This statement was drafted in connection with a proposed hearing before the House Oversight and Government Reform Committee that would have examined legislative proposals to block access to websites containing copyright infringing materials. The testimony was submitted to the Committee, but the hearing was postponed before the testimony could be entered in the record.

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On

"Government Mandated DNS Blocking and Search Takedowns - Will It End the Internet as We Know It?

Before the House Committee on Oversight and Government Reform

January 18, 2012

Chairman Issa, Ranking Member Cummings, and Members of the Committee:

Thank you for holding this hearing and extending to the American Civil Liberties Union the privilege of offering testimony. We oppose current proposals to take down infringing online content through Domain Name Service (DNS) and/or search engine blocking because such mechanisms assuredly will also block lawful non-infringing content. Moreover, current proposals fall short procedurally by failing to provide notice of the takedown to the owners or producers of such lawful content and by failing to provide those parties any opportunity to participate in the proceedings relevant to the restriction.

The American Civil Liberties Union (ACLU) is a non-partisan advocacy organization having more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide. We are dedicated to the principles of individual rights, equality, and justice as set forth in the U. S. Constitution. For more than 90 years since its founding, the ACLU has been America's leading defender of First Amendment free speech principles. Most relevant to the current hearing, we led the way in landmark federal litigation establishing the principle that online speech deserves the very same protections as offline speech.[1]

The purpose of this hearing is to examine the potential impact of DNS and search engine blocking on the Internet community. The Chairman has called for an examination of policy proposals affecting the way taxpayers access the Internet and federal strategies to protect American intellectual property without adversely affecting economic growth. The key legislative proposals put forward in the current Congress are H.R. 3261, the Stop Online Piracy Act ("SOPA"); S. 968, the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 ("PROTECT IP Act"); and S. 2029, the Online Protection and Enforcement of Digital Trade Act ("OPEN Act"). In the last Congress, S. 3804, the Combating Online Infringement and Counterfeits Act ("COICA") served as a precursor to the current bills. Each of the bills presents at least some First Amendment concerns. This statement will focus primarily on SOPA – the bill which is the primary vehicle for activity in the House of Representatives and which is currently pending in the Committee on the Judiciary.

SOPA is a well-intentioned effort to reduce the infringement of copyrighted material online. We share the sponsors' goal in that regard. As introduced and in the form of the proposed December 2011 House Judiciary Committee Manager's Amendment, however, the bill is flawed and will result in the takedown of large amounts of non-infringing content from the Internet in contravention of the First Amendment of the U. S. Constitution.[2] We have opposed SOPA in its current form before the Judiciary Committee and have worked with the sponsors to try to reformulate the bill so it is narrowly focused on providing an effective and adequate remedy to those content producers whose copyright interests are infringed by the activities of others, while

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[1] Reno v. ACLU, 521 U.S. 2329, 2344 (1997).

[2] Amendment in the Nature of a Substitute to H.R. 3261 Offered by Mr. Smith of Texas [hereinafter 'Manager's Amendment']. The Manager's Amendment remains pending before the House Judiciary Committee's mark up of H.R. 3261. The markup hearing was suspended in December with dozens of amendments still to be heard. Votes on amendments prior to suspension, however, would suggest that the Manager's Amendment would ultimately be adopted and, therefore, its provisions will be the focus of our discussion of SOPA.

preserving access to non-infringing content and protecting the rights of the creators and owners of that lawful content.

By their very nature, laws protecting copyrights constrain free speech and access to information. Unlike other speech restrictions, however, copyright laws may also advance the generation of information and ideas. A robust copyright system encourages free speech by giving speakers incentives to create and disseminate original works of authorship. Such laws add to the marketplace of ideas by encouraging the creation of more content through the assurance that content producers will receive the fruits of their labor. But access to information of all kinds – even disfavored information - is a fundamental right that must be protected. Even more to the point, the mere existence of infringing content online does not justify the removal of non-infringing content in the course of attempting to rid the Internet of the former.[3] These established principles should not change or be treated differently just because technology has changed.

- **Background**

Copyright protection in theory should only impact those who would steal the rights in works entitled to protection. But the implementation of such a system can have an effect that goes far beyond the copyright pirate and restrict perfectly lawful non-infringing content. Such is our concern with SOPA and such was our concern with two preceding bills in the legislative process. The Senate Judiciary Committee considered S. 3804, the Combating Online Infringement and Counterfeits Act (COICA) near the end of the 111th Congress. COICA was not narrowly tailored to impact only infringing content. In the current Congress, S. 968, the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PROTECT IP) received approval of the Senate Judiciary Committee but remains stalled short of the Senate floor. PROTECT IP is a significant improvement over COICA in that it uses a narrower definition for the term "dedicated to infringing activity". By narrowing the definition, the drafters thereby limited the number of online sites that would become subject to restrictive court orders. While the new definition did not eliminate impact on non-infringing content and while we were unable to support the bill for that reason, it clearly was an improvement over COICA.

SOPA in its original form was substantially worse than PROTECT IP. In prescribing the Attorney General's role in eliminating copyright infringement, SOPA eliminated the concept of sites 'dedicated to infringing activity'. In so doing, SOPA would enable law enforcement to target all sites that contain some infringing content – regardless of how pervasive that infringing content is on the site.[4] The potential for impact on non-infringing content is greater under SOPA

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[3] In Sony v. Universal Studios, 464 U.S. 417 (1984), the Supreme Court held that in general, technology is not considered unlawful if it has a substantial non-infringing use. Thus, the manufacturer of a product could not be held liable for the infringing uses of the product by others. While not directly on point, SOPA would appear to work contrary to this rule by requiring the takedown of an entire online site due to the presence of some infringing content even if the site held substantial amounts of non-infringing content.

[4] The original SOPA would also reach sites that 'facilitate' online infringement. The proposed removal of the facilitation language is a significant improvement since it eliminates the ambiguities associated with the undefined term "facilitation". We remain concerned by the language in the Manager's Amendment which requires a

than under other versions of this bill. As such, despite our support for the protection of the legitimate copyright interests of online content producers, we oppose it in its current form, given its broad sweep and its heavy hand that will land largely upon innocent content producers. In our statement to the House Judiciary Committee, we urged that committee to focus not just on the goal of protecting copyright owners, but also protecting the speech rights of consumers and providers who are reading and producing wholly non-infringing content and to eliminate the collateral damage to such protected content. Only in that way can the proposed legislation truly achieve its goal of protecting all authors in a way that is constitutionally appropriate.

- **SOPA Will Restrict Non-Infringing Online Content**

    - **Attorney General Actions**

Under SOPA, the Attorney General would identify an Internet site that is a 'foreign infringing site' – defined as a foreign site that would be subject to seizure or forfeiture for violating certain copyright laws or subject to criminal prosecution if it were sited within the U.S.[5] A successful proceeding would result in the issuance of a court order compelling the registrant or owner of the site to cease and desist from continuing activity as a 'foreign infringing site'.[6] There is no mandate that the court order provide any information about what content caused the site to become a 'foreign infringing site' or any instruction about what content would have to be removed in order to come into compliance with the order. As a consequence, the owner or registrant will be motivated to be over-inclusive in attempting to comply with the order.

Once issued, the Attorney General would have authority to serve the court order affirming the infringement upon any Internet service provider (ISP), search engine, payment network provider, or Internet advertising service.[7] The ISP would be obliged to prevent access by its subscribers to the 'site that is subject to the order'. The search engine would be compelled to prevent the site from being served as a direct hypertext link. The payment network provider would have to suspend payment transactions involving the site. The Internet advertising service would be barred from providing ads or payments for ads for the site.[8] Such orders might be acceptable if they only affected infringing content. But a site with infringing content almost always has a wealth of non-infringing content as well. As long as the court order only references a particular site and as long as the mandate to ISP's, search engines, payment providers, and advertising services is to interdict access, payment or ads relating to the entire site – containing both infringing and non-infringing content – the statutory mandate goes too far. By contemplating an order that effectively bars others from gaining access to both infringing and non-infringing content, the proposed statute goes beyond appropriate First Amendment free speech protections.

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determination of whether a site is 'operated in a manner that would . . . subject it . . . to . . . seizure or forfeiture . . . or . . . prosecution by the Attorney General . . . .' Manager's Amendment at Section 2 (Section 102 (a) defining 'foreign infringing site'), the conditional nature of which creates its own ambiguities.

[5] Manager's Amendment at Section 2 (Section 102 (a)).

[6] *Id*. (Section 102(b)).

[7] *Id*. (Section 102 (c)).

[8] *Id*.

A speech restriction will fail unless it achieves a compelling public purpose and does so by being narrowly tailored to achieve its stated purpose.[9] The Supreme Court has held a very strict line in determining if a statute's scheme is narrowly tailored – striking down laws banning animal crush videos, violent video games, and indecent online material.[10] A court may very well find that stopping online piracy is a legitimate public purpose, perhaps even a compelling one. But the scheme presented in SOPA is far from narrowly targeted at infringing content. Just compare it to the other pending bill – PROTECT IP. That is only one example of how to protect online copyrights with a lesser impact on non-infringing content. While we think even PROTECT IP falls short of adequately protecting non-infringing content from removal, the bill nonetheless serves as Exhibit A in establishing that SOPA falls short of the constitutional requirement. As long as SOPA's statutory scheme seeks to impact sites that are something other than pervasively and grossly infringing, we will continue to have very grave concerns about the statute's constitutionality.

- **Manager's Amendment – Limiting Impact on Non-Infringing Content**

The Manager's Amendment implicitly recognized the constitutional weakness resulting from the impact on non-infringing content by adding language to the provision describing the compliance obligation of search engine providers. Pursuant to that new section, the bill would require the court to narrowly tailor the order to a search engine provider to be consistent with the First Amendment and 'to be the least restrictive means to effectively achieve the goals of this title'.[11] This language would be most helpful if only it were inserted in the directive to the courts relating to issuance of cease and desist orders. In the original proceedings against a foreign infringing site, SOPA contains no suggestion that the complaining party must make the court aware of the third parties who will be served copies of the order. In issuing its order, a court will have no idea whether the compliance obligation will fall to an ISP, a search engine, a payment provider, or an advertising service. There is nothing within the section describing the order to be issued to suggest to a court that it must include an instruction to such a recipient to narrowly tailor its compliance action so as not to impact non-infringing content. And, because the Manager's Amendment only includes the narrowly tailored language in its section on search engine compliance, it clearly does not apply to ISPs, payment providers or advertising services.

Chairman Smith deserves credit for advancing this new language, but we strongly recommend that it be moved from the subsection relating to search engine compliance to the subsection describing the relief to which a complaining party is entitled upon proving the existence of a foreign infringing site. The language should require any court's order to state with specificity the content deemed to be infringing and should direct those subject to its mandate to take all reasonable measures to avoid restricting access to non-infringing content in the course of complying with the order. Such a change would have the effect of narrowing and clarifying not only the cease and desist order, but also the nature of compliance expected of ISPs, search engines, and other third parties.

[9] Sable Comm'ns of Calif. v. FCC, 492 U.S. 115, 126 (1989).
[10] U.S. v. Stevens, 130 S. Ct. 1577 (2010) (animal cruelty); Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729 (2011) (violent video games); Reno v. ACLU, 521 U.S. 2329, 2344 (1997) (Communications Decency Act).
[11] Manager's Amendment at Section 2 (Section 102(c)).

- **Manager's Amendment – Notice and Service of Process**

The Manager's Amendment also recognized the importance of due process by expanding the notice obligations of the Attorney General in bringing an action to seek an order against a foreign infringing site. If adopted, the new version of SOPA would require notice not just to some, but all registrants of the domain name and to all owners and operators of the site. However, the proposal still creates a less rigorous due process obligation when compared to regular federal procedures. When fundamental speech rights are on the line, Congress should be concerned with providing more rigorous procedures for notice and opportunity to be heard, not less. Even more troubling, there is absolutely no obligation to provide notice to the producers or owners of non-infringing content to which access will be restricted as part of the collateral damage associated with the takedown of the foreign infringing site.

While the Manager's Amendment expands notice requirements by mail and email to all registrants, owners and operators associated with the targeted site, formal service of process is also met by the same mail and email delivery.[12] And even such minimal notice obligation is required only if the addresses are reasonably available.[13] While providing notice to additional parties is a step in the right direction, such a standard for service – the procedure traditionally used to begin a court action - is substantially less than required in most federal proceedings, where the standard calls for personal delivery upon the party or an officially designated agent.[14] Service by publication is authorized in certain limited circumstances, but typically only as a last resort upon showing that a party cannot be served by other means.[15] No justification exists to deny to alleged online infringers those tried and true procedural protections available to most parties who are called to account before federal courts. Because of the restrictive impact on First Amendment-protected materials and because alleged online pirates are neither more nor less deserving of procedural protections than other defendants, any legislative proposal must avoid such weakened notice provisions. Instead, Congress should insist that the Attorney General make service upon online infringers in the same way that other federal plaintiffs must serve notice upon other federal defendants.

Just as importantly, SOPA ignores the rights of those owning and producing non-infringing content. There is agreement among supporters and opponents of SOPA that access to non-infringing content will be restricted when courts issue orders under SOPA to restrict access to sites with infringing content.[16] Yet SOPA includes no provision to alert the producers and/or

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[12] Such delivery is one of two notice alternatives. The other alternative is to provide notice under Rule 4(f) of the Federal Rules of Civil Procedure – the rule that defines traditional mechanisms for serving parties in foreign countries. Because service in foreign countries is sometimes complicated and time consuming, as a practical matter, the Attorney General will always choose mail delivery.

[13] Manager's Amendment at Section 2 (Section 102(b)).

[14] Fed. R. Civ. Proc. 4.

[15] *See, e.g., id*. at 71A.

[16] *See* Letter of Floyd Abrams to Chairman Lamar Smith et al. (Nov. 7, 2011) (favoring SOPA, but noting it may 'result in the blockage or disruption of some protected speech') *available at* http://www.mpaa.org/Resources/1227ef12-e209-4edf-b8b8-bb4af768430c.pdf; Laurence H. Tribe, *The "Stop Online Piracy Act" (SOPA) Violates the First Amendment* (noting 'tens of thousands of pages could be targeted if only a single page' was infringing) *available at* http://www.net-coalition.com/wp-content/uploads/2011/08/tribe-legis-memo-on-SOPA-12-6-11-1.pdf.

owners of non-infringing content that access to their content may be restricted or wholly blocked. These content producers have done nothing wrong – yet under SOPA they would receive no notice and have no assured right to intervene in the proceedings if they happened to become aware of the action impacting their online materials. If the Attorney General in good faith determines that access to lawful online content is likely to be restricted by any court order, the owner and producer of that content should receive notice and have the opportunity to intervene in the proceedings.

- **Internet Advertising Services**

As a separate matter, the section barring Internet advertising services from providing ads relating to the infringing site or from making ads for the infringing site is far too broad. While a payment interdiction order would have a less direct impact on the First Amendment protection of free speech, an order barring the creation or delivery of ads which have no infringing content violates the speech rights of the advertising service. The section relating to Internet advertising services should be eliminated from the bill or, at the very least, limited in scope to a payment interdiction scheme for those services that are directly tied to infringing content.

- **Market-Based Actions**

SOPA also contains another remedy for those who are the victims of online infringement – one that allows the victim to take action independently. Copyright infringements at their core are private commercial disputes. One person holding a copyright is damaged by another's infringing use of that protected content. The remedy should in most cases be one that compensates the content producer with the profits gained by the infringer or the profits lost due to the infringement. Accordingly, market-based actions make sense – and such a remedial scheme has the advantage of minimizing a direct government role in restricting speech. A real danger of overreach and/or conflict exists if the federal executive branch plays a major role in deciding what content stays up on the Internet and what content comes down.[17]

The market-based system proposed in SOPA, as modified by the Manager's Amendment, is in some respects as flawed as the Attorney General system. The same issues exist as to service of process and the impact on the non-infringing content of Internet advertising services. Also, even though market-based actions are limited to those sites that are 'primarily designed or operated' for infringing purposes, the sites that a copyright holder can target can still contain a wealth of non-infringing content in addition to the allegedly infringing content.[18] But the Manager's

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[17] How will the Attorney General decide which of many sites containing infringing content to pursue and which to let stand? Will it be on the basis of the most egregious violations or will it be on the basis of which content providers most vigorously lobby for action? Would it be permissible for the Attorney General to pursue solely those sites infringing the rights of movie producers? While prosecutorial discretion may be permissible in most circumstances, the First Amendment does not permit a law that allows government to discriminate on the basis of content. Forsyth County v. Nationalist Movement, 505 U.S. 123, 135 (1992).

[18] Manager's Amendment at Section 2 (Section 103). *See also* Kathy Gill, *Congress Bows to Hollywood, Introduces Bill to Fundamentally Alter Internet Infrastructure*, The Moderate Voice (Oct. 27, 1022) (takedown of infringing material will also result in takedown of non-infringing material) *available at* http://themoderatevoice.com/126684/congress-bows-to-hollywood-introduces-bill-to-fundamentally-alter-internet-infrastructure/.

Amendment would make valuable changes, including an expansion of notice requirements and a removal of the ability of a private party to obtain relief outside of a judicial proceeding.

- **PROTECT IP**

S. 968, the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PROTECT IP) is similar to SOPA in that it authorizes certain actions to be taken against infringing sites by the Attorney General and certain other actions that can be initiated by the alleged victims of infringement. The Senate bill has moved out of the Judiciary Committee but has not yet been considered by the full Senate.

One of the key differences between SOPA and PROTECT IP is that the Senate bill is founded on a definition of 'sites dedicated to infringing activity'. A court order will not issue unless the court finds the site meets that definition. One half of the PROTECT IP definition appears quite narrow – so that the universe of sites potentially affected by PROTECT IP would be limited to those that have 'no significant use other than engaging in, enabling, or facilitating' infringing activities.[19] The second portion of the definition, however, would appear to allow a court to reach sites that may have some other significant use and, therefore, we are concerned that the Senate bill shares some of the same problems SOPA has with respect to its impact on non-infringing content.

PROTECT IP also impacts non-infringing content of Internet advertising services and, as such, we have the same concerns noted above with regard to similar provisions in SOPA. We also have concerns with reduced service requirements and with the absence of notice to non-infringing parties whose content is impacted by the contemplated court orders. However, because of the narrower starting point – sites dedicated to infringing activities – the impact on non-infringing parties would be substantially less under PROTECT IP, unless courts construe the alternate definition to be substantially broader than the primary definition would suggest. Finally, PROTECT IP envisions no limiting language in the proposed cease and desist orders. An order that narrowly defines the infringing material would give guidance to the targeted registrant or owner as to how to come into compliance with the order. An order requiring third parties to narrow their own compliance so as to minimize the impact on non-infringing content – particularly given the narrower definition of 'sites dedicated to infringing activity' – would go a long way toward ensuring that the compliance activity of third party recipients of the orders would not further exacerbate the impact on non-infringing content.

- **Setting an Example for the World**

We are concerned with the example that an overly broad online infringement takedown scheme would set for other countries with fewer free speech protections. Even established democracies – Great Britain, France, Germany – have lesser speech protections than the United States. And as events of the 'Arab Spring' demonstrate, other more totalitarian nations have abused and will continue to abuse their technological capacity to take down content they find objectionable or threatening. Secretary of State Clinton has voiced strong support for international open Internet

[19] S. 968 at Section 2 (Definitions).

principles and standards, even while affirming that there is no inconsistency between free speech principles and strong online copyright protections.[20] Such considerations make it all that much more important to ensure that any Internet content restriction be confined strictly and solely to infringing content so that America can continue to advocate vigorously for truly open Internet standards on the international stage.

A strong system of copyright protection for online content is critical to the continued success of the flourishing Internet marketplace of ideas. But Congress must not provide that protection at the expense of taking down non-infringing content. Congress should reject or reformulate SOPA or further narrow the scope of PROTECT IP as suggested herein. By protecting ALL online content even as it attempts to provide remedies to those who are the victims of online piracy, Congress can set an example for the world.

The ACLU looks forward to continuing to work with Congress to find the right balance so that legislation designed to protect the important and legitimate interests of original content producers from online pirates does not result in the removal or chilling of lawful non-infringing online content from the Internet.

[20] Indira A. R. Lakshmanan, *Clinton to Support Facebook Freedom, Fight Censorship,* Bloomberg BusinessWeek (Feb. 16, 2011) *available at* http://hwww.businessweek.com/news/2011-02-16/clinton-to-support-facebook-freedom-fight-censorship.html; *see also* Letter from Secretary Clinton to Rep. Howard L. Berman (Oct. 25, 2011).