Not Break the Net*, RON WYDEN SENATOR FOR OREGON (Dec. 17, 2011), http://www.wyden.senate.gov/news/press-releases/wyden-moran-cantwell-introduce-ip-protection-bill-that-will-not-break-the-net.

131. Christina DesMarais, *SOPA, PIPA Stalled: Meet the OPEN Act*, PCWORLD (Jan. 21, 2012), https://www.pcworld.com/article/248525/sopa_pipa_stalled_meet_the_ open_act .html.

132. Sameulson, *supra* note 47.

133. GOVTRACK.US, *supra* note 11.

134. DeMarais, *supra* note 131; *Beyond SOPA*,; Ebay, Facebook, Google, LinkedIn, Mozilla, Twitter, Yahoo, & Zynga, *Letter,* KEEPTHEWEBOPEN (Dec. 13, 2011), http://keepthewebop en.com/assets/pdfs/121311%20Big%20Web%20Companies%20OPEN%20Endorsement%20Letter.pdf; Computer and Communications Industry Association, Consumer Electronics Association & Net Coalition, *Letter,*KEEPTHEWEBOPEN (Dec. 12, 2011),

1. Opacity in Drafting

Among the most marked differences between SOPA/PIPA and OPEN was the transparent process by which OPEN was introduced. SOPA/PIPA indeed were criticized largely for their closed-door discussions.[135] The idea that an open government is essential to accountability and democracy has been endorsed by the American government since post-WWII-era.[136]

House Representative and OPEN-sponsor Darrell Issa has ensured that OPEN enjoys feedback and collaboration from anyone who may be interested on keepthewebopen.com.[137] On the site, Issa invites those interested to voice their opinions, concerns, edits, etc. on the text of the bill.[138] A version featured on the site includes "user-generated improvements" which are hyperlinked to the portions of the bill's text that viewers have a comment upon, along with every user's comment; to date there are 173 "community suggestions and concerns."[139] Additionally, Issa has responded to viewers' comments and suggestions directly through the technology section of the online forum, Reddit.[140] In the words of the Association of Research Libraries director Brandon Butler, the opacity of OPEN's drafting (that was made possible by none other but the Internet) was refreshing and welcomed: "legislation that affects this broad, democratizing platform [the Internet] should be subject to an equally broad and open discussion, and it is fitting that the Internet itself makes that discussion possible."[141]

http://www.keepthewebopen.com/assets/pdfs/121211%20CCIA,%20CEA,%20 NetCoalition %20OPEN%20Endorsement%20Letter.pdf; Library Copyright Alliance, American Library Association, Association of Research Libraries, *Letter,* KEEPTHEWEBOPEN (Dec. 12, 2011), http://www.keepthewebopen.com/assets/pdfs/121211 %20Library%20 Copyright,%20ALA,%20ACRL,%20ARL%20OPEN%20Endorsement%20Letter.pdf; Vint Cerf, *Letter,* KEEPTHEWEBOPEN (Dec. 14, 2011), http://www.keepthewebopen.com/as sets/pdfs/121411%20Cerf%20Father%20of%20the%20Internet%20SOPA%20Critique %20OPEN%20Approach%20Endorsement.pdf.

135. *See* Goldman *supra* note 53.

136. Harlan Yu & David G. Robinson, *The New Ambiguity of "Open Government,"* 59 UCLA L. REV. DISC. 178, 186 (2012) (citing President Lyndon B. Johnson).

137. Keep the Web Open, *supra* note 129.

138. Id.

139. Id.

140. *Congressman Seeking Input*, http://www.reddit.com/r/technology/comments/ 13vtx0/ iama_congressman_seeking_your_input_on_a_bill_to/ (last visited Jan. 12, 2013).

141. Library Copyright Alliance, *Letter*, *supra* note 134.

2. Strategy

The discussion surrounding SOPA/PIPA made clear that a mechanism that requires blocking sites and disturbing DNS structures will not be popular.[142] The drafters of OPEN believed that blocking the money to foreign infringing websites would strike an appropriate balance to combat infringement over the Internet while still keeping the forum intact.[143] Paul Kedrosky is a venture investor and a senior fellow at the Kauffman Foundation, and summarizes why "following the money" is a much better strategy at curbing online copyright infringement than the SOPA/PIPA protocol: "if [rogue websites posting infringing content] can't make money from trafficking in ill-gotten content, the problem will become much, much smaller."[144] This is a more practical and tailored approach; it examines the incentive structure for rogue websites, and removes those incentives.[145]

3. Process

To quell the lack of notice safeguards of SOPA/PIPA, OPEN required investigations of violations by the International Trade Council ("ITC").[146] Rights-holders petition the ITC to investigate into whether a rogue website has as its main purpose infringement of copyright.[147] The most blatant sites would be readily discovered and action taken.[148]

The action taken would likely include a cease-and-desist order that compels payment processers and online advertising providers to stop providing funds to these sites.[149] As the process is called an "investigation" there would be an opportunity for accused sites to make their case.[150] A section of OPEN specifically titled "opportunity to be heard" explicitly provides that the owner and operator of the Internet site alleged to be operated for purposes of copyright infringement shall be granted an opportunity to be heard, *before a*

142. See generally, Vint Cerf, Letter, supra note 134.

143. OPEN*, supra* note 6, § 337 (g)(2)(A)(i).

144. Paul Kedrosky, *Follow the Money, Not the Domains*, N.Y. TIMES (Jan. 18, 2012), http://www.nytimes.com/roomfordebate/2012/01/18/whats-the-best-way-to-protect-against-online- piracy/follow-the-money-not-the-domains.

145. Vint Cerf*, Letter, supra* note 134.

146. OPEN, *supra* note 6, § 337(C).

147. Id.

148. *Id.* § 337(E).

149. *Id*. § 337(f).

150. *Id*. § 337(E)(i).

temporary or preliminary action is issued.[151] This is hugely different from the SOPA/PIPA process, by which there could be takedown notices prompted before an investigation and solely on accusations.[152] OPEN also provides an appeals process.[153]

4. More Tailored

Rather than expecting one piece of legislation to force a myriad of groups to monitor the Internet for infringing activity like SOPA/PIPA expected,[154] OPEN takes just one approach: cutting off funds.[155] After an investigation, if the ITC finds that a site willfully infringes copyrighted material, financial transaction providers that give funds to the site are asked to take reasonable measures, "designed to prevent or prohibit the completion of payment transactions."[156] Additionally, Internet advertising services are asked not to serve advertisements to those infringing foreign sites.[157] There are explicit limitations so that other potential obligations are not mistakenly read into the sole requirements of cutting off money; neither the financial transaction provider nor the internet advertising service have to "implement measures that are not commercial reasonable; modify the services, or facilities of the provider to comply with the order."[158] There are no other requirements, and very importantly, OPEN does not interfere with DNS systems or other search engines that link to infringing sites.

Additionally, OPEN targeted only internet sites that were "accessed through a non-domestic domain name" that directed their services to American Internet users and that had as a main purpose infringing activity.[159] There is a portion that makes clearer what is meant by "business directed to" Americans.[160] This significantly reduces the overreaching scope and vagueness of SOPA/PIPA. In a letter supporting OPEN, the world's most prominent Internet and technology companies, including Facebook, Google, Yahoo!, and AOL, lauded the tailored text for precisely this reason: "this

151. *Id.* § 337(f)(2)(C).
152. SOPA, *supra* note 4, §102(C)(3); PIPA *supra* note 4, § 3B.
153. SOPA, *supra* note 4, § 102(D); PIPA *supra* note 4, § 3F.
154. CHEMERINSKY, *supra* note 44.
155. OPEN, *supra* note 6, § 2(G)(2)(A) & § (G)(2)(b)(i).
156. *Id*. § 2(G)(2)(A)(i).
157. *Id.* § 2(B)(i).
158. *Id.* § 2(A)(ii) & § 2(B)(ii), respectively.
159. OPEN, *supra* note 6, § 337(A)(8).
160. *Id.* § 337(B).

approach targets foreign rogue sites without inflicting collateral damage on legitimate, law-abiding U.S. Internet companies by bringing well-established international trade remedies to bear on [copyright infringement.]"[161]

It is for the aforementioned reasons that OPEN fits much more neatly within Pamela Samuelson's framework.[162]

IV. Proposal: Why OPEN was Not Enacted and How It May Serve as a Model for Future Reforms

A. Why OPEN was Not Enacted

OPEN was ultimately not passed.[163] It is most likely that OPEN was not able to push through because it was released so shortly after SOPA/PIPA discussions were failing, in January 2012.[164] A lobbyist told *The Hill* that since SOPA/PIPA was defeated, there was no pressing need to have "a broader conversation on the issue."[165] Another view is that discussions of copyright-Internet legislation stalled because of the November election.[166] A final view is that SOPA and PIPA precipitated so much backlash that those in Congress confronted with the possibility of OPEN were wary to begin another attempt at regulating infringing websites.[167]

B. The Future and What Can Be Learned From the SOPA/PIPA/OPEN Trajectory.

This note has outlined the trajectory of SOPA/PIPA/OPEN, from a demonstration of the gravity of the problem the bills sought to remedy, to the defeat of all three. What is clear from this discussion is that it is critical to engage all stakeholders involved; SOPA/PIPA failed in part because of the massive outcries and participation from Internet users, and OPEN failed in part because of a lack of

161. Ebay, *Letter, supra* note 134.

162. Samuelson, *supra* note 47.

163. Govtrack.us, *supra* note 11.

164. Brendan Sasso, *Rep. Issa fails to gain traction in push for new anti-online piracy bill*, THE HILL'S CONGRESS BLOG (March 8, 2012), http://thehill.com/blogs/hilliconvalley/technology/214859-rep-issa-fails-to-gain-traction-in-push-for-new-online-piracy-bill; Nicole Kardell, *Better Anti-Piracy Bill Introduced in Wake of SOPA, PIPA*, NATIONALLAWREVIEW .COM (Feb. 13, 2012), http://www.natlawreview.com/article/better-anti-piracy-bill-introduced-wake-sopa-pipa.

165. Id.

166. Sasso, *supra* note 164.

167. Comment of Note Supervisor Professor Ben Depoorter, Apr. 15, 2013.

excitement over the issue.[168] Therefore, it is clear that for a piece of copyright legislation that will lessen the strain of infringement over the Internet to be enacted, it must be produced via coordinated conversation and have the right scope. Indeed, recent scholarship promotes the use of evidence-based law to test the assumptions underlying most proposed solutions.[169]

Copyright reform must be proportional, and its regulations may not overreach beyond the problem it is intended to solve.[170] SOPA/PIPA's millions of enemies were as vocal as they were because their regulations were much too broad. Conversely, the attitude towards OPEN was entirely different and was mostly all positive.[171] Therefore, in future efforts, drafters should look to the accepted scope proposed by OPEN and try to implement that amount of regulation, and no more.

Future copyright legislators drafting a bill that will impact something as technically complicated as the Internet will also need to collaborate. One reason why a coordinated conversation is needed to draft such a bill is that expertise is necessary to first understand the intricacies of the Internet. Under the Pamela Samuelson framework, it is essential to understand the problem before finding out what sort of solution is needed.[172] Indeed, this is why Art Brodsky calls for concrete numbers on how much money and how many jobs are lost because of online piracy by foreign and domestic websites, and who the users are.[173]

Apart from using experts to figure out what the proper scope of the solution should be, there needs to be involvement from Internet engineers regarding what sorts of regulations would technically work without destroying the open nature of the Internet.[174] The United States Public Policy Council of ACM's article regarding PIPA's effect on DNS is illuminating on how much the drafters of SOPA/PIPA

168. Sasso, *supra* note 164.

169. Jeffrey J. Rachlinksi, *Essay; Evidence-Based Law,* 96 CORNELL L. REV. 901, 909 (2011).

170. Samuelson, *supra* note 47.

171. *Beyond SOPA*, *supra* note 134; Crawford, *supra* note 116, Goldman, *supra* note 53; Larry Downes, *Lawmakers Unveil Sensible Alternative to SOPA*, CNET NEWS (Dec. 8, 2011), http://news.cnet.com/8301-13578_3-57339611-38/lawmakers-unveil-sensible-alternative-to-sopa/.

172. Samuelson, *supra* note 47.

173. Andrew Joseph, *SOPA Critics Still Want to Stop Online Piracy, But How?*, NATIONAL JOURNAL BLOG (Jan. 26 2012), http://www.nationaljournal.com/blogs/influencealley/2012/01/so pa-critics-still-want-to-stop-online-piracy-but-how--26.

174. Downes, *supra* note 171.

were unaware of technological implications of their bill.[175] In fact, the article posits that blocking this system will be detrimental, and yet at the same time insufficient since those who use the Internet to illegally share copyrighted works have already found alternatives to DNS. Engineers will likely be the best ones to come up with a solution that will not unduly disturb the network.

Finally, what the SOPA/PIPA/OPEN trajectory makes clear is that the proposed regulations cannot displace millions of users' ability to access the Internet.[176]

Unfortunately, it is unclear what those that drive the content industries have learned from the SOPA/PIPA war.[177] John Fithian, a CEO of the National Association of Theater Owners, and proponent of SOPA/PIPA declared that "The backlash occurred, Google made its point, they're big and tough and we get it. Hopefully now reasonable minds will prevail."[178] Unfortunately, this sort of thinking, wherein only one side of a bill proposition is unwilling to listen to the other will not work. This is what leads Downes to declare that "given both their arrogance and ignorance, it goes without saying that the content industries are unlikely to avoid similar catastrophes in the future, let alone find a way to work collaboratively with a political force they don't know—or don't believe—exists."[179]

Indeed, there has been some action to lessen the brunt of copyright infringement on the Internet. That action comes in the form of small steps forward, like the Association of National Advertisers and the American Association of Advertising Agencies coming up with best practices to address online piracy and counterfeiting in May 2012, to the more substantial: Google's August 2012 change in its search algorithm that takes into account the number of valid copyright removal notices when determining the ranking of search results.[180]

175. An Analysis, supra note 95.

176. Mike Masnick, *Why Chris Dodd Failed With His SOPA/PIPA Strategy,* TECHDIRT (Jan. 20, 2012), http://www.techdirt.com/articles/20120119/21092917484/why-chris-dodd-failed-with-his-sopapipa-strategy.shtml.

177. Downes, *supra* note 121.

178. Id.

179. Id.

180. Declan McCullagh, *After a Year in the Grave, Can SOPA and Protect IP Return?* CNET *NEWS* (Jan. 18, 2013), http://news.cnet.com/8301-13578_3-57564637-38/after-a-year-in-the-grave- can-sopa-and-protect-ip-return/, (quoting Copyright Alliance Executive Director Sandra Aistars).

V. Conclusion

This note has suggested that although the problem of copyright infringement on the Internet is real and needs a solution, that solution is still unknown. What is known after the SOPA/PIPA/OPEN saga is that our age is made of proud Internet users who will fight to preserve an open Internet. Changing the true character and functionality of the Internet will never work. A true candidate for copyright legislation that reforms the Internet must be informed with the proper research, be backed by a variety of stakeholders, get its message out clear and with purpose, and win the votes of its constituent Internet users. Luckily, the channels of such proper research and discussion can be done with the open Internet of today.

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