



Australian Government
Attorney-General's Department

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Mr James Catchpole
Committee Secretary
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

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Dear Mr Catchpole

Anti-Counterfeiting Trade Agreement – Summary of SOPA and PIPA

The Attorney-General's Department undertook to provide JSCOT with a summary of the PROTECT Intellectual Property Act (PIPA) and Stop Online Piracy Act (SOPA) at the Committee's hearing about the Anti-Counterfeiting Trade Agreement (ACTA) on 19 March 2012.

Please find the summary below. The summary has been prepared by the Department for information purposes only. It does not represent the Government's views about SOPA or PIPA. It is not legal advice and should be not relied upon to determine a person's legal rights and obligations.

Summary of SOPA and PIPA

The PROTECT IP Act¹ ('PIPA') is a bill that was introduced into the US Senate in May 2011. The Stop Online Piracy Act² ('SOPA') is a bill that was introduced into the US House of Representatives in October 2011.

On 18 January 2012, protests were held against SOPA and PIPA (including online protest by sites such as Google and Wikipedia). On 20 January 2012, the Senate Majority Leader decided to postpone a vote on PIPA. On the same day, the sponsor of SOPA decided to postpone further consideration of the legislation 'until there is wider agreement on a solution'.

¹ Preventing Real Online Threats to Economic Creativity and Theft (PROTECT) Intellectual Property Act, S 968 112 Congress (2011).

² Stop Online Piracy Act, HR 3261 112 Congress (2011).

PIPA

1) Actions by US Attorney-General (AG) against 'foreign' websites

PIPA would allow the AG to take court action against the owner of an "internet site dedicated to infringing activities"³ accessed through a non-domestic domain name,⁴ or the registrant of that domain name. If that is not possible, the action can be taken *in rem* against the non-domestic domain name itself.

The court may issue an injunction against the domain name if the domain name is used within the United States and the internet site harms holders of US intellectual property (IP) rights. With the court's approval, court orders can then be served against the following entities:

- A - Certain US domain name servers (generally ISPs) requiring them to not provide the internet protocol address for the domain name when requested.⁵
- B - Financial transaction providers requiring them to not process transactions between the internet site and US-based customers.
- C - Internet advertising services requiring them to not provide services to the internet site.
- D - Information location tools (e.g. search engines and potentially other websites) requiring them to not link, etc. to the internet site.⁶

For these entities, PIPA makes available injunctions (and defences) for non-compliance and immunity from other liabilities for compliance.

2) Actions by the AG or harmed US IP holder against 'foreign' or 'domestic' websites

PIPA would also provide a similar mechanism as described in 1) above available to the AG and harmed US IP holders in relation to both domestic and non-domestic domain names. However, the remedies listed at A and D above would not be available.

3) Encouraging entities to voluntarily not deal with certain sites

PIPA provides that entities listed at B and C are not liable for damages if they suspend services in relation to sites that in 'good faith' and on 'credible evidence' they believe are Internet sites dedicated to infringing activities.

PIPA also provides that entities listed at A-D are immune from liability if they refuse to deal with Internet sites that in 'good faith' and on 'credible evidence' they believe are endangering public health (eg selling counterfeit drugs).

³ A website with no significant use other than engaging in, enabling, or facilitating copyright infringement, circumvention of copyright access control measures and trade mark infringement. It also includes websites that are used primarily as a means for engaging in or enabling those activities.

⁴ A domain name issued by a domain registry not in the United States.

⁵ A website's IP address is needed to access that website.

4) *Some criticisms of PIPA*

- Impacts on free speech – eg the definition of “Internet site dedicated to infringing activities” is too broad, domain name blocking could set precedents for repressive regimes.
- Technical issues – eg domain name blocking could affect the reliability and security of the Internet, domain name blocking is subject to workarounds and ‘whac-a-mole’.
- ‘Harmed US IP holders’ could use their new right of action (against internet sites, internet advertising services, and financial transaction providers) to protect outdated business models.
- Entities may inappropriately voluntarily boycott certain sites.
- Digital Millenium Copyright Act⁷ safe harbours would be overridden.

SOPA

SOPA contains many similar mechanisms as found in PIPA. This summary is based on the latest amendments to SOPA proposed by the sponsoring senator.

5) *Actions by US Attorney-General (AG) against ‘foreign’ websites*

This mechanism is substantively the same as in 1) above but contains changes to the definitions and requirements which are intended to address some concerns raised.⁸

6) *Actions by harmed US IP holders against ‘foreign’ websites*

This mechanism is substantively the same as in 2) above. However, it differs primarily in that the action can only be taken against foreign websites. US-based websites would not be covered.

The original version of SOPA contained a notice and counter-notice system. A US IP holder could issue a notice to a financial transaction provider or an internet advertising service requiring them to forward the notice to an alleged site dedicated to infringement. Unless a counter-notice was received, the financial transaction providers or internet advertising service would be required to suspend services with that site. If a counter-notice was received or service was not suspended, the IP holder could take action as described in 2) above. The latest amendments proposed by the sponsoring senator remove this system.

7) *Encouraging entities to voluntarily not deal with certain sites*

This is a similar mechanism as described in 3) above. However, all entities listed at A-D above would be able to rely on this limitation from liability.

⁷ Digital Millenium Copyright Act of 1998, Pub L No 105-304, 112 Stat 2860.

⁸ For example, US ISPs can choose how they block their subscribers from accessing Internet sites rather than having to use domain name blocking and search engines could still link to pages of a site not dedicated to infringement.

8) *Other provisions*

SOPA also contains several other provisions including:

- criminalising copyright infringement caused by 'online streaming'
- increasing penalties for various IP offences, and
- directing a review of federal sentencing guidelines.

The action officer for this matter is Peter Treyde who can be contacted on 02 6141 3450.

Yours sincerely

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