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Federal bill pits creative industries against the Internet in piracy fight

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A law being debated in the U.S. House of Representatives that would give owners of intellectual property the power to quickly shut down "rogue websites" pirating their goods draws two major industries into a clash over how far the federal government can go in policing the Internet.

The Stop Online Piracy Act (SOPA) cuts off the revenue stream of foreign pirating sites by demanding Internet service providers (ISPs) restrict U.S. access to them, ensuring online advertising services refuse to work with them and banks quit sending money their way.

The bill's author, Rep. Lamar Smith, R-Texas, said it will "promote prosperity, creativity, entrepreneurship and innovation by combating the theft of U.S. property." The bill will recover some of the \$100 billion a year Smith said is estimated U.S. companies lose to pirating of intellectual property.

But some IP lawyers said that although its intentions are good, the bill threatens to tip the responsibility of protecting intellectual property too heavily toward Internet companies.

"All the Internet commerce companies recognize that this would be the nose of the elephant in the tent; a dramatic change in the Internet balance that we set early on," said R. Mark Halligan, a partner at Nixon, Peabody LLP, who deals with intellectual property.

"You can see the tension in this balance. On the one hand you have the chamber of commerce, the Motion Picture Association of America, the so-called Hollywood, all lining up in favor of this legislation. And it's got a lot of legislative backing."

Movie, music and pharmaceutical industry groups sent letters of support for the bill to congressional members. Many of the letters tout the legislation as a way to protect American jobs at a time of 9 percent unemployment.

"Our creative industries provide good jobs for millions of Americans and represent one of the country's most important exports," Viacom CEO Philippe Dauman said in a letter in support of the legislation. "However, we face an increasingly difficult battle against

entities overseas that shamelessly steal our valuable products and illegally market them online for their own gain."

Roger H. Stein, a partner at Ungaretti & Harris LLP, who works in intellectual property law, said the problem of intellectual property theft is real, but SOPA needs to be more narrowly tailored. In its current form, it could have an unintended impact on otherwise law-abiding sites, he said.

"The whole (argument) is surrounded by the fact that there's tremendous uncertainty around what certain (language in the bill) means," Stein said.

The bill says it targets any website "dedicated to the theft of U.S. property." Stein said that wording has not been clearly defined and could be stretched beyond what the bill's author might intend.

"They tried very hard to aim this statute at sites 'dedicated' to infringing activity," Stein said. "So what does that mean, 'dedicated'? Does that mean 50 percent, 20 percent or 100 percent (of the site is dedicated to infringing)? Nobody has really defined what it means in this context."

The bill will create more costly litigation and possibly make companies nervous to set up shop on the Internet, Stein said.

"What it does mean is when you are fighting it, there is a cost associated with it. And when does that cost itself prevent you from entering business in the industry or from censoring yourself?" Stein said.

The legal fight between pro-SOPA content creators and Internet companies that are coming out against the legislation, Google and Facebook among them, could be costly if this bill becomes law, Stein said.

Google, in a testimony before Congress, said the "show cause" standard of proof will prove costly. The bill makes Internet companies prove they have taken sufficient steps to stop pirate sites.

Scott J. Slavick, a partner at Brinks, Hofer, Gilson & Lione, who works with Internet and social media law, said the show cause standard, which does not exist under current law, would put a heavier burden on Internet companies.

"Show cause means that they have to provide evidence to show they did something,"

Slavick said. "They have to actually provide evidence. They'll provide records of who at Google investigated this. What type of searches did they run? What type of hardware or software did they provide? Again, it's just going to increase costs."

Joseph T. Kucala, a partner at Norvell IP LLC, who works with trademark and copyright law, said another issue that needs to be answered is what this will do with current legislation. The Digital Millennium Copyright Act (DMCA) now regulates the responsibilities of Internet service providers when faced with a copyright infringement complaint.

"It should be clarified as to what does this do to the current DMCA process? What exactly would be the obligations on filtering and monitoring for the intermediaries? Because it seems uncertain," Kucala said.

The current DMCA process, known as notice and takedown, allows Internet service providers to avoid liability for copyright infringement so long as they respond to any complaint. Kucala said that might change under this law with Internet companies being forced to defend themselves.

"If there is no counternotification, then a copyright owner can file a notice and because ISPs don't want to get sued, they just won't do business with (any site accused of infringing on copyright)," Kucala said.

Halligan from Nixon, Peabody, said the DMCA process likely would not be jettisoned, but that SOPA would strengthen copyright holders' rights by extending U.S. courts' jurisdiction to foreign entities.

Under SOPA, foreign sites would submit to U.S. jurisdiction when they respond to an infringement notification. The bill reads: "In order to register your counternotification rights you have to consent to the rights of the United States."

While that provision could extend the reach of U.S. courts, these lawyers say it's unclear whether rogue websites will bother to counternotify or if they will just set up shop under a new name.

"They're trying to plug up all these holes like the boy with the finger in the dike, but I don't think it's going to stop. It's just going to change," Stein from Ungaretti & Harris said.