COMPETING VALUES: AN EVALUATION OF SOPA'S IMPACT ON INTELLECTUAL PROPERTY RIGHTS AND FREE SPEECH

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COMPETING VALUES: AN EVALUATION OF SOPA'S IMPACT ON

INTELLECTUAL PROPERTY RIGHTS AND FREE SPEECH

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Abstract

This thesis seeks to investigate the competing values of intellectual property rights identified by Title 17 of the United States Code and the freedom of speech by evaluating the constitutionality of the Stop Online Piracy Act, or SOPA. Through the lens of historical precedent and the arguments made by important figures in the SOPA debate, the thesis explores the bill and finds that it may violate the Constitution and be inconsistent with current law. A balanced solution to the conflict is proposed by severing the unconstitutional provisions in SOPA so that the bill no longer affects free speech but still meets its intended purpose of addressing online piracy.

Introduction

January 18, 2012 will be remembered as the day the Internet went dark. People across the United States and other nations woke to find their favorite websites blocked and censored. “Black Wednesday,” as it was later termed, was a result of the efforts of Internet companies that banded together in protest of a piece of legislation that they claimed would censor the Internet. Many websites put up a site “blackout” that replaced their regularly functioning websites with messages that illustrated the harms of this new bill.[1] Google did not completely shut down its services, but lent its support to the protest by blacking out the Google logo and directing users to a petition that could be signed in protest of the bill.[2]

The Internet protest was in response to the Stop Online Piracy Act, a legislative statute proposed in fall 2011 that was intended to address the growing concern of Internet piracy. The entertainment industry quickly moved to support the bill that set out to protect their copyrighted materials claiming the legislation was a necessary measure to ensure the security of intellectual property.[3] The Internet companies that protested were joined by others in opposition of the law on the grounds that it would harm the Internet by

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[1] Erik Kain, “The Day The Internet Stood Still: Why Wikipedia And Craigslist Went Dark,” *Forbes*, January 18, 2012, http://www.forbes.com/sites/erikkain/2012/01/18/why-the-wikipedia-and-craigslist-websites-went-dark/.

[2] Suzanne Choney, “Google Protests SOPA on Home Page,” *MSNBC*, http://www.technolog.msnbc.msn.com/technology/technolog/google-protests-sopa-home-page-117733.

[3] “Joint Statement from AFM, AFTRA, DGA, IATSE, IBT and SAG Regarding Stop Online Piracy Act (HR 3261),” *Screen Actors Guild*, October 26, 2011, http://www.sag.org/files/sag/documents/10-26-2011_JointStatementHouseJudiciaryLegislation.pdf.

censoring free speech.[4] This conflict represents the latest struggle between two competing constitutional values: intellectual property rights and the freedom of speech.

[4] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc.," (presented before the house of Representatives Committee on the Judiciary Hearing, November 16, 2011), http://judiciary.house.gov/hearings/pdf/Oyama%2011162011.pdf.

Chapter One: Legal and Historical Background of Intellectual Property Rights and the Freedom of Speech

Part One: Intellectual Property Rights

The protection of intellectual property is considered an important right in the United States as it protects the works of individuals and encourages innovation and creativity through the profit associated with such works. Intellectual property rights have a rich legal history beginning with the founding of the United States. Even before the Constitution was ratified, 12 out of the 13 original states had created their own copyright laws to protect intellectual property.[5] This was followed by the Constitution which gave Congress the ability "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[6] However, it was not until 1790 that the first national copyright law was passed.

The original copyright law in Title 17 of the United States Code, the Copyright Act of 1790, only provided protection for maps, charts, and books that were published in the United States by citizens for a term of 14 years, which could later be extended an additional 14 years.[7] In order to receive copyright protection, owners of intellectual property had to pay a small fee and record the title of their work with the Clerk's Office.[8] Under this copyright law, the owners of works had the sole authority to print, reprint,

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[5] Robert Trager, Joseph Russomanno, and Susan Dente Ross, "Copyright," in *The Law of Journalism & Mass Communication* (DC: CQ Press, 2010), 554.

[6] "Constitution of the United States," *National Archives and Records Administration*, accessed March 17, 2012, http://www.archives.gov/exhibits/charters/constitution_transcript.html, article I section 8.

[7] "Copyright Act of 1790," *U.S. Copyright Office*, accessed March 17, 2012, http://www.copyright.gov/history/1790act.pdf, section 1.

[8] "Copyright Act of 1790," section 3.

publish, or sell their works.[9] If someone were to infringe upon these rights by using copyrighted material without express consent, the owner had the ability to seek compensation for each page of infringing material found in the possession of the violator, and additional damages that would be determined by a court.[10] This copyright law set the groundwork for intellectual property rights in the United States, but the law was limited and only applied to specific works. As new technology became available, new types of intellectual works were being created that the Copyright Act of 1790 could not cover. New media like photographs, radio, and motion pictures needed to be addressed in copyright law.

Between the years 1909 and 1973 several revisions were made to existing copyright law to keep up with innovations and expand the protection of intellectual property. First, the classification of works that could be protected by copyright was expanded to include periodicals, lectures, musical compositions, art, scientific drawings, photos, motion pictures, and sound recordings.[11] These new classifications greatly increased the types of works that could be protected, and updated the law for new technologies as they were developed. The law also extended the rights that were afforded to copyright owners and the duration of protection. In addition to the exclusive rights outlined in the Copyright Act of 1790, the copyright revisions gave copyright owners the sole ability to translate their work; convert, arrange, or adapt the work into another

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[9] "Copyright Act of 1790," section 1.

[10] "Copyright Act of 1790," section 6.

[11] "Copyright Act of 1909 (revised to January 1, 1973)," *U.S. Copyright Office*, accessed March 17, 2012, http://www.copyright.gov/history/1909act-1973.pdf, 4-5.

medium; and to perform, read or deliver the work in a public manner.[12] These additional works increased the scope of the protection of intellectual property, making the use of a copyrighted work in any of the above-mentioned ways infringement. As for duration, the revisions increased the terms for a copyrighted work from 14 years to 28 years following the first publication.[13] The terms could be extended 28 more years if the owner applied for renewal within a year of expiration.[14] The available remedies for owners of a copyright that was violated increased as well. A court had the ability to award the owner of a violated work either actual or statutory damages for their lost profit and the profits made by the infringer, compensation for costs and attorney's fees, and other remedies that could be determined on a case by case basis by the court, including criminal prosecution for willful infringement.[15] These remedies placed a larger burden on the person violating intellectual property rights, and gave more opportunities for compensation to the owner of the work.

Along with the extensions to the Copyright Act of 1970, the revisions made between 1909 and 1973 created new provisions to intellectual property law. First, the revisions included protection for foreign works. A foreign work could be protected under copyright in the United States if the work was published in the United States, if the country of publication had entered in to a treaty with the United States to protect American copyright, or if the President gave specific permission for the foreign work.[16]

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[12] "Copyright Act of 1909 (revised to January 1, 1973)," 2-4.

[13] "Copyright Act of 1909 (revised to January 1, 1973)," 13.

[14] "Copyright Act of 1909 (revised to January 1, 1973)," 13.

[15] "Copyright Act of 1909 (revised to January 1, 1973)," 16-18.

[16] "Copyright Act of 1909 (revised to January 1, 1973)," 6-7.

This inclusion not only allowed for protection of foreign works in the United States, but also promoted the protection of American works in foreign countries through treaties and trade agreements. This section would become an important aspect of copyright law in 1989 when the United States joined the Berne Convention, an international organization dedicated to the mutual protection of copyrighted works across all member nations.[17] [18] Also under the revisions, both the copyright symbol and the United States Copyright Office were created. The symbol of a "C" inside of a circle was created to identify works that were protected by copyright law. A copyrighted work had to either include the copyright symbol, or the abbreviation "Copr." in conjunction with the year of publication and the name of the author to receive protection.[19] This does not mean, however, that an owner is not given copyright protection if they accidentally leave the symbol off of a copy of their work, or if their work is not yet published at the time the infringement occurs. The revisions specifically stated that copyright protection was not limited in those circumstances, but works must be registered for liability to be given to the violator.[20] In order to register a work, an author or creator must still paid a deposit and registered copies of the work with the government, but a new entity was created to handle all copyright claims. The United States Copyright Office was established as part of the Library of Congress, and was given the responsibility to evaluate all copyright requests,

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[17] "Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)," *World Intellectual Property Organization*, http://www.wipo.int/treaties/en/ip/berne/summary_berne.html.

[18] "Contracting Parties," *World Intellectual Property Organization*, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15

[19] "Copyright Act of 1909 (revised to January 1, 1973)," 11.

[20] "Copyright Act of 1909 (revised to January 1, 1973)," 12.

and to then register and document all granted requests.[21] These revisions brought the Copyright Act of 1790 up to date with technological innovation, but they were still not enough to cover all of the intricacies of copyright.

In 1976, a large revision was made to Title 17 to incorporate all of the previous revisions, and to add even more to copyright law. This revision is an important landmark in copyright history as it represents the main text of the current Title 17, though there have been amendments made to the law since 1976. Under the 1976 law, copyright was given to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid or a machine or device."[22] This meant that almost all authored works that could be physically reproduced can be protected under copyright. While the law did condense the categories for protected works, it did not take away the protection for any medium that was included in previous law, and it added protection for pantomime and choreographed works.[23] The revision did, however, outline a list of works that cannot be copyrighted including, but not limited to, ideas, systems, discoveries, procedures, and concepts.[24]

The new law also changed the rights associated with holding a copyright so that owners had the sole right to reproduce, create derivative works, distribute, perform, and

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[21] "Copyright Act of 1909 (revised to January 1, 1973)," 21-25.

[22] "Copyright Act of 1976," *U.S. Copyright Office*, accessed March 17, 2012, http://www.copyright.gov/history/pl94-553.pdf, section 101.

[23] "Copyright Act of 1976," section 102.

[24] "Copyright Act of 1976," section 102.

display their copyrighted material.[25] Once registered by the United States Copyright Office, a work was granted full protection and was eligible to receive remedies granted by a court of law. Unregistered works were still afforded protection, however, they were not eligible to receive statutory damages or attorney's fees as compensation for infringement.[26] Finally, the duration of a copyrighted work was once again increased from 28 years to the owner's lifetime plus 50 years.[27] Although this was a major revision to the terms of copyright law, it was increased again by the Sonny Bono Copyright Term Extension Act in 1998, which increased the duration by an additional 20 years in order to bring the United States into compliance with international law.[28]

Along with the revisions made to existing copyright law, the Copyright Act of 1976 outlined new provisions that would become important in the current copyright law. First, the act created the Fair Use defense, which allowed "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, scholarship, or research."[29] This defense allowed for the use of copyrighted works in specific noncommercial forms so that others could freely express themselves under the First Amendment without being held in violation of intellectual property rights. Additionally, the 1976 Act made the first mention of computers in copyright law. The act stated that copyright owners were not given any more or less protection for their creative works in

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[25] "Copyright Act of 1976," section 106.

[26] "Copyright Act of 1976," section 504.

[27] "Copyright Act of 1976," section 302.

[28] *Eldred v. Ashcroft*, 537 U.S. 186, 257 (2003).

[29] "Copyright Act of 1976," 107.

regard to computer processing than the law had already given for other media.[30] At the time that the law was created, computers were a relatively new idea and a limited one at that, but this quickly changed, and copyright law was once again outdated. Lawmakers at the time had no idea how integrated computers would come to be in society, and they certainly had no idea that they could be interlinked on a global level through the invention of the Internet.

In 1984, what would become a landmark case in intellectual property rights came before the U.S. Supreme Court. *Sony Corporation of America v. Universal City Studios, Inc*. presented a direct conflict between technology and Copyright Law and questioned the liability of companies who vicariously enable infringement. When Sony invented the VTR (Videotape Recorder) capable of video recording, the company was aware that their product could be used to infringe on the copyrighted material of others through the illegal recording and distribution of programs, though Sony maintained that this was not the product's intent or primary purpose.[31] The company said that the VTR was meant to be used to "time shift," or videotape television for viewing at a later time.[32] Universal City Studios and other copyright holders recognized the potential uses of the technology as well and sought legal action against Sony for the infringement that they had enabled. The Supreme Court found that Sony was not liable for the infringement of VTR users as "the mere understanding that some of one's products will be misused" does not constitute

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[30] "Copyright Act of 1976," 117.

[31] *Sony Corporation of America v. Universal City Studios, Inc.*, 1981 U.S. Briefs 1687, 6 (1982).

[32] *Sony Corporation of America v. Universal City Studios, Inc.*, 1981 U.S. Briefs 1687, 10 (1982).

fault.[33] The Court held that a product is not in violation of copyright so long as it is "capable of commercially significant non-infringing uses."[34] As the VTR was mostly used for recording shows to watch at a later time, which the Court considered fair use, Sony was not liable for the small percentage of customers that used it for infringement. The impact of the case was that companies were not liable for third party copyright violations so long as infringement was not the main purpose of their product and it was capable of significant lawful use.

Following the invention of the VTR, two significant inventions emerged that changed the scope of intellectual property law. First, the invention of the personal computer allowed the average citizen the processing power and storage capacity that had previously only been seen on a government level. Second, the emergence of the Internet connected all of the personal computers together in cyberspace. This created new issues with copyrighted materials. Now individuals and companies had the ability to bypass in-place security systems to access and distribute music, movies, software, and other protected works. In 1989, the issue of emerging computer and Internet technology was finally addressed in the Digital Millennium Copyright Act (DMCA).

The DMCA addressed these issues by making security circumvention, the distribution of products that enable security circumvention, and the distribution of works obtained with those products illegal.[35] In accordance with the *Sony v. Universal Studios* Supreme Court decision, a product would only be considered infringing if its primary

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[33] *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 932-933 (2005).

[34] *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 933 (2005).

[35] "Digital Millennium Copyright Act," *The Library of Congress*, accessed on March 17, 2012, http://thomas.loc.gov/cgi-bin/query/z?c105:H.R.2281.ENR:, 4-13.

purpose was circumvention and it had a limited commercially significant purpose that is not infringing on copyright.[36] The law was narrowly tailored to only target software that was intended for infringement, and it specifically said that the state of fair use and free speech would not be affected by the law.

The law also set out to protect Internet service providers, search engines, and websites from vicarious liability for users that violate copyright law without the knowledge of the Internet company. Safe Harbor provisions ensure that companies that are unaware of the infringement of others through their services, that remove the material when they become aware, and that do not benefit financially from the copyrighted works are not held liable for the violation.[37] If a company believes that a website contains material that they own, they must notify the website, which in turn takes down the material and notifies the user that posted it.[38] A user may then offer a counter-notice if they believe that the takedown was issued by mistake, but the website is not legally responsible for the removed material, so long as they replace it and notify the copyright owner of the counter-notice.[39] With the Safe Harbor provisions in place, the DMCA creates a balance between technology and intellectual property rights.

In 2005, the Supreme Court case *Metro-Goldwyn Meyer Studios, Inc. v. Grokster, Ltd.* challenged the balance given by the DMCA. After Napster was disbanded for copyright infringement, it was quickly replaced by Grokster and other companies. MGM

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[36] "Digital Millennium Copyright Act," 5.

[37] "Digital Millennium Copyright Act," 18-27.

[38] "Digital Millennium Copyright Act," 21-22.

[39] "Digital Millennium Copyright Act," 24-25.

sought legal action against Grokster for violation of copyright on the grounds that the peer-to-peer site knew that it contained infringing material and furthermore that it actively encouraged the distribution of it.[40] Grokster argued that like Sony, their product had potential non-infringing uses, like the distribution of works not covered by copyright.[41] MGM responded by requesting that the Court quantify the Sony decision so that if a product is principally used to infringe, the company can be held liable.[42]

The Court ruled that Grokster was vicariously liable for the infringement of their users. The Court used the inducement rule, which applied to this case says the distribution of a device that is used to violate copyright, "as shown by clear expression or other affirmative steps taken to foster infringement" would constitute vicarious liability.[43] Three standards for inducement are given by the Court to help quantify the Sony decision. First, there must be intent to bring about infringement, which Grokster shows by targeting former Napster users.[44] Next, the defendant must have distributed a device that can be used for infringement and for Grokster this was their peer-to-peer network.[45] Finally, the owner must provide evidence that there was actual infringement.[46] As Grokster was 90 percent copyrighted material, the company was found liable. If the same standards outlined in *MGM v. Grokster* were applied to the Sony case, the decision would

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[40] *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 913 (2005).

[41] *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 922-923 (2005).

[42] *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 933 (2005).

[43] *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005).

[44] *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939-940 (2005).

[45] *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 922-923 (2005).

[46] *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940-941 (2005).

still be the same because Sony did not meet the first criterion as they did not intend to bring about copyright infringement.

The *Grokster* decision represents one of the most recent attempts to alter law to fit the changes made in technology. The long history of intellectual property protection illustrates the progression of copyright law to accommodate new technology and the potential uses for infringement that go along with it. The changes made to copyright law throughout time by lawmakers and decisions made by the Supreme Court have shaped the way intellectual property is balanced with other conflicting values.

Part Two: Freedom of Speech

Freedom of speech has just as rich a legal history as intellectual property rights beginning with the First Amendment, which states, in part, "Congress shall make no law. . . abridging the freedom of speech or of the press."[47] Although the First Amendment prohibit the government from infringing on the free speech rights of United States citizens, it is often difficult to determine exactly what is considered protected speech. As a set definition cannot be given, the responsibility of interpreting the First Amendment falls to the Supreme Court of the United States. The Court is able to set common law that serves as precedent for future First Amendment conflicts. This allows the Court to set standards by which to evaluate laws that affect the free expression of others.

Two standards are used by the Supreme Court to determine if a law is constitutional under the First Amendment: strict scrutiny, and intermediate scrutiny. Strict

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[47] "Bill of Rights," *National Archives and Records Administration*, accessed March 17, 2012, http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html, amendment I.

scrutiny is applied to laws that are content-based. These are laws that specifically prohibit a specific type of speech.[48] When applying strict scrutiny, a content-based law is only constitutional if the law is advancing a "compelling or paramount government interest" by the least restrictive means possible.[49] An example of this is given by the case *Texas v. Johnson*. In 1989, Gregory Lee Johnson was convicted and sentenced to a year in prison for burning a flag at a protest at the Republican National Convention in Dallas, Texas due to a state law that prohibited the desecration of the American flag. Johnson argued that the law violated his rights under the First Amendment. As the law specifically prohibited a type of speech, flag desecration, the Supreme Court justices in the majority opinion applied strict scrutiny in the case. The Court determined that the burning of a flag was considered symbolic speech, and, by a 5-4 vote, the law was found to be unconstitutional.[50]

Intermediate scrutiny, on the other hand, is applied to cases involving content-neutral laws. These are laws that regulate "the non-speech elements of a message, such as time, the place or the manner in which the speech occurs."[51] Content-neutral laws do not directly prohibit free expression, but rather, reduce the variety of speech available to citizens in order to further a government goal.[52] An example of a content-neutral law can be found in the case *United States v. O'Brien.* During the Vietnam war, David Paul

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[48] Robert Trager, Joseph Russomanno, and Susan Dente Ross, "The First Amendment," in *The Law of Journalism & Mass Communication* (DC: CQ Press, 2010), 62-64.

[49] Robert Trager, Joseph Russomanno, and Susan Dente Ross, "The First Amendment," 63.

[50] Robert Trager, Joseph Russomanno, and Susan Dente Ross, "The First Amendment," 63.

[51] Robert Trager, Joseph Russomanno, and Susan Dente Ross, "The First Amendment," 64.

[52] Robert Trager, Joseph Russomanno, and Susan Dente Ross, "The First Amendment," 64.

O’Brien burned his draft card in protest of the war. As the law stated that all eligible males had to always have a draft card on their person, the mutilation of a draft card was prohibited. O’Brien challenged the law on First Amendment grounds.[53] The case is similar to *Texas v. Johnson*, however, the law in question did not specifically prohibit speech. O’Brien’s conviction for burning the draft card was because it was needed for military operations and not because the speech itself was prohibited. Because of this, the Court applied intermediate scrutiny.

United States v. O’Brien set the three-pronged standard for determining if a law is constitutional under intermediate scrutiny. First, the law cannot be specifically suppressing speech. Next, the law must advance a significant government interest. Finally, the law had to be narrowly tailored so that the restriction of free speech is only incidental in achieving the important government interest.[54] Under these standards, the Court found that the draft law was constitutional.

Another important consideration in First Amendment cases is the use of prior restraint. A law is using prior restraint when it impedes speech before it can be expressed. In order to be in violation, a law must be broad and impose oversight for entire categories of speech, allow government to choose what is acceptable, and allow the banning of content before it reaches the public.[55] The best case to illustrate prior restraints is *New York Times Co. v. United States*. In 1971, the New York Times began publishing excerpts from a leaked Department of Defense study called the Pentagon Papers. The government

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[53] Robert Trager, Joseph Russomanno, and Susan Dente Ross, “The First Amendment,” 64.

[54] Robert Trager, Joseph Russomanno, and Susan Dente Ross, “The First Amendment,” 64.

[55] Robert Trager, Joseph Russomanno, and Susan Dente Ross, “The First Amendment,” 59.

asked for a court ordered injunction to prevent the publication because it felt that this was a national security risk.[56] By a 6-3 vote, the Supreme Court decided that the injunction was a prior restraint that violated the First Amendment because the government could not prove that there was an immediate national security risk.[57] Prior restraints are generally considered to be a huge violation of free speech by the Court.

While the Court is able to use these general standards in First Amendment cases, different types of media are treated differently for free speech cases. Generally, print media are less restricted than broadcast media because broadcast messages have a finite number of frequencies that can be utilized.[58] In order to ensure that as many different messages in the marketplace of ideas are broadcasted as possible, the Court has allowed time, place, and manner restrictions.[59] These regulations do not suppress any form of speech, but rather place restrictions on when, where, and how the messages can be broadcasted. Print media is not held to time, place, and manner restrictions because a print medium is not limited. Anyone has the ability to publish a printed expression at any given time, but they cannot always broadcast an expression due to frequency limitations.

As "the Internet is a unique and wholly new medium of worldwide human communication," the Court had to decide if it could be restricted by time, place, and management regulations.[60] The precedent for this is set in *Reno v. ACLU*. In this case, the

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[56] Robert Trager, Joseph Russomanno, and Susan Dente Ross, "The First Amendment," 60.

[57] Robert Trager, Joseph Russomanno, and Susan Dente Ross, "The First Amendment," 60.

[58] Robert Trager, Joseph Russomanno, and Susan Dente Ross, "Electronic Media Regulation," in *The Law of Journalism & Mass Communication* (DC: CQ Press, 2010), 455.

[59] Robert Trager, Joseph Russomanno, and Susan Dente Ross, "The First Amendment," 455.

[60] *Reno v. American Civil Liberties Union*, 521 U.S. 844, 850 (1997).

ACLU challenged the Communications Decency Act (CDA), an act that sought to protect minors from explicit and indecent content online, on the grounds that it violated the First Amendment rights of adults. Through looking at the CDA the court was able to determine that the Internet is similar to print in that it is not held to time, place, and manner restrictions.[61] The Internet is not a limited medium like broadcast because cyberspace is nearly infinite and certainly has more than enough space to accommodate any and all ideas. Because the Internet is not held to these restrictions, the Court was able to look more strictly at the law. Using strict scrutiny, the Court was able to determine that the law "lacks the precision that the First Amendment requires when a statute regulates the content of speech."[62] Furthermore, the law was found to be overly restrictive as other, less prohibitive means could have been employed to accomplish the same goal.[63] The importance of this case lies in the decision that the Internet cannot be held to time, place, and manner restrictions.

The Supreme Court oversees many cases that involve free speech and the First Amendment, but *Eldred v. Ashcroft* is topically relevant as it deals specifically with the intersection of speech and copyright. In 1998, the Sonny Bono Copyright Extension Act (CTEA) was passed, increasing the duration of copyright by 20 years. Eric Eldred and several others argued that this law violated First Amendment rights on the grounds that the increase in duration prevented copyrighted works from entering the public domain

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[61] *Reno v. American Civil Liberties Union,* 521 U.S. 844, 845 (1997).

[62] *Reno v. American Civil Liberties Union,* 521 U.S. 844, 846 (1997).

[63] *Reno v. American Civil Liberties Union,* 521 U.S. 844, 846 (1997).

where others could use and adapt them freely.[64] The Supreme Court ruled in favor of the CTEA, stating that the law does not increase the duration infinitely and still allows for fair use, as the copyrighted works are only protected for a specific form of expression, not the ideas expressed.[65] The Court argued that the First Amendment and copyright law came about around the same time, suggesting that the "proximity indicates the Framers' view that copyright's limited monopolies are compatible with free speech principles."[66] This means that the Supreme Court ruled that intellectual property protection can be done in conjunction with the protection of free speech. The Court said both rights are important and can coexist.

[64] *Eldred v. Ashcroft*, 537 U.S. 186, 186 (2003).

[65] *Eldred v. Ashcroft*, 537 U.S. 186, 187 (2003).

[66] *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003).

Chapter Two: SOPA Proponents and Opponents

Part One: The Internet and SOPA

Eldred v. Ashcroft helps to illustrate the conflict between free speech and copyrights. The competing values of intellectual property and personal expression have to be carefully balanced to maintain the rights outlined in the Constitution and the Bill of Rights. Unfortunately, this balancing act is difficult for lawmakers, as both sides of the issue have compelling interests that they are attempting to protect. In the end, however, both sides have much in common. Both have legal and historical precedent, and both say they are attempting to protect the same thing: innovation and creativity.

The intangible world created by the Internet only serves to further muddy this conflict. The Internet has the ability to connect people across the world with different interests, ideas, and opinions. It is the virtual equivalent of the marketplace of ideas, but not everything on the Internet is an original expression. Piracy has become increasingly problematic in the digital age. When the Supreme Court rendered their decision in *Sony v. Universal Studios* in 1984, the easiest way to pirate copyrighted material was to record it with a VTR and sell a finite number of physical copies. Now, piracy is facilitated by the interconnected nature of the Internet. Pirates are able to make digital copies of others' intellectual property, and distribute it to a large amount of users at the click of a button. The United States is left with the dilemma of how to stop digital piracy. Regulations, like the DMCA, have been passed to try to address the issue, but the scope of the problem is large and the Internet is a difficult medium to govern because the media transcends normal boundaries. The virtual world is immense and it is a place that is able to transcend

geography, making it difficult to regulate, because it is difficult to determine jurisdiction. Lawmakers are still attempting to find regulation that is able to help address the problem.

An example of the struggle with the jurisdiction over the Internet can be found with China. The Chinese government has been criticized by the international community for its failure to address the issue of Internet piracy in its country.[67] China is ranked third globally for Internet piracy with 90 percent software piracy rate, as reported by a study done by the Business Software Alliance in 2004.[68] With this high rate of piracy, China represents a threat to the intellectual property of the international community, including the United States. Both the United States and China are members of the Berne Convention.[69] This membership should mean that China is obligated to protect works copyrighted in the United States, but the law has not been heavily enforced by the international community. Alone, the United States court system does not have jurisdiction over copyright violations made in China and is unable to address the issue. The example of China helps to illustrate the difficulty of dealing with Internet piracy, but China is not the only nation guilty of copyright infringement. A study by Envisional shows that 23.8 percent of all global Internet traffic, and even 17 percent of United States Internet is

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[67] Jia Lu and Ian Weber, "Internet Software Piracy in China: A User Analysis of Resistance to Global Software Copyright Enforcement," *Journal of International and Intercultural Communication, Ebsco,* 300-301.

[68] "Internet Software Piracy in China: A User Analysis of Resistance to Global Software Copyright Enforcement," 299.

[69] "Contracting Parties," *World Intellectual Property Organization*, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15.

infringing.[70] With the rate of online piracy, lawmakers in the United States are seeking new methods of addressing the problem both domestically and internationally.

The Stop Online Piracy Act (SOPA) represents one of the newest methods to balance copyright protection and free speech in the digital age. U.S. Rep. Lamar Smith of Texas introduced the bill on October 26, 2011 to combat online piracy.[71] According to the text of the bill, its intention was "to promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property, and for other purposes."[72] The bill attempts to do this by removing, preventing payment to, and preventing search for foreign infringing sites and "sites dedicated to the theft of U.S. property."[73] The proposed bill seeks to do this by requiring search engines, Internet service providers, domain name services, payment services, and advertising services to block sites deemed to be infringing.[74] Shortly after the bill was introduced, there was significant public backlash. SOPA faced a strong force of opposition from many different organizations and individuals. However, even though the opposition was strong, so was the support.

Part Two: Proponents

SOPA has received a large wave of support for its efforts to stop online piracy. Proponents argue that the protection of intellectual property rights promotes innovation

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[70] "Technical Report: An Estimate of Infringing Use of the Internet - Summary," *Envisional*, http://documents.envisional.com/docs/Envisional-Internet_Usage_Report-Summary.pdf.

[71] "Stop Online Piracy Act," *The Library of Congress*, accessed on March 17, 2012, http://www.gpo.gov/fdsys/pkg/BILLS-112hr3261ih/pdf/BILLS-112hr3261ih.pdf, 1.

[72] "Stop Online Piracy Act," 1.

[73] "Stop Online Piracy Act," 10-47.

[74] "Stop Online Piracy Act," 10-48.

by protecting the creative works of others.[75] Organizations from the entertainment industry like the Motion Picture Association of America (MPAA), the Screen Actors Guild (SAG), American Federation of Musicians (AFM), and the Directors Guild of America (DGA) have lent their support to the law.[76,77] These are organizations that hold copyrights for their creative works, and stand to lose substantial revenue from Internet piracy.

The entertainment industry represents an important part of the United States economy. Four large sections of this industry are the motion picture industry, the sound recording industry, the software publishing industry, and the video game industry. According to a study done in 2005 by the Institute for Policy Innovation (IPI), these sections contribute a large amount of capital to the U.S. economy. In 2005, the motion picture industry earned $73.4 billion in revenue, the sound recording industry earned $18.7 billion, the software industry earned $119.6 billion and the video game industry earned $7.4 billion.[78] The entertainment industry earns this revenue through their copyrighted works and would not be able to contribute to the U.S. economy without copyright protection.

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[75] "Statement of Maria A. Pallante, Register of Copyrights," (presented before the house of Representatives Committee on the Judiciary Hearing, November 16, 2011), http://www.copyright.gov/docs/regstat111611.html.

[76] "Statement of Michael P. O'Leary, Senior Executive Vice President, Global Policy and External Affairs on Behalf of the Motion Picture Association of America," (presented before the house of Representatives Committee on the Judiciary Hearing, November 16, 2011), http://www.scribd.com/doc/72915526/MPAA-Testimony.

[77] "Joint Statement from AFM, AFTRA, DGA, IATSE, IBT and SAG Regarding Stop Online Piracy Act (HR 3261)."

[78] Stephen E. Siwek, "The True Cost of Copyright Industry Piracy to the U.S. Economy," *Institute for Policy Innovation*, October 3, 2007, http://www.ipi.org/.

These industries say that piracy costs an immense amount of revenue each year. The motion picture industry says that they alone lose $6.1 billion annually to piracy, and 38 percent of that figure is due to online piracy.[79] That means the motion picture industry loses $2.3 billion every year to Internet pirates. The recording industry loses $3.7 billion from downloaded piracy alone.[80] This may seem small compared to the amount of revenue generated by each of these industries, however, these are significant numbers. To help put these figures into perspective, a comparison must be made. The recording industry is losing the equivalent of the 2011 GDP of the Central African Republic, a small African nation of about 5,057,208 people, every year to downloaded piracy.[81] These figures do not include the loss to the retail industry that legally sells the works of the entertainment industry and other associated industries, or the tax lost by the government due to piracy. According to an IPI study commissioned by the Motion Picture Association of America, piracy costs the United States $58 billion, 373,375 jobs, and $2.6 billion in tax revenue annually.[82]

Workers in these industries also suffer from piracy. The entertainment industry provides jobs for more than two million Americans, from actors and directors, to carpenters and technicians, to equipment producers and retailers.[83] Collectively, these

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[79] Stephen E. Siwek, "The True Cost of Motion Picture Piracy to the U.S. Economy," *Institute for Policy Innovation*, September 9, 2006, http://www.ipi.org/.

[80] Stephen E. Siwek, "The True Cost of Sound Recording Piracy to the U.S. Economy," *Institute for Policy Innovation*, August 21, 2007, http://www.ipi.org/.

[81] "Country Comparison: GDP (Purchasing Power Parity)," *CIA: The Wold Factbook*, accessed March 17, 2012, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html.

[82] Stephen E. Siwek, "The True Cost of Copyright Industry Piracy to the U.S. Economy."

[83] "Statement of Michael P. O'Leary, Senior Executive Vice President, Global Policy and External Affairs on Behalf of the Motion Picture Association of America."

workers lose $16.3 billion in wages annually.[84] As Michael O'Leary, the spokesperson from the MPAA, testified, "to these men, women, and their families, online content theft means declining incomes, reduced health and retirement benefits, and lost jobs."[85] Based on these assessments, there is no doubt that the cost of piracy is significant. The entertainment industry supports SOPA as a means to protect their property and stop the loss of revenue due to theft.

O'Leary testified on behalf of the MPAA in favor of the SOPA legislation. He and the MPAA agree that the DMCA works for web companies that make good faith efforts to respond to infringement notices, however, the rogue sites make no such effort and are often foreign sites, and therefore, other legal measures are needed to address the problem.[86] He argues that SOPA presents the best opportunity to address the concerns with piracy. He says that the law is narrowly tailored to target rogue websites and not legitimate websites through the definitions provided throughout the bill.[87] He also said that the bill would not limit free expression. In fact, he says it would uphold the First Amendment by protecting the expression of copyright holders, "some of the hardest-working, most imaginative, most creative and innovative people in our country, who

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[84] Stephen E. Siwek, "The True Cost of Copyright Industry Piracy to the U.S. Economy."

[85] "Statement of Michael P. O'Leary, Senior Executive Vice President, Global Policy and External Affairs on Behalf of the Motion Picture Association of America."

[86] "Statement of Michael P. O'Leary, Senior Executive Vice President, Global Policy and External Affairs on Behalf of the Motion Picture Association of America."

[87] "Statement of Michael P. O'Leary, Senior Executive Vice President, Global Policy and External Affairs on Behalf of the Motion Picture Association of America."

invest their time, energy and resources to create extraordinary filmed entertainment enjoyed by millions around the world."[88]

The bill also receives support from the government. The bill has 23 co-sponsors in the House of Representatives and the support of the United States Copyright Office.[89] Maria Pallante, the Register of Copyrights, provided a statement in favor of SOPA on behalf of the Copyright Office. She argued that not only does piracy harm copyright holders, it makes the Internet less appealing for creators and innovators.[90] She agreed with the MPAA that SOPA is the best way to combat piracy. In defense of SOPA, she said that it takes care to give due process to the accused websites through the notice requirements.[91] She went further to say that the notification process employed by SOPA is innovative as it reduces the need for litigation by allowing copyright owners to work directly with web companies to take down infringing content.[92] Finally, she said that SOPA was not incompatible with the DMCA safe harbor provisions because it limits the liability of web companies for acting in compliance with the bill.[93]

Finally, SOPA has the backing of legal experts. Floyd Abrams, a prominent First Amendment scholar and representative for several entertainment industry organizations, defends SOPA against claims that it infringes upon free expression. He argues that the

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[88] "Statement of Michael P. O'Leary, Senior Executive Vice President, Global Policy and External Affairs on Behalf of the Motion Picture Association of America."

[89] "Stop Online Piracy Act," 1.

[90] "Statement of Maria A. Pallante, Register of Copyrights."

[91] "Statement of Maria A. Pallante, Register of Copyrights."

[92] "Statement of Maria A. Pallante, Register of Copyrights."

[93] "Statement of Maria A. Pallante, Register of Copyrights."

law does not specifically prohibit any form of speech, and it does not limit the use of defenses against infringement including fair use.[94] He also argues that the bill takes several steps to ensure due process. First, it authorized the Attorney General to notify the site found to be infringing before taking other action. Then it requires the Attorney General to provide substantial information to web companies to block the infringing website. Finally, the infringing site is given ample opportunity to respond and offer counter notice against the claim.[95] He also argues that the law is narrowly tailored because the definition of the infringing site has three clear measures that must be met.[96] While he admits that some non-infringing speech would probably be taken down under the law, he says this is only incidental and there is ample means for the owner of such material to recover it.[97]

Overall, the arguments in favor of SOPA are that the copyright holders are losing large sums of money to copyright, and that the bill is a narrowly tailored means of addressing these losses that does not impede First Amendment rights.

Part Three: Opponents

While SOPA does have significant support, it also faces intense opposition. Opponents argue that SOPA is detrimental to innovation, creativity, and the Internet industry. Some of the major protestors to SOPA are Internet-based technology companies

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[94] Floyd Abrams, "Re: Stop Online Piracy Act," *Motion Picture Association of America*, accessed March 17, 2012, http://www.mpaa.org/Resources/1227ef12-e209-4edf-b8b8-bb4af768430c.pdf.

[95] Floyd Abrams, "Re: Stop Online Piracy Act."

[96] Floyd Abrams, "Re: Stop Online Piracy Act."

[97] Floyd Abrams, "Re: Stop Online Piracy Act."

like Google, Yahoo, and Linkedin.[98] These companies say they are the most affected by the SOPA legislation and stand to lose the most if the law is not narrowly tailored.

The Internet industry is also an important part of the U.S. economy. The Internet represents 15 percent of the U.S. GDP growth in the last five years.[99] Google alone netted $64 billion for American businesses.[100] As a whole, Internet advertising represents 21 percent of the GDP and makes $300 billion.[101] Even though the Internet industry is relatively new compared to the entertainment industry, it is certainly providing the U.S. with significant revenue and is an important part of the economy.

These companies are legitimate websites that make good faith attempts to take down any infringing material on their websites under the DMCA.[102] They believe that stopping piracy is a worthy goal and are willing to do their part to address the issue.[103] They do not believe that SOPA is the best way to achieve this goal. Several Internet companies banded together to protest SOPA by blacking out their websites or sending users to pages dedicated to preventing SOPA.[104]

Katherine Oyama testified against SOPA on behalf of Google, illustrating the concerns the Internet companies have about the law. First, she argued that the law was not narrowly tailored, and that law-abiding U.S. companies could be at risk of being

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[98] "November 15, 2011," accessed March 17, 2012, http://politechbot.com/docs/sopa.google.facebook.twitter.letter.111511.pdf.

[99] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc."

[100] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc."

[101] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc."

[102] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc."

[103] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc."

[104] "The Day The Internet Stood Still: Why Wikipedia And Craigslist Went Dark."

considered a site that "enabled or facilitated" infringement.[105] Google worries that it might be held accountable for content posted to its various web services regardless of whether the company is responsible for the content. Oyama points out that due to the vague wording of the law, a third-party user could post copyrighted content to one of the thousands of web pages that Google owns without the companies knowledge, and Google could be held liable for that content.[106] Google could be targeted for secondary liability because they provided the platform for posting the infringing content, even though it really had no part in the actual infringement.

She and Google also worry that the wording of the law has serious First Amendment implications if non-infringing content can be affected due to "a portion" of a website being "dedicated to theft" without the knowledge of the site owner.[107] If Google were to be labeled infringing due to one portion of its website, all of the legitimate content could be targeted along with the illegal content. Oyama argues that the law would have to be better defined so as to only target websites that are dedicated to infringement so that legitimate content would not be affected, and therefore free speech would not be harmed.[108]

Finally, she expressed concern that SOPA would undermine the DMCA safe harbor provisions by forcing companies to preemptively monitor their sites and services so they cannot be held liable for infringing content on "a portion" of their sites.[109] Google

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[105] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc."

[106] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc."

[107] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc."

[108] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc."

[109] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc."

is a website that is afforded protection by the DMCA safe harbor provisions so long as it takes down infringing content when notified. Oyama argued that the wording of SOPA causes uncertainty about the level of monitoring the company must manage in order to still be afforded protection.[110] Due to the uncertainty, Google feels that it may have to preemptively monitor all of the content to ensure that it is not liable for anything posted on even "a portion" of its web property.[111]

The opposition of SOPA also has the support of the government. Ten members of Congress, including U.S. Rep. Ron Paul of Texas wrote a letter concerning the wording of SOPA. They said that SOPA was "overly broad and would cause serious and long term damage."[112] The Obama administration has also commented on SOPA and stated that it will not lend its support to the law. A representative specifically stated, "we will not support legislation that reduces freedom of expression, increases cyber security risk, or undermines the dynamic, innovative global Internet."[113] This amount of government support helps to legitimize the concerns of the Internet industry.

Finally, legal scholars have also sided with the SOPA opposition. Laurence Tribe, a First Amendment scholar, outlines several concerns with SOPA in regard to free speech. First, he states that SOPA provisions place prior restraints on speech because they allow

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[110] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc."

[111] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc."

[112] "Dear Chairman Smith and Ranking Member Conyers," November, 15, 2011, accessed March 17, 2012, http://static.arstechnica.net/2011/11/17/sopa.house.opponents.letter.111511.pdf.

[113] Victoria Espinel, Aneesh Chopra, and Howard Schmidt, "Combating Online Piracy while Protecting an Open and Innovative Internet," White House, https://wwws.whitehouse.gov/petition-tool/response/combating-online-piracy-while-protecting-open-and-innovative-internet.

companies to block or stop service to websites without notice or even a court order.[114] This is problematic because only a court can determine if the content justifies restraint. Next, he argued that the law is overly broad because a website "dedicated to theft of U.S. property" could be "a portion" of a website that "enables or facilitates" infringement by a third party.[115] He said that this wording would cause legitimate companies, with legitimate forms of expression to be held liable for secondary liability. He goes further to say that websites may stop engaging in lawful speech because they fear that they will be liable under SOPA.[116]

In summation, the opponents of SOPA argued that the bill could undermine the DMCA safe harbors, place unwarranted regulation on law-abiding websites, and violate the First Amendment rights of websites and users. These concerns and opinions are just as valid as those of the SOPA proponents in evaluating the law.

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[114] Laurence H. Tribe, "The 'Stop Online Piracy Act' (SOPA) Violates the First Amendment," accessed on March 17, 2012, http://www.scribd.com/doc/75153093/Tribe-Legis-Memo-on-SOPA-12-6-11-1.

[115] Laurence H. Tribe, "The 'Stop Online Piracy Act' (SOPA) Violates the First Amendment."

[116] Laurence H. Tribe, "The 'Stop Online Piracy Act' (SOPA) Violates the First Amendment."

Chapter Three: Discussion

Part One: Constitutional Evaluation of SOPA

After exploring the opinion of both the supporters and opponents of the SOPA legislation, some serious concerns were raised by both sides that need to be addressed. In order to determine if SOPA is constitutional, it must be determined if strict or intermediate scrutiny should be applied to the law. Strict scrutiny requires the law to be content-based.[117] SOPA's proposed purpose and legislative text do not specifically prohibit any form or speech because the law is worded to prevent and prohibit piracy, and to protect copyright law.[118] As copyright law is compatible with the First Amendment, the law is not content-based. Any violation of free speech in this bill would ensue from the protection of copyright. Therefore, intermediate scrutiny should be applied.

In order to be constitutional under intermediate scrutiny it must meet three standards. First, the law must not specifically suppress speech.[119] As determined in the previous paragraph, SOPA does not outline any single type of speech that would be targeted, so the bill meets the first standard. Second, the law must advance a important government interest.[120] SOPA represents the government attempt to update copyright law for innovations in Internet technology, and it seeks to protect the government's interest in

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[117] Robert Trager, Joseph Russomanno, and Susan Dente Ross, "The First Amendment," 63.

[118] "Stop Online Piracy Act," 10-48.

[119] Robert Trager, Joseph Russomanno, and Susan Dente Ross, "The First Amendment," 64.

[120] Robert Trager, Joseph Russomanno, and Susan Dente Ross, "The First Amendment," 64.

the entertainment sector of the economy.[121,122] As such, the bill meets the second criterion for constitutionality. The third standard is the one that warrants further consideration: the law must be narrowly tailored so that free speech is only incidentally restricted in pursuing the government interest.[123] So, in order to be constitutional, the SOPA legislation must be narrowly tailored, and only incidentally affect free speech. These standards will be evaluated separately, along with the additional considerations offered by the previous SOPA commentary of the effect on the DMCA safe harbors and the use of due process.

First, it must be determined if the bill is narrowly tailored. The issue to consider here is the definition of "foreign infringing site" and "dedicated to the theft of U.S. property" outlined in Sections 102 and 103 of the bill.[124] SOPA outlines that in both definitions that a "site, or a portion thereof" can cause a company to be held liable for infringement.[125] The problem here is the use of "a portion" of a website. The bill does not specify a certain threshold for how much of a website must be infringing to constitute "a portion."[126] Without specification, a single page on a website that contains copyrighted content could cause an entire website with otherwise legitimate forms of expression to be held liable for copyright infringement, even if the owner of the website has no knowledge of the content. These definitions are not narrowly tailored enough to protect the

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[121] "Stop Online Piracy Act," 10-48.

[122] Stephen E. Siwek, "The True Cost of Copyright Industry Piracy to the U.S. Economy."

[123] Robert Trager, Joseph Russomanno, and Susan Dente Ross, "The First Amendment," 64.

[124] "Stop Online Piracy Act," 10-47.

[125] "Stop Online Piracy Act," 10-47.

[126] "Stop Online Piracy Act," 10-47.

legitimate forms of speech on websites, both foreign and domestic, because it is uncertain what "a portion" of a website might be when defining copyright infringement. The uncertainty could be problematic for forms of speech that are protected under the First Amendment.

Next, it must be determined if any speech restrictions are only incidental in furthering the government's goal of combating piracy. The part of the bill at issue here is section 104, which provides legal immunity to companies acting voluntarily to restrict piracy.[127] In this section of the bill, a private company may, with no prompting from the government, a court, or a copyright holder, block or cease service to a website that they believe to be infringing.[128] The section provides a company immunity for "taking any action described in [section 102 and 103] with respect to an Internet site, or otherwise voluntarily blocking access to or ending financial affiliation with an Internet site," as long as the company believes the content to be in violation of copyright.[129] This causes problems with prior restraints and fair use. Only a court can determine if content is enough to restrain and if content is safe under the fair use doctrine, not a private company.[130] In essence, the bill allows a company to take down anything they feel is infringement without notifying a court, the content provider, or the website without any fear of legal action. This is a prior restraint on expression. A company may take down a legitimate form of expression, without notification, that contains copyrighted material but

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[127] "Stop Online Piracy Act," 47-48.

[128] "Stop Online Piracy Act," 47-48.

[129] "Stop Online Piracy Act," 47-48.

[130] Laurence H. Tribe, "The 'Stop Online Piracy Act' (SOPA) Violates the First Amendment."

is protected under fair use. Section 104 of the bill causes the repression of free speech to not be incidental, but rather prior restraint.

Based on the third standard for intermediate scrutiny, the SOPA legislation is neither narrowly tailored, or only an incidental restraint on free speech. Because the bill cannot meet this standard, it may be in violation of First Amendment rights.

In order to understand the full scope of the problem with the bill, considerations must also be made for the affect it has on the DMCA safe harbor provisions, and due process. Section 104 causes problems on both fronts. If a company can act independently and remove content it determines to be infringing, legitimate websites that adhere to the DMCA take-down notice provisions could be affected. These websites are already afforded immunity from liability under the safe harbor provisions and should not be held accountable for infringing content on their websites that they have no knowledge of.[131] Furthermore, this section does not allow for due process. The private companies may stop service or block content without ever having to notify the content provider because the bill gives them a blank check to "otherwise voluntarily" block access to a site, meaning the company can approach the issue in any way they see fit.[132] This means that under this section, a private advertiser or payment service could choose to end their services to a website even if they are still under contract without fear of legal action.

Section 103 also conflicts with the DMCA safe harbor provisions. The purpose of section 103 is to prohibit sites "dedicated to theft of U.S. property."[133] Under this section

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[131] "Digital Millennium Copyright Act," 18-27.

[132] "Stop Online Piracy Act," 47-48.

[133] "Stop Online Piracy Act," 24-25.

of the bill, a website can be held liable if the "site, or portion thereof" is being used to "enable, or facilitate" infringement by a third party.[134] So, once again, a legitimate site that adheres to DMCA take down notifications may be liable for a small part of their website that enables or facilitates infringement, that they have no knowledge of.

For these reasons, SOPA is unconstitutional under the First Amendment, and is inconsistent with the DMCA. These issues are not only legally problematic, they also have real-world ramifications. As written, SOPA could be used to expand the law beyond its original purpose of stopping Internet piracy, to targeting legitimate websites with legitimate content with First Amendment protection. The bill could potential harm the precarious balance between copyright protection and free speech.

Part Two: The Effect of SOPA on YouTube

The best way to illustrate the problem with this law is to follow the effect it would have on a legitimate website in the United States. YouTube is the perfect venue for examining this effect because it is both legitimate and has content that would be problematic under SOPA.

YouTube was founded in 2005 by Chad Hurley, Steve Chen, and Jawed Karimis.[135] It is primarily a user-generated website where users may post personal videos and share them with other Internet users. In 2009, YouTube was acquired by Google, who added advertisement capability to the website through existing Google technology.[136]

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[134] "Stop Online Piracy Act," 25.

[135] "Frequently Asked Questions," YouTube, accessed March 17, 2012, http://www.youtube.com/t/faq.

[136] "Frequently Asked Questions."

Today, 60 hours of video are uploaded to YouTube every minute and over four billion videos are viewed daily.[137] One hundred million people socialize on YouTube each week, making the website both incredibly successful and an important part of the Internet community.[138]

YouTube is considered a legitimate, non-infringing website in both common and statutory law. *Sony v. Universal Studios* says that a company is not liable for infringement via their product if the product is not primarily intended for infringement, and it has significant non-infringing uses.[139] YouTube was founded to "create a place where anyone with a video camera and an Internet connection could share a story with the world."[140] This shows that YouTube's primary purpose is facilitating free expression, and not infringing on copyrighted content. The website has significant uses not only as a venue for social networking, but also has significant commercial uses. YouTube generates revenue through advertisements placed on its home page, search results, and within posted videos.[141] These advertisements generate revenue not only for YouTube, but also for the advertiser. Companies have the ability to target specific audiences and reach specific markets through YouTube.[142] This illustrates that YouTube has significant uses for non-infringing content that are both social and commercial.

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[137] "Statistics," YouTube, accessed March 17, 2012, http://www.youtube.com/t/press_statistics.

[138] "Statistics."

[139] *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 933 (2005).

[140] "YouTube & the Online Video Revolution," YouTube, February 14, 2010, http://youtube-global.blogspot.com/2010/02/youtube-online-video-revolution.html.

[141] "Frequently Asked Questions."

[142] "Frequently Asked Questions."

Even though a quick search of YouTube can turn up copyrighted content, it is not posted by YouTube and YouTube, when notified, takes steps to take down content that is in violation of copyright law.[143] *Sony v. Universal Studios* set the precedent that the "mere knowledge of infringing potential or of actual infringing uses would not be enough" for the company to be held liable.[144] *MGM v. Grokster* further qualifies the Sony decision by stating that in addition to actual infringement and the capability of distributing copyrighted content, a website must have the intent to infringe to be liable.[145] While YouTube does have posted material that violates copyright, and it provides the means for distributing the content, it does not have the intent to infringe. Because of this, the infringing content on YouTube is not enough for it to be held liable and it is consistent with common law.

YouTube is also in compliance with the DMCA.[146] The website qualifies for safe harbor under the law so long as it takes reasonable steps to take down any content that is in violation of copyright law.[147] YouTube has created technology called Content ID that allows copyright holders to find infringing content on the website and request to have it removed.[148] More than 2,000 companies use the Content ID software to address the copyright issues on YouTube.[149] If YouTube receives notice to take down content, the

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[143] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc."

[144] *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005).

[145] *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939 (2005).

[146] "Frequently Asked Questions."

[147] "Digital Millennium Copyright Act," 18-27.

[148] "Frequently Asked Questions."

[149] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc."

request is processed within 24 hours.[150] Because YouTube takes the steps to remove content in violation of copyright law, it is not held liable for the infringing content on its website.

While YouTube is a law-abiding website, it does contain content that might be problematic under SOPA. The YouTube website has three different types of content: original, appropriated, and copied.[151] Original content are videos that do not include any material copyrighted by someone else and are the original expression of the poster.[152] Posts that fall into this category are videos placed on YouTube by copyright owners, like OkGo's "Here I Go Again" music video, and videos posted by users that do not include others copyrighted material, like "Noah takes a photo of himself everyday for 6 years."[153] Appropriated content contains copyrighted material, but the inclusion of the material falls under fair use and constitutes an expression separate from the original content.[154] This category includes remix, videos that mash together other videos and audio tracks to create something new, and machinima, a type of video production that involves placing an original voiceover on top of footage from video games. Examples of appropriated videos can be seen in Lawrence Lessig's TED talk in 2007, including a video that pokes fun at the relationship between Tony Blair and George Bush through the song "Endless Love"

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[150] "Testimony of Katherine Oyama, Copyright Counsel, Google Inc."

[151] Lucas Hilderbrand, "Youtube: Where Cultural Memory and Copyright Converge," accessed on March 17, 2012, JSTOR.

[152] Lucas Hilderbrand, "Youtube: Where Cultural Memory and Copyright Converge."

[153] Lucas Hilderbrand, "Youtube: Where Cultural Memory and Copyright Converge."

[154] Lucas Hilderbrand, "Youtube: Where Cultural Memory and Copyright Converge."

by Diana Ross and Lionel Richie.[155] Finally, copied content, or pirated content, is content that completely belongs to a copyright holder that does not further the poster's own original expressions.[156] These are movies, songs, TV shows, and other copyrighted content that are posted on the website without the consent of the owner, and without the knowledge of YouTube. This is the content that SOPA is supposed to target, but other types of content are also at risk under sections 103 and 104 of the bill.[157]

If SOPA were to pass, YouTube could be liable under section 103 for the portion of its website that contains infringing content even if YouTube is unaware of this content and is in compliance with the DMCA takedown notices. YouTube could be considered a site "dedicated to the theft of U.S. property" because its services "enabled or facilitated" the infringement of "a portion" of its third-party users.[158] This label means that the United States and the copyright holder could issue a notice to the YouTube's advertisers and request that they stop their services to the website.[159] Because YouTube is a website that generates its revenue from advertisements, if this were to happen, the website would no longer be commercially viable and YouTube's services, as well as, all of the content on YouTube, both infringing and legitimate, would be lost.

Even if the United States and copyright holders did not pursue action against YouTube, the website could still be at risk due to the action of a private company under

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[155] "Larry Lessig on Laws that Choke Creativity," TED, March, 2007, http://www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity.html.

[156] Lucas Hilderbrand, "Youtube: Where Cultural Memory and Copyright Converge."

[157] "Stop Online Piracy Act,"1.

[158] "Stop Online Piracy Act," 24-47.

[159] "Stop Online Piracy Act," 24-47.

section 104 of the bill. One of YouTube's advertisers could decide to act voluntarily, without the prompting of a court, and stop advertising with YouTube due to any infringing content on the site, or even appropriated content that is considered fair use.[160] As long as the advertiser believes that the content is infringing they can stop service without notifying YouTube even if they are under contract, and they would not be legally responsible for their actions.[161] In order to ensure that this does not happen, YouTube would have to monitor all of the content on its website and take down any content that could be construed as a violation to copyright, even content that should be protected under fair use. Because 60 hours of video are uploaded to YouTube every minute preemptively monitoring all of this content would place a significant burden on the company, and new technology would need to be developed.[162]

Under SOPA, a legitimate site like YouTube, and the legal forms of expression on the website could be targeted because of SOPA. This is not constitutional and is inconsistent with other copyright laws. The law would have to be drastically modified to stop this from happening, and reach only its target: pirate websites.

Part Three: Alternative Solution

As it is written, SOPA is overly broad and inconsistent with both common and statutory law. It has the potential to violate First Amendment rights and undermine the DMCA safe harbor provisions. However, the law does offer the ability to sever any

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[160] "Stop Online Piracy Act," 47-48.

[161] "Stop Online Piracy Act," 47-48.

[162] "Statistics," YouTube, accessed March 17, 2012, http://www.youtube.com/t/press_statistics.

provisions or applications that are deemed unconstitutional. The bill states "if any provision of this Act . . . is held to be unconstitutional, the other provisions . . . shall not be affected thereby."[163] Because of this severability clause, the portions of SOPA that are problematic can be removed, leaving the law to be narrowly tailored and only targeting pirate websites and not legitimate content. The proposed solution uses this clause to sever problematic passages, while still retaining the intent of the law.

First, and foremost, section 104, which allows private companies to take voluntary action against websites, should be removed as it does not provide due process, undermines the DMCA safe harbors, and allows for the infringement of First Amendment rights through prior restraints on fair use content.[164] The removal of this section would ensure that only courts are able to determine if action must be taken against a website for a violation of copyright. It would make sure that private advertisers and payment services could not voluntarily stop services to a website without a court order. This would protect websites and users from unnecessary action against content without notification.

Next, section 103 should be severed because it violates the First Amendment through a vague wording on the definition of a site "dedicated to the theft of U.S. property," and because it interferes with the DMCA safe harbor provisions.[165] The removal of section 103 would protect legitimate websites like YouTube from liability for "a portion" of its website that contains copyrighted material. Instead, websites based in the United States would continue to be governed by current law, and would still be

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[163] "Stop Online Piracy Act," 2-3.

[164] "Stop Online Piracy Act," 47-48.

[165] "Stop Online Piracy Act," 24-47.

afforded safe harbor so long as they comply with the law. The DMCA would still ensure that sites within the United States do not violate copyright, while still allowing for the immunity of web companies that make reasonable attempts to comply with takedown notices.[166] The DMCA is more than adequate to address the issues of copyright for companies that are based in the United States.

Finally, section 102, that targets foreign infringing websites, would still be included in the bill, but some of the wording would have to be changed so that it is more narrowly tailored to target only foreign sites that are dedicated to copyright infringement.[167] The specification that "a portion" of a website that violates copyright would be severed. This definition should be revised so that it is in compliance with the *Sony* and *Grokster* Supreme Court Decisions. The definition would now say that a site is considered to be a "foreign infringing site" if it its primary purpose is infringement. The site must also be intentionally providing copyrighted material, or the means to acquire copyrighted material. These changes would make it so the law is only targeting pirate websites and not foreign legitimate websites that are unaware of infringement on their website.

With the changes, section 102 would now represent the main text of the bill, and would allow the United States to take a more proactive role in stopping foreign infringement. The bill would be used in conjunction with the current means of addressing foreign copyright infringement through trade agreements with other countries and the Berne Convention. While the trade agreements aid the process of stopping foreign

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[166] "Digital Millennium Copyright Act," 1-27

[167] "Stop Online Piracy Act," 10-24.

pirating, the section would increase protection for copyright by giving the United States courts independent jurisdiction through the accessibility of web companies located in the United States.

These changes to the SOPA legislation fix the constitutional problems by making the bill narrowly tailored to combat sites that intentionally pirate copyrighted works. The changes also cut out any prior restraints, inconsistencies with fair use and the DMCA, and violations of due process. With the changes, SOPA would be a constitutionally grounded bill that not only prevents major instances of copyright infringement, but also protects the right to free expression.

Conclusion

The controversial bill SOPA pitted two long-held legal rights in the United States against each other: intellectually property rights and First Amendment rights. The goal of the bill, the protection of copyrighted works from web-based violators, was well received by most, but the actual wording of the law brought forth strong protests and concerns for free expression. The overly broad wording of the bill appeared to make it unconstitutional under the First Amendment but the legislation could be rewritten to effectively meet its goal without risking free speech if some of the provisions were removed. Although SOPA has been tabled in the House of Representatives, the conflict between free speech and intellectual property is far from over.[168] Lawrence Lessig, a law professor at Harvard University, has warned that it is likely that similar bills with similar First Amendment concerns will be introduced in the near future.[169] Bills like the Anti-Counterfeit Trade Agreement illustrate that the struggle to balance the two competing values continues.[170] Despite this, viable solutions can be found to accommodate both sides of the debate. The proposed alternative solution is one such option. The suggested changes to the Stop Online Piracy Act would help to maintain the careful balance between copyright and free expression, while still targeting pirate websites. Given the importance of these two values, there is no reason that the United States should not strive to maximize both of them rather than pit them against each other.

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[168] Julianne Pepitone, "SOPA and PIPA Postponed Indefinitely After Protests," January 20, 2012, http://money.cnn.com/2012/01/20/technology/SOPA_PIPA_postponed/index.htm.

[169] Alex Fitzpatrick, "SOPA 2.0: Why the Fight for Internet Freedom Is Far From Over," April 6, 2012, http://mashable.com/2012/04/06/sopa-lawrence-lessig/.

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