



# INSTITUTE FOR INTELLECTUAL PROPERTY & SOCIAL JUSTICE, INC.

*ADVANCING IDEAS  
ENCOURAGING ENTERPRISE  
PROTECTING PEOPLE*

## **Letter on Behalf of the Institute for Intellectual Property and Social Justice in Opposition to the Stop Online Piracy Act of 2011 (H.R. 3261)**

### **Summary of the Institute's Opposition**

This letter is respectfully submitted on behalf of the Institute for Intellectual Property and Social Justice by its Director, Lateef Mtima, Professor of Law, and its Associate Director, Steven D. Jamar, Professor of Law, in opposition to the Stop Online Piracy Act (H.R. 3261). While the stated purpose of the Act is to improve the protection of American intellectual property rights from foreign and domestic acts of online piracy and other infringement, certain of the Act's provisions would have a dire impact on the socio-economic interests and civil rights of members of various marginalized communities and other underserved intellectual property stakeholders. The most salient problematic provisions are:

1. The Act's **excessively broad definition** of "an Internet site dedicated to the theft of U.S. property" improperly captures non-infringing websites which assert Fair Use or other legitimate defenses in response to allegations of intellectual property infringement. Indeed, under the Act, a user's website can be deemed an infringing website by virtue of the user's refusal to confirm that it is engaged in infringing activity;
2. The Act's **notice provisions** do not require an accusing rights holder to provide notice to alleged infringers, but only to third-party intermediaries;
3. The Act's **third-party immunity provisions** grant immunity only for acts done to comply with rights holders' requests, but not for acts done at the behest of alleged infringers who deny the rights holders' claims and allegations;
4. The Act's **injunctive relief provisions** prescribe an extremely limited period for responsive action and fail to provide for judicial discretion to expand the response period when appropriate; and
5. The Act's **blocking provisions** would permit and sometimes require domain name server (DNS) blocking of websites, including blocking access to websites at the domain name server level and requiring advertisers and search engines to de-index websites.

Collectively the foregoing provisions are likely to have a differentially harsh impact in marginalized communities where struggling "Digital Entrepreneurs" often combine their original material with public domain material and their Fair Use of copyrighted material, and/or possess state trademark rights to engage in regional and other trademark use in connection with their websites. Assuming these users/entrepreneurs/content creators even receive timely notice of allegations of infringement (which is not assured under the Act despite the fact they would have legitimate defenses to infringement allegations), merely by *raising these defenses* they could be deemed purveyors of sites dedicated to the theft of U.S. property and ultimately violators under the Act.

Many other such users will simply lack the resources to litigate these issues, especially given some of limited time periods for responding to allegations, and thus the Act would effectively abrogate their ability to employ the Internet as a socially and economically empowering, entrepreneurial tool. Indeed, both the Act's notice and third-party immunity provisions, which should serve to ensure Constitutional due process protections for the accused and to provide safe harbors for third-party intermediaries, actually accomplish the opposite and functionally abrogate their Constitutional due process rights. Innocent Digital Entrepreneurs may never be confronted with direct allegations of infringement, but nonetheless watch their meager revenues evaporate and their business ventures crushed without being given an effective opportunity to face the allegations.

The potential effects of deputizing third-party intermediaries such as payment providers and advertisers who do business with these marginal entrepreneurs as rights holders' enforcers can be equally devastating by drying up their revenue stream simply because these entrepreneurs have not been given proper notice and the opportunity to defend themselves. The impact is exacerbated by the imbalance in the Act insofar as it provides for *immunity from both suit and liability* for actions these sometimes deputies may take against an accused website, while providing no such immunity in the event the intermediary declines to be deputized and refuses to engage in "knee-jerk" compliance with a rights holder's demands. If the intermediary refuses the role of enforcer it faces the prospect of responding to court orders and eventually even monetary sanctions. Clearly the "choice" to comply with a rights holder demand under the Act is really no choice at all.

The negative impact on entrepreneurs from marginalized communities does not stop there. Certain provisions of the Act would permit DNS blocking of websites which contain any infringing material. Because many of the websites maintained by marginalized and minority entrepreneurs are accessed through web addresses also used by other Internet users, innocent website owners would be shut down along with the guilty—even if there is only one single infringer among dozens of law abiding site owners. Thus, DNS blocking is akin to disrupting all telephone service to and from a household because one member has been accused of using the family telephone to buy or sell illegal drugs. Innocent people are denied a basic essential service (while the illicit activity continues largely unabated).

IIPSJ believes that in its present form, the Act needlessly embraces the "all or nothing" outlook of some IP owners who view all unauthorized use indiscriminately, indifferent to the legal reality that unauthorized IP use is not always base piracy. Such extremist positions not only inhibit progressive initiatives to recalibrate the IP rights holder/public interest balance so as to better exploit the full benefits of digital information technology, but they also undermine efforts to develop reasonable and effective measures to preserve legitimate IP property interests, which include users' rights and the endeavors of the marginalized to utilize intellectual property as a means of socio-economic advancement. IIPSJ believes that such extremism is wholly unnecessary inasmuch as more socially nuanced, equitable, and efficacious mechanisms are readily available.

## **I. The Institute for Intellectual Property and Social Justice: Improving IP Development, Dissemination, and Use in Marginalized Communities**

The Institute for Intellectual Property and Social Justice (IIPSJ) was founded in 2002 to address the social justice implications of intellectual property law and practice, both domestically and globally. IIPSJ is dedicated to promoting law and policy development which facilitates and engenders the use of intellectual property to advance social justice objectives, particularly within communities that have been traditionally underserved and underrepresented in IP ownership, exploitation, and use. IIPSJ's programs are intended to achieve the constitutional intellectual property mandate that IP serve the public interests of inclusion and empowerment.

IIPJSJ's work ranges broadly and includes scholarly examination of intellectual property law from the social justice perspective; community IP education and empowerment programs which promote the entrepreneurial development and exploitation of intellectual property in historically marginalized and "indigenous culture" communities; initiatives to increase the diversity of those who practice IP law; and advocacy for intellectual property and social justice by taking public positions on major intellectual property controversies and otherwise interjecting social justice concerns into national and international intellectual property access, trade, and enforcement dialogues and polemics. On the whole, IIPJSJ is concerned with fairness in access to knowledge, information, and the tools of creative expression and innovative development, as well as with the impact of intellectual property law and policy on opportunities for economic, political, and social advancement.

### *The Unique Interests of Minorities, the Marginalized, and the Underserved*

Given the history of cultural misappropriation and inequitable IP exploitation, the concomitant need for comprehensive IP protection and use policies is particularly resonant in the African American and similarly heretofore marginalized communities. The increased importance of intellectual property to national economic, security, and social interests generally means at least as much to historically marginalized communities seeking improved avenues for equal access to justice and opportunities for economic and social advancement. Now that the pie is to be fairly divided, the right to sit at the table has genuine value to those previously denied a seat. Therefore, In developing a national intellectual property agenda, it is critical that the full range of IP constituent interests be reflected, and not solely the most myopic concerns of those who have a vested interest in the preservation of a particular IP status quo. A wisely structured intellectual property regime not only protects IP property rights, but also allows and encourages appropriate sorts of transformative uses which in turn create new opportunities for previously marginalized groups to express themselves creatively, enjoy economic and social empowerment, and otherwise contribute to and profit from full participation in the American IP infrastructure.

## **II. Detailed Comments on SOPA's Market-Based Provisions**

All responsible Internet stakeholders appreciate the importance of addressing online intellectual property infringement and piracy; such acts not only harm the direct property interests of IP owners, but they also help to polarize the debate concerning IP users' rights in the Internet context. The extreme positions that some IP owners take with respect to User Generated Content, Copyright Fair Use, and other IP user interests are often fueled by IP owners' anger and resentment toward the more brazen Internet piracy, resulting in a reactionary response to all unauthorized (including legally permissible) use of their works.

Although the Act may be intended to address online infringement, certain of its mechanisms are highly problematic and will likely have an inequitably harsh impact in marginalized communities where struggling "Digital Entrepreneurs" and community town-criers could be unfairly shut down. This likelihood stems in part from the Act's definition of a domestic online infringer as "an Internet site dedicated to the theft of U.S. property." This definition is hopelessly ambiguous and almost certainly constitutionally deficient. This definition could include, for example, websites which discusses the history of Jim Crow in America, or perhaps more pointedly which address the misappropriation of African American intellectual property rights, or sites which might include fair-use protected quotes from copyrighted works or perhaps even commentary on protected photographs which depict historic events, or could even reach websites which contain material as to which the status of the intellectual property rights may be unclear or difficult or

expensive to ascertain. In such cases a claim of infringement might be asserted, even though the use might be entirely permissible as a Fair Use. Nonetheless, pursuant to Section 103(a)(1)(B)(ii) of the Act, by asserting its right of Fair Use or otherwise denying that it is an infringer, the site could be deemed one dedicated to the theft of U.S. property because it “is taking...deliberate action to avoid confirming a high probability of the use of the...site to carry out acts of [infringement]”. While there are certainly arguments that the language of Act need not be read so broadly, these provisions form the basis of a private right of action, and thus such questions of interpretation would be left to the judgment and discretion of individual, and sometimes powerful, rights holders who would hold the fate of accused websites in their less-than-objective hands. In such situations the impact of money on effectuating rights cannot be ignored.

Furthermore, pursuant to section 103(b)(4) of the Act, Qualifying Plaintiffs are not required to provide notice of their allegations to the accused websites. Instead of placing the onus on the rights holders, the provision of notice becomes the responsibility of intermediaries. However, the Act’s immunity provisions do not provide any penalties for an intermediary failing to forward such notice. Moreover the Act immunizes intermediaries from both suit and liability for actions taken against an accused website. But, if the intermediary refuses to engage in knee-jerk compliance with a rights holder’s demands, she faces the prospect of responding to court orders and eventually even monetary sanctions. Such a structure is hardly one that would facilitate a timely opportunity to be heard on the part of the accused.

Indeed, this approach is more reminiscent of certain current practices in the online context, in which industry insiders have taken it upon themselves to maintain secret “blacklists” of alleged online infringers and to privately “encourage” advertisers and others not to do business with named sites. Recently such concerns have been raised in connection with GroupM, one of the nation’s leading advertising placement firms, which announced a “digital media policy” purportedly designed to prevent any of its clients’ advertisements from appearing on websites that GroupM (or its copyright-holder clients) has declared as containing illegal content or “supporting” piracy. GroupM has created a list of some 2,000 such websites, and its vendors are prohibited from placing GroupM’s clients’ advertising on any of these sites.<sup>1</sup> Upon reviewing the GroupM List, however, it reveals a disproportionate number of “hip hop” music informational websites which, in many instances, contain little or even no illegal content. On the other hand, many of these websites do provide information for musicians, bloggers, and fans promoting independent artists and labels and otherwise providing alternatives to established music products and distribution channels. In other words, many of these websites appear to be the start-up competition to some of GroupM’s major clients.<sup>2</sup> No legitimate copyright goals are served where advertisers and others can be cajoled or bullied into unjustly boycotting informational websites used by marginalized and independent artists to connect with the public, particularly where such sites have not been given a fair opportunity to confront their accusers and perhaps clear their names.

Even where marginal websites do receive notice under the Act, many will simply lack the resources to litigate these issues, particularly in those situations in which extremely short time periods (as little as seven days) are involved. Even if these individuals are somehow able to enforce their right and ultimately prevail, the victory is likely to be a Pyrrhic one—the Act does not provide

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<sup>1</sup> See Mike Masnick, Techdirt, <http://www.techdirt.com/articles/20110620/01370314750/universal-music-goes-to-war-against-popular-hip-hop-sites-blogs.shtml>, “Among those [sites] on the list [are Youtube alternative Vimeo,... SoundCloud, which has become one of the most popular tools for musicians to promote their own music [and] Vibe.com, the online site for Vibe Magazine, founded by Quincy Jones... and still considered one of the key sources for news and information about the hip hop and R&B worlds.”

<sup>2</sup> See Masnick, *supra*, (“GroupM’s own content producing clients – such as Warner Bros., Paramount, Universal Music and Summit Entertainment, which produced the popular Twilight series of vampire movies – have shared their own lists of pirate websites to help create a [GroupM] master copy.”

for compensation for users who are ultimately vindicated, but only provides a remedy in cases of affirmative misrepresentation. Thus a rights holder who “disagrees” with a claim of Fair Use may take action under the Act without fear of meaningful reprisal.

Finally, it should be kept in mind that the potentially devastating social justice detriments that could result from adoption of the Act are not limited to copyright interests. In many instances, on-line start-ups possess various trademark rights to engage in geographic regional, nominative fair use, and other non-confusing trademark use, and are employing these rights through the Internet to exploit new channels for goods and services distribution, product and source identification, and brand development. Given the dual system of federal and state trademark rights which permits coexisting and regionally based uses, and the core assessment of likelihood of confusion in the marketplace, trademark disputes are highly fact sensitive, and thus the right to preclude another’s use of a mark is rarely a black and white issue. Whether or not the Act is intended to include these kinds of Internet disputes within its ambit, once accused under its provisions, a website owner’s only meaningful recourse will be to seek the protection of the courts. Unfortunately, this option may only be an illusory one for start-up digital ventures in marginalized communities which are already resource-strapped and are otherwise at a disadvantage in the competition to attract and ultimately repay capital investment.

### **III. Section 102 of the Act and Actions by the Attorney General**

Section 102 Of the Act, makes DNS blocking of websites one remedy for alleged intellectual property infringement by a website. As IIP SJ has previously commented in connection with other proposed legislation, blocking DNS numbers, impeding search engine indexing, and curtailing advertiser indexing are mechanisms that would seriously harm the interests of members of marginalized communities and threaten the integrity of the Internet as a whole.

The most egregious effect of the Act would arise in those many situations where entirely innocent parties could face the loss or disruption of their Internet presence even though no one has asserted that they infringed any IP at all. This unfair result stems from the common practice of many unrelated Internet websites saving expenses sharing a single IP address by renting space on an independently owned and operated server—a kind of modern day equivalent of an apartment building with a telephone party line. In these situations, if DNS blocking were to be adopted, the presence of a single rogue “tenant” on a shared server could disrupt the Internet service for *all* of its “residents” - residents whose only “crime” is not being able to afford a nicer Internet neighborhood.

Such social injustices are not the only ramifications of DNS blocking. Directing that the DNS number of a website be blocked, such that the website is no longer accessible by typing in its domain name, would fundamentally change the infrastructure of the Internet as we know it. Domain names currently function in essentially the same way as ordinary telephone numbers (i.e., dialing a specific number will always take you to the same location no matter who happens to be at home on the other end). That is, entering a url or domain name will take you to the website associated with that domain name. However, the Act would require the domain name server to take the user to a different location (i.e., to a page stating that the website sought is no longer available). This could have untenable ramifications on current automatic DNS workings of the internet. The Act’s effects on search engines and other Internet information locators is also significant and ultimately untenable. The Act would require search engines to delete all links to a DNS number from their indexes and databases. The result would be that entire websites, including non-infringing sites that happen to share a server with a rogue tenant, would become invisible even to a direct search for that specific site or in response to a general search inquiry that would normally include such sites in the search results. Essentially the same requirement would also be imposed on advertising networks. The Act would require third party Internet advertiser networks

to take down ads for and/or remove links to sites, and mandate payment processors to halt payment orders from customers to site owners. Obviously such actions would swiftly sound the death knell for a struggling “Digital Entrepreneur.”

Such Draconian measures are both unnecessary and not worth the social injuries that would likely result. For one thing, DNS blocking does not result in the actual take down of any material. An infringer can simply advertise her twelve-digit ISP number instead of or in addition to giving out her domain name, and her visitors can simply enter this number themselves, thereby bypassing the need for DNS “directory assistance” (and thus evading DNS blocking) and reaching the infringing material anyway. Furthermore, blocking one site does not block mirror sites or stop the immediate creation of alternative sites with other urls. Thus, determined IP infringers, the erstwhile target of the legislation, could thus easily evade DNS blocking, while less sophisticated non-infringing site owners caught in the net of DNS blocking remedies could well be cut off without even knowing it was happening. Such a result is particular problematic because it is unnecessary given other available methods to block access to specific links to infringing material, as opposed to blocking ISP numbers for entire websites. The alternative methods not only provide greater assurance that infringing material cannot be accessed, but leaves access to non-infringing material uninterrupted. By contrast, DNS blocking would inevitably sweep many legitimate Internet purveyors into its ambit, hampering Internet entrepreneurial ventures and promoting an atmosphere of “cyber-fear” in those communities which benefit most from robust Internet use as means of economic empowerment, social activism, and cultural dissemination.

## **Conclusion**

Curbing Internet piracy not only serves the interests of IP owners, but also serves the broader interests of all of us in the continuing growth and success of the digital information age in general and in the IP owner/user rights dialectic in particular. Intellectual property law must accommodate important opportunities for social and economic inclusion, empowerment, and advancement, and new technological uses of intellectual property should be assessed from this perspective. Today, access to the Internet is access to a growing global store of expressive and inventive works. From this virtually unlimited catalogue of works, one can find the inspiration to create new works, one modify existing works or portions of them to create new works for the benefit of society. The Internet allows development of independent channels of distribution for new IP works and for licensed distribution of the IP of others, and as this happens, yesterday’s “economically excluded” can become tomorrow’s entrepreneurial vanguard.

Lateef Mtima, Director,  
Institute for Intellectual Property and Social Justice, and  
Professor of Law, Howard University School of Law

Steven D. Jamar, Associate Director,  
Institute for Intellectual Property and Social Justice, and  
Professor of Law, Howard University School of Law

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