Written Statement of the American Civil Liberties Union

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Committee on the Judiciary

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"Stop Online Piracy Act"

Chairman Smith, Ranking Member Conyers, and Members of the Committee:

We offer this statement for the record in connection with the hearing on H.R. 3261, the "Stop Online Piracy Act" (SOPA). The bill is a well intentioned effort to reduce the infringement of copyrighted material online. We share the sponsors' goal in that regard. As introduced, however, the bill is severely 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. Accordingly, we urge the Committee to set aside this bill in its entirety or, alternatively, 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, without impacting non-infringing content.

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]

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 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. These established principles should not change or be treated differently just because technology has changed.

- **Background**

Copyright protection in theory only impacts the speech rights of 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. Despite significant changes incorporated into the bill, the bill would have impacted online content that had no infringing qualities. Further, the bill was insufficiently narrowly tailored to minimize its impact on such protected 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)

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

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, unfortunately, is substantially worse than PROTECT IP. By eliminating the concept of sites 'dedicated to infringing activity', SOPA enables law enforcement to target all sites that contain some infringing content – no matter how trivial – and those who 'facilitate' infringing content. The potential for impact on non-infringing content is exponentially greater under SOPA 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 cannot support SOPA, and in fact we oppose it in its current form, given its broad sweep and its heavy hand that will land largely upon innocent content producers. We urge Committee members 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 will the Committee truly achieve its goal of protecting authors and allow the legislation to survive constitutional challenge.

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

    - **Attorney General Actions**

Under SOPA, the Attorney General would identify an internet site that is 'committing or facilitating the commission' of an online copyright infringement.[2] Once established, 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. The ISP would be obliged to prevent access by its subscribers to the infringing site. The search engine would be compelled to prevent the infringing site from 'being served as a direct hypertext link'. The payment network provider would have to suspend payment transactions involving the infringing site. The internet advertising service would be barred from providing ads for the infringing site.[3] 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. 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.

A speech restriction will fail unless it is designed to achieve a compelling public purpose and does so by being narrowly tailored to achieve its stated purpose.[4] Courts have held a very strict line in determining if a statute's scheme is narrowly tailored – striking down laws banning

[2] S. 3261, Section 102 (a)
[3] *Id*. at Section 102 (c).
[4] Sable Comm'ns of Calif. v. FCC, 492 U.S. 115, 126 (1989).

animal crush videos, violent video games, and indecent online material.[5] 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 for the statute's constitutionality.

- **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 avoid impact on the First Amendment protection of free speech, an order barring the creation or delivery of ads which may not have anything whatsoever to do with infringing content violates the speech right 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.

But the market-based system proposed in SOPA is as flawed as the Attorney General system. The sites that a copyright holder can target include sites that often contain non-infringing content in addition to the allegedly infringing content.[6] The SOPA scheme is especially egregious because there is no obligation to seek court approval and the copyright holder has no incentive to narrow the scope of the proposed takedown to minimize impact on non-infringing material. A

[5] 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).

[6] S. 3261 at Section 103 (a). *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/.

copyright holder may provide a notice to a payment network provider or an internet advertising service, which must then take the same steps it would have to take under the court order described above. While there is no provision in the bill for issuing orders to search engines or ISPs, the authorization of an outright ban of advertising content is of questionable constitutional propriety and the absence of court oversight of such a process makes a flawed system even worse.

- **Other issues**

    - *'Facilitating' the commission of infringement.* SOPA's threshold for action rests on the existence of a site that contains infringing material or 'facilitates' such infringement. Yet the statute fails to define the activities that would comprise 'facilitation'. Could the mere unintentional provision of a link to an infringing site that contains predominantly non-infringing content be construed as 'facilitating' if the target site also has infringing content? Some who support this bill argue that is not the intention. At the very least, the bill should define 'facilitation' so as to incorporate an intent requirement and to ensure that facilitation benefitting a site that is not pervasively infringing does not warrant the harsh remedies set forth in the bill.

    - *Adequate Notice and Opportunity to be Heard.* Service of process provisions for actions under SOPA fail to assure that those having interests in the content to be removed from the Internet have an opportunity to receive notice and an opportunity to be heard before the seizure order is issued. SOPA only requires the government to send a notice of alleged violation and intent to proceed to a domain name's registrant or the owner or operator of the internet site, and only if the email and postal address are available. Such a standard is substantially less than required in most federal proceedings, where the standard calls for personal delivery upon the party or an officially designated agent.[7] 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.[8] While most people agree that online infringement continues to impact copyright holders and content producers, no justification exists to sidestep tried and true procedural protections available to all others who are called to account before the federal courts. Especially because of the implications for non-infringing First Amendment protected materials, the Committee must not permit such weakened notice provisions to control. Instead, the Committee should require true advance notice of proceedings before issuance and enforcement of a seizure order. This is especially true since in many case there is a possible financial remedy available through the payment interdiction remedy.

    - *Alternative enforcement and remedies*. A pursuit of the proceeds of infringement poses fewer constitutional risks than the proposed seizure regimen and we urge you to focus and perhaps expand upon that alternative approach. Even if the Committee decides to retain the seizure format, it should encourage alternative enforcement mechanisms. When the non-infringing content that would be taken down is

[7] Fed. R. Civ. Proc. 4.
[8] *See, e.g., id*. at 71A.

substantial in volume, or when there is a real question whether the content provider has received actual notice, deferral to such an alternative remedy seems especially appropriate. First Amendment risks are especially acute when a government actor is in the position of deciding whether to prosecute such cases. When the courts are in the position of properly framing the seizure order that effectively removes content from the internet, the court must minimize or eliminate the impact on non-infringing content. SOPA does not contemplate the issuance of such narrowing court orders, however. Instead, such orders – when the court is involved – merely provide the moving party the authority to demand that third parties cooperate in the process of removing online content. Such a system can only be saved by setting aside the emphasis on taking down content and substituting a system that emphasizes interdicting the flow of money to infringing sites.

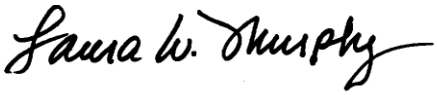
- **Setting an Example for the World**

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 ongoing '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 principles and standards, even while affirming that there is no inconsistency between free speech principles and strong online copyright protections.[9] 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.

[9] Indira A. R. Lakshmanan, *Clinton to Support Facebook Freedom, Fight Censorship*, Bloomberg BusinessWeek (Feb. 16, 2011) *available at* http://www.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).

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. We urge the Committee to reject SOPA in its present form and to set an example for the world by protecting ALL online content even as it attempts to provide remedies to those who are the victims of online piracy.

Sincerely,



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