

SOPA Defeat Is Not the End Of Hollywood's Ramped-Up Fight Against Piracy (Analysis)

Hollywood still needs Obama. SOPA and the Protect-IP Act could be red herrings. And bigger fights lie ahead. Time to examine the much larger picture...

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Today, leaders in both the Senate and House announced the postponement of a procedural vote on controversial anti-piracy bills. As the backlash to SOPA and the Protect-IP Act forces political leaders to reconsider their stances, MPAA head **Chris Dodd** has signaled that he desperately wants to meet with leaders in the tech sector to look for a compromise.

A truce? Don't speak that word just yet.

Although debate over SOPA has instigated protests and gathered headlines in the past few weeks, the truth is that the legislation would have been only a small part of Hollywood's ongoing attempt to crack down on foreign piracy. Large entertainment studios wanted -- and still want, of course -- codified language that would result in serious efforts by websites to do something about troublesome foreign piracy sites. But even in the absence of such formal legislation, there's a plan to get

the intended results anyway.

Here are some key weapons for Hollywood as politicians now do their best to quell the SOPA uproar:

- **Federal Enforcement**

Many observers have noted the timing of federal authorities dropping the hammer on Megaupload by shutting down the file-sharing site and arresting its leaders on Thursday.

What is not commonly appreciated is the amount of frustration inside Hollywood in the past decade at the Justice Department's refusal to do more about wholesale copyright infringement. Yes, the Hollywood trade organizations and labor guilds issue praising press releases anytime the FBI or ICE makes a major action against copyright pirates. But in our background interviews with Hollywood's fiercest piracy protectors over the years, we've consistently heard how the entertainment industry thinks the executive branch of the government could be doing so much more.

Remember the scene in *The Wire* when Baltimore cops go into FBI offices in an attempt to get them to make a major drug kingpin crackdown? In that episode, the cops are told that drugs are simply not as big a priority as things like terrorism and political corruption.

That's exactly what happens in real life. Hollywood would love for federal authorities to do everything they can concerning piracy, and to that end, have attempted to connect piracy with terrorism funding. But the Justice Department has limited resources. If the Megaupload raid is a sign of things to come in terms of federal law enforcement reprioritization, it will certainly make Hollywood happy.

- **International Enforcement**

One thing remarkable about the Megaupload crackdown was the willingness of New Zealand's government to arrest leaders of the company, who were residents of that nation. This was not a simple matter of slapping handcuffs on a few guys. Reportedly, Megaupload founder **Kim Dotcom** retreated behind a series of electronic locks and barricaded himself in a safe room, gun in hand. In other words, New Zealand decided to put its own law enforcement in harm's way in the fight against piracy.

The move followed another action in England where 23-year-old British student, **Richard O'Dwyer**, accused of running a website linking to free films and TV shows, was ordered extradited to the United States. To make this sort of stuff happen requires diplomatic effort. It's not entirely clear that mere linking is illegal so we imagine that British officials had to be convinced that extradition was appropriate.

All the hullabaloo about whether Hollywood will continue to donate money to the campaign of **Barack Obama** ignores one big reality: They still need him. The Justice Department has discretion on whether to pursue the Megauploads of the world. And the State Department or the U.S. Trade Rep still gets to decide how hard to lean on other countries for cooperation.

- **Extraordinary Injunctive Relief**

As we discussed last month, even if SOPA doesn't pass, courts could eventually put the effects of the bill into force anyway. Hollywood would surely like this, but in the meantime, judges are issuing all sorts of extraordinary injunctive relief for plaintiffs in intellectual property disputes.

One judge in a case involving a website that marketed counterfeit Chanel merchandise ordered GoDaddy to change registration info and told Google, Twitter, Facebook and Bing to "de-index and/or remove [the domain name] from any search results page." Another judge ordered two advertising networks from assisting a website that was pointing its users to copyright infringing

textbooks. (The judge reversed course after hearing an objection.) And yet more judges have ordered search engines, web hosts, registrars and registries to cease facilitating access to websites allegedly participating in trademark infringement.

SOPA protesters roundly cheered when DNS-blocking was taken out of the anti-piracy bills before Congress. But just because Congress won't explicitly approve such measures doesn't mean that they won't happen. In piracy cases going forward, Hollywood can ask sympathetic judges to grant such relief anyway.

- **The Boundaries Of Copyright Liability**

The debate over SOPA has been marked by heated rhetoric, and perhaps the most overreaching reaction to the controversy is suggestions that some big American-based websites like Wikipedia or Reddit could shutter as a result of a passage. We'll let others argue whether SOPA really poses an existential threat to such operations, but we will propose that the sanctity of free speech isn't the primary reason why some leaders in the tech lobby are fighting so hard.

Rather, the legislation represents yet more burden for them.

The passage of previous anti-piracy laws has compelled these tech companies to have takedown provisions in place, and in many instances, to invest in things like filtering and digital fingerprinting technologies. Now, for better or worse, these companies are dealing with the ramifications of receiving subpoenas and responding to ex parte injunctive relief orders. This is not only a headache and an added expense. It also disrupts relationships with its legitimate customers. Does Facebook, for example, want to explain why it can't protect the secrets of all its users?

Hollywood has stressed that the legislation is intended to fight foreign pirates, but what's got everyone *stressing out* is the obligations on companies inside American borders. Hollywood has defended the legislation on the idea that nothing will happen without judicial approval, but yes, what then...?

Just because the SOPA fight has been tabled for now doesn't mean that the fight won't continue in the courts over the boundaries of such obligations. Coming soon is the decision in the 2nd Circuit Court of Appeal in Viacom's lawsuit against YouTube. Viacom maintains that YouTube willfully blinded itself to infringements and had an affirmative duty to clean up its servers of copyright infringing material. YouTube says that it is the copyright owner's responsibility to first provide notice of specifically infringing material. That's one case that will shape copyright liability and the burdens of tech companies going forward, but there are others (like MPAA's lawsuit against Hotfile) which will also be important.

Each of these developments will have just as much -- and perhaps more -- impact on innovation, speech, and property protection as the SOPA sweepstakes. Keep perspective.

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