

Piracy vs. an open Internet

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To avoid the reach of U.S. copyright laws, numerous online pirates have set up shop in countries less willing or able to enforce intellectual property rights. Policymakers agree that these "rogue" sites pose a real problem for U.S. artists and rights holders who aren't getting paid for the rampant distribution of their music, movies and other creative works. The question is how to help them. Lawmakers keep offering proposals, but they don't seem to be getting any closer to the right answer.

The latest, HR 3261, comes from House Judiciary Committee Chairman Lamar Smith, R-Texas, and a dozen co-sponsors. Dubbed the Stop Online Piracy Act, it's designed to isolate foreign websites that commit or "facilitate" willful copyright infringements by cutting off their funding and shrinking their U.S. audience. In that sense, it's similar to its counterpart in the Senate, S 968, the PROTECT IP Act, which the Judiciary Committee has approved.

Both bills go to risky extremes, however, in their efforts to stop these sites from attracting an audience. Of the two, the House bill goes further down the wrong path, weakening protections for companies - including those based in the United States - that enable users to store, publish or sell goods online. The change could force such companies to monitor everything their users do, turning them into a private security force for copyright and trademark owners.

Supporters of the bills emphasize the [proliferation](#) of pirated content online, which they argue has cost the [entertainment industry](#) billions of dollars in sales and thousands of jobs. A new survey by the American

Assembly, a public policy forum at Columbia University, found that almost half of the adults interviewed had bought, copied or downloaded bootlegged music or video, including 70 percent of those aged 18 to 29. But it also found that few did so on a large scale, and that legal and low-cost services were drawing people away from illegal ones.

The Senate and House bills would attack rogue sites in several ways, including through U.S. domain-name registrars, Internet service providers, search engines, credit card companies and advertising networks. The bills would allow the Justice Department to seek a court order to seize the domain name of an offending foreign [site](#) (if a U.S. company provided it) and require Internet service providers to redirect customers away from it. The order would also compel online payment processors to stop transferring money to the site and online advertising networks to stop providing ads.

ISPs already block sites that send spam and computer viruses, but redirecting users away from sites they're eager to reach is a bigger challenge. As British Telecommunications is discovering as it tries to blacklist a site popular with illegal downloaders, the Internet is very good at routing traffic around obstacles. Additionally, some top Internet engineers have warned, persuasively, that the data misdirection contemplated by the House and Senate bills would undermine efforts to make the Internet less vulnerable to hackers.

The House bill makes matters worse by seemingly exposing to liability a wide range of social networks, online data storage sites for consumers and user-generated content sites that are shielded today. That's because of the broad way it defines its reach.

Under Smith's proposal, a site that merely facilitates infringement on some of its Web pages - for example, by letting users post comments that include links to bootlegged or counterfeit goods - could be targeted,

even if most of the activity on the site is legal. So might online companies that deliberately take steps to "avoid confirming a high probability" that at least some users are infringing. That passage seems problematic for sites that could monitor their users but choose not to.

On sites and services such as Facebook, Dropbox and YouTube, infringements aren't just highly probable - they're certain. Some portion of the audience for virtually any site that allows users to upload, share or collaborate on content will infringe. But under current law, such sites aren't liable for what their users do on their platforms as long as the companies abide by certain rules, such as removing infringing content quickly when notified by the copyright holder.

The House bill seemingly renders those safe harbors meaningless, in effect requiring online companies to guard against infringements on pages that users control. And if the technologies they used to police their sites didn't prevent every infringement, a copyright or trademark owner could ask a court to second-guess their choice and order a different solution.

The potential result is that fewer companies would try to create the next YouTube - that is, the next industry-disrupting approach to communications or entertainment. And there would probably be a chilling effect on speech as sites block some fair uses of copyrighted content just to avoid ending up in court.

Supporters argue that such concerns are overblown and that only egregious infringers will be targeted. As Michael P. O'Leary, a lobbyist for the movie industry's trade association, told lawmakers, "Legitimate sites are not covered by this legislation."

But though the Justice Department, given its limited resources, might be expected to go after only the most significant foreign infringers, some

litigious copyright owners have already shown a willingness to pursue the little guy. Under the House bill, copyright and trademark holders wouldn't have to go to court to compel payment processors and advertising networks to cut off an offending site. They'd merely have to send a notice asserting that some portion of the site runs afoul of the bill, with "specific facts that support the claim." Only if the site sent a counter-notice within five days would the blacklisting be put off until a court could adjudicate.

Although much of Silicon Valley is up in arms about the House bill, there is a clear path to consensus. [Lawmakers](#) should craft a bill focused on cutting off funding for foreign sites that really are dedicated to infringement. If they have any doubt that such an approach can be effective, they should consider WikiLeaks. Efforts to block access to the site were an abject failure. Cutting off the company's ability to collect funds from its supporters, however, has pushed it to the brink of bankruptcy.

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