

Chicago Daily Law Bulletin®

Volume 157, No. 231

Friday, November 25, 2011

New proposal challenges Internet piracy

Piracy and the Internet have had an unfortunate, but apparently enduring, relationship. From the earliest days of “warez” sites that sold pirated versions of third-party software to today’s ThePirateBay, which offers “free” versions of every type of copyright protectable work imaginable, piracy has found a regrettably comfortable home on the Web.

Today, Internet piracy is big business. “Rogue websites” such as ThePirateBay reportedly earn millions in advertising dollars annually. Such earnings can only be expected to grow, given the increasing global reach of the Internet and the human desire to gain something for nothing.

Worse, in the 21st century, piracy has become a political movement with members of the Pirate Party recently elected to the European Parliament. To date, international law has provided few effective methods for challenging the growing power of Internet piracy. Recent efforts in Congress to deal with the issue, however, may help alter this situation.

Internationally, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) requires countries to provide “effective enforcement” for copyrights. Such protection is tempered by Article 5(2) of the Berne Convention for the Protection of Artistic and Literary Works, incorporated by reference into TRIPS, providing that “the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.” Thus, relief against foreign-based rogue websites like ThePirateBay, Baidu and Allofmp3 is largely limited to whatever domestic remedies are available in the home country.

To make enforcement more problematic, TRIPS contains a significant loophole. It only obligates member countries to provide relief against “commercial piracy on a commercial scale.” This has allowed rogue sites to hide behind the myth of their noncommercial nature by giving away “free” pirate copies, while securing commercial-scale earnings through Internet advertising.

Beginning last year, U.S. Immigration and Customs (ICE), in coordination with the Department of Justice, initiated a program labeled Operation In Our Sites in which ICE seized various U.S.-based pirate sites by seizing the domain names associated with such sites. The success of these early efforts at shutting down pirate web-



Global IP

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sites through Internet action is partly behind new U.S. legislation seeking to apply a similar approach to foreign-based rogue sites.

The Stop Online Piracy Act (SOPA), House Bill 3261, introduced on Oct. 26, authorizes criminal prosecutions against foreign websites “directed” to U.S. residents that are “committing or facilitating the commission of criminal violations of U.S. copyright law.” It also establishes a civil cause of action against U.S.-directed sites that are “dedicated to the theft of U.S. property.” Such dedication is demonstrated if the foreign site “is primarily designed or operated for the purpose of ... engag(ing) in, enabl(ing) or facilitat(ing) a (copyright) violation.”

Since a U.S. court would lack the means to eliminate a foreign infringing site, the proposed legislation seeks instead to deny access both to U.S. subscribers as well as to any U.S.-based funds to support the site. Specifically, it obligates service providers to take “technically feasible and reasonable measures” to prevent access by U.S. subscribers to “the foreign infringing site.” It also requires Internet search engines to take “technically feasible and reasonable measures” to prevent the site “from being served as a direct hypertext link.”

Payment network providers are similarly obliged to take “technically feasible and reasonable measures ... to prevent, prohibit or suspend its service from completing payment transactions” between U.S. customers and the payment account used by the rogue site.

Finally, in order to complete the cycle of preventing rogue sites from earning monies from their illegal use of U.S. copyrighted works, the proposed bill prohibits Internet advertising services from “knowingly” serving advertising to or for such sites. Criminal proceedings impose these prohibitions through a court order. In civil actions, they are imposed through receipt of a written notice based on a plaintiff’s “good faith”

belief of infringement.

Predictably the legislation has been subject to a firestorm of criticism. At a 3½-hour hearing on Nov. 16, while content owners generally supported efforts to challenge rogue websites by “following the money trail,” Google, Facebook and other Internet search and social media entities criticized the obligation to “disappear a website” by removing any links to it as a potential free speech violation. The notice provisions of SOPA were criticized for circumventing earlier safe harbors granted Internet service providers. Even the requirement to block access (by using technological measures to prevent a rogue site’s domain name from resolving to its Internet protocol address) was criticized for undermining the security of the present domain name system.

These challenges indicate that SOPA will undoubtedly be subject to further discussion and amendment. Nevertheless, the general method favored by the proposed legislation of directly attacking the money source for rogue sites represents a viable road map for future enforcement activities — in theory.

But even if SOPA is enacted in its basic form, it will not solve the problems ICE faced in Operation In Our Sites. Blocking access to websites or their payment sources does not prevent pirates from reopening operations under a cloned site, using a different registrant name. ThePirateBay has survived despite successful criminal prosecution of its founders by following this path.

If blocking of sites and funds is to be successful, obligations for truthful registration information regarding domain name registrants, including information regarding previous or connected websites operated by the same principles, need to be put in place with sufficient penalties to ensure compliance. Such truthful registration would enable authorities to track clones sites more readily. Yet, even with all these U.S.-based efforts in battling rogue sites, similar efforts remain stalled internationally, even in Europe.

Despite the problems that SOPA currently presents, challenging rogue sites by using the networked nature of the Internet against pirates represents a substantial advance in enforcement methodologies. The secret, however, is to make sure that these advances are matched by the necessary tools and that they are practically useful in an environment that currently gives pirates the edge.