

## “No SOPA For You!” Why SOPA Led to Such an Acrimonious Fight and What We Can Learn From It

Posted By [Jesse Saivar](#) on January 26, 2012



If you read the paper, watch TV, listen to the radio or use the Internet, it's been tough to avoid SOPA recently. (If you don't, well, you're probably hand-writing angry missives in a cabin and not reading this.) What we've seen thus far are two widely-popular, well-funded industries passionately going toe-to-toe with one another, with one widely-unpopular but well funded group of politicians playing referee. After some low blows, eye gouging and hair pulling, the anti-SOPA team has prevailed, at least temporarily.

Unfortunately, after listening to both sides of the debate, I'm convinced the vast majority of the debaters and their audience lacked a strong understanding of exactly what SOPA says and what its true implications would be. Because we're dealing with powerful industries with enormous soap boxes, the majority of the "discussions" presented to the public have been severely slanted by the presenter's personal stake in the contest. As with most heated political topics, this is great for sound-bites and overbroad, black-and-white ways of looking at things, but not so great if you actually want to understand the proposed legislation. So as any good humanitarian should do, I'm going to attempt to sum it up from a relatively-neutral legal perspective. Even if SOPA itself is no longer on the table (for now), the fight it started can give us insight into the sides' respective concerns and the future skirmishes we're likely to see.

### Who Are The Dogs In This Fight?

On one side of the fight, we have the MPAA, studios, networks, guilds, record companies and other large content-owners and entertainment-industry groups. According to this camp, if you don't support SOPA, then you obviously support Russian mafia-funded, off-shore pirate websites whose goal in the world is to put lunchbox-owning key grips and boom operators on the street by giving people free, unfettered access to *The Notebook*.



On the other side, you've got Google, Wikipedia, Boing Boing and other Internet/tech entities that have business models that rely on making all kinds of content available to the public. In this camp's eyes, if you do support SOPA then you clearly love censorship and have an overwhelming desire to shut down the Internet, install a Chinese-style dictatorship, and deprive the public of videos like **this one**.

You like movies and support blue collar movie set carpenters but you also enjoy yourself a little Internet. How are you supposed to feel?!

### **What Does SOPA Actually Say?**

The reality, of course, is not as extreme as either side would have you believe. SOPA is, unfortunately, fairly complex and requires a deft touch at statutory interpretation, which is hard enough for lawyers and next to impossible for anyone smart enough to have avoided law school. I'll try my best to summarize the key provisions as broadly as possible. (Hopefully my constitutional law professor isn't reading. Oh, who am I kidding? After mentioning "statutory interpretation," all three people who were reading have now stopped.)

There are two key provisions in the proposed SOPA legislation. The first, Section 102, grants certain rights to the Attorney General to combat against "*foreign infringing sites*." If a site located abroad but directed at the U.S. is committing criminal copyright violations, the Office of the Attorney General can take action against the site and be awarded a temporary restraining order, preliminary injunction or permanent injunction against the operator of the site. The court order will then be served upon (a) Internet service providers, (b) search engines, (c) payment providers (companies that facilitate financial transactions) and (d) Internet advertising servicers (companies that facilitate the placement of ads on websites) which will then be obligated to stop doing business with the foreign infringing site. This means that an ISP would be required to prevent user access to the site while Google and other search engines would have to stop providing links to the site. The goal is to, in essence, wipe the site off of the digital map.



The second key aspect of SOPA is found in Section 103, which is labeled the “Market-Based System.” Under this section, the content-owners themselves are given the right to take action against sites “*dedicated to the theft of U.S. property*” by hitting them where they hurt: their pocket books. Under Section 103, content-owners can notify (a) payment providers and (b) Internet advertising servicers that they are providing services to a site “dedicated to the theft of U.S. property.” The receipt of such a notice obligates such entities to cease providing services to the site in question within 5 days of receiving the notice *unless* they receive an effective “counter-notification” from the site. If the payment providers or advertising servicers don’t comply, or if the site in question issues a counter-notification, then the content-owner can take court action against the site itself (and, pursuant to such action, the payment providers or Internet advertising servicers may be forced by the court to stop doing business with the site).

Still reading? Let’s see what we can do about that.

### **Why Was SOPA Proposed?**

While the Internet may not be guaranteed to tear down the entertainment industry as we know it and deprive us of great Hollywood movies like *Jack and Jill*, I don’t think there’s any question that piracy and file sharing are rampant and are severely eating away at entertainment industry profits. Back in the good old days, the majority of copyright enforcement in the film industry involved nabbing the sketchy dude with a camera lens sticking out of his jacket in the movie theatre and knocking over the table of VHS tapes/DVDs set up in SoHo next to the guy playing Three-Card Monte. Now there are pirate sites popping up every few minutes. While content-owners have the legal right to take action against such sites, litigation isn’t easy, quick, or cheap. Plus, in the time it takes a lawyer to draft a complaint, three more sites may have popped up.

SOPA represented ~~motion picture industry lobbyists’~~ Congress’ attempt to combat this, by making it easier to go after infringing sites, and increasing the consequences for sites that get caught. In the eyes of large content owners, it’s an effort to save the industry by placing a tourniquet on the profits being lost to piracy.



## Why Do People Keep Asking Me to Sign Anti-SOPA Petitions on Facebook?

Because the rhetoric from the opponents of SOPA was so over-the-top (all we've heard is that SOPA amounted to censorship and may "shut down the Internet"), it's difficult to decipher the specific legal issues opponents had with the language of the legislation. There are no sound bites in statutory interpretation.

In my eyes, Section 102 is the less controversial section of the two discussed above, which is likely why it appears to be the central focus of SOPA supporters (much of the pro-SOPA rhetoric incorrectly painted it a bill solely intended to go after foreign infringing sites). Section 102 requires a court determination before action is taken — in other words, the site has the ability to defend itself in court. Plus, because it relies on action being taken by the Office of the Attorney General as opposed to a self-interested corporation or content-owner, it is less ripe for abuse. Even without SOPA, the government can take action against a warehouse filled with pirated DVDs; taking action against a website is conceptually not all that different. Despite this, there was still a strong backlash from the tech community, in the form of an apparent moral objection to the idea that ISPs would be forced to cease providing services to infringing sites and that search engines would have to wipe those sites from results lists as if they never existed. At least I *think* it must be based in morality, because I've yet to read any strong legal basis for the objection to Section 102 (maybe I'm just not digging deep enough).

Section 103, however, is where I believe SOPA gets dicey. At first glance, legislation designed to protect against websites "*dedicated to theft of U.S. property*" doesn't appear too controversial (which is why you hear pro-SOPA rhetoric stressing that term). But the bill contains a definition of that term that isn't as cut and dry as the phrase suggests.

First of all, it doesn't just cover foreign sites. It applies to any website which directs business at users in the U.S., which would include U.S.-based sites (uh oh, now we aren't just talking about the **dead-eyed evil foreigners** who we root against in movies).



Second, the “dedication” to theft required to fall under the definition is questionable. A site would be considered dedicated to theft if it “has only limited purpose or use other than . . . offering goods or services in a manner that engages in, *enables*, or *facilitates*” (my emphasis) certain illegal acts, such as copyright infringement. Words like “enable” and “facilitate” don’t create a very high standard. Unless you count “preventing me from actually focusing on work during business hours,” YouTube doesn’t have any purpose other than providing a means by which users can post and watch any videos they want (which may include third party copyrighted content). That purpose sure seems to enable or facilitate copyright infringement; yet, the majority of the public likely would not see YouTube as a site dedicated to the theft of U.S. property.

A site can also be seen as dedicated to theft if it is “taking, or has taken, deliberate actions to avoid confirming a high probability” that the site is being used to carry out infringing acts. This is not only horribly worded, but appears to directly contradict the Digital Millennium Copyright Act. Under the DMCA, websites posting user-generated content like YouTube are encouraged to act solely as bulletin boards and NOT take steps to seriously review user-posted videos before they go up. The more control a site exerts over the content posted on it, the more likely the site would lose the safe harbor protections under the DMCA. If YouTube is purposefully doing very little gate-keeping (in order to benefit from the DMCA), could it be argued that it is taking deliberate actions to avoid confirming the high probability that the site is being used to carry out infringing acts? I don’t think it’s a stretch.

Therefore, a wide array of sites, including many extremely popular sites we all frequently visit (as opposed to those scary foreign pirate sites) could possibly fall under the definition of sites “dedicated to theft of U.S. property.” Opponents of SOPA argue that the legislation would require sites to start aggressively policing content uploads in order to avoid falling under the definition. Because this would be so costly and time-consuming, many argue that sites would instead simply shut down. No one, especially me, wants YouTube to shut down.

If sites were to instead continue without performing the near-impossible policing efforts that may be required by SOPA, content owners would have the ability to cause payment providers and advertising



servicers — the financial life blood of most websites — to stop doing business with the sites, effectively dooming their business model. All of this could be done by the simple action of a self-interested entity, without the requirement of a full court proceeding. The only way to combat this would be for the sites to be wary enough to serve counter-notifications when necessary, and even then, the sites may still lose access to the critical services of payment providers and advertising servicers while the eventual court case is handled. Again, this could lead to the death of many popular sites — which helps explain why major Internet portals like Wikipedia, Boing Boing, and even Google recently staged protests against SOPA.

### **Is There Any Chance We'll See a Resolution?**

An interesting characteristic of many of the high-rhetoric assaults on SOPA is that the opponents didn't just seem to take issue with some of the specific issues addressed above; they appeared to be fighting against copyright law in general. In its simplest form, copyright law prohibits the copying and distribution of someone else's original work. The problem is that many people who have grown up in the Internet era have a different view of copyright law than those who did not. If you've always had easy access to music-sharing, movie clips on YouTube, and the myriad of other ways to consume copyrighted content for free, you're bound to have a hard time imagining a future (or past) without it. There is a rising movement (not necessarily organized) which advocates a severe scaling back of the rights currently granted to copyright owners (as an example, see the "**copyleft**" movement). When certain parties describe SOPA as a censorship vehicle simply because it doesn't allow users to "share" copyrighted content with other users, they're not just focusing on statutory drafting issues specific to SOPA; they're taking a stand against the long-standing principles of copyright law.

It's obvious that those who question traditional copyright standards, including some Internet companies that have been pushing the boundaries of copyright law for years, are bound to oppose any legislation that could dial back their ability to make any and all content available to the masses. On the other hand, it is equally obvious that, because it is hurting their bottom line, major studios and other large content-creators who've relied on copyright protections for over a century are going to continue to push for legislation that strengthens their ability to combat copyright infringement.



Unfortunately, a few tweaks to the statutory language of SOPA are not likely to lead these two camps to suddenly agree and sit down together for a **YouTube party**. I see SOPA as the first high-profile battle in a war between two enormous industries who not only believe that their entire economic model may be at stake, but also feel that they're on the "right" side of a moral issue. This is not exactly a recipe for peace or compromise, whatever might end up happening to SOPA in the coming days and weeks. At some point, something's got to give, whether that means changes to our copyright laws and/or new business models for content-based Internet businesses.

In the meantime, I can't wait for some more of that rhetoric.