

“Stop Online Piracy Act” – H.R. 3261 Rhetoric vs. Reality

Rhetoric: “H.R. 3261 allows content owners to shut down any web sites they don’t like, to ‘disappear’ entire Web domains.”

Reality: False. H.R. 3261 gives content owners absolutely no power to shut down anything. An action to deny access to the U.S. market by foreign sites determined by a U.S. court to be dedicated to *criminal activity* can only be brought by the Attorney General of the United States, not a content owner.

Content owners can only work with financial services in the marketplace to stop funding sites dedicated to theft of U.S. property after following a strict set of notice and counter-notice requirements (under penalty for misrepresentation). In order to prevent litigation, only if a market-based approach to stop funding doesn’t work, can a property owner bring an action to determine that a site is dedicated to theft of US property. Then, only after a court, based on strict rules of process and procedure, determines that a qualifying plaintiff has made the case that a site is dedicated to theft, can the court order injunctive relief (no money damages).

Rhetoric: “Under H.R. 3261, sites can be taken down for minimal infringement or even a single link.”

Reality: False. The legislation treats foreign sites the same way U.S. sites are treated today under current law. It only allows the Attorney General to target sites that are engaged in criminal activity under U.S. law and that would be subject to seizure if they were in the United States. It makes no sense to treat foreign sites engaged in crime better than U.S. sites engaged in the same activity.

Rhetoric: “Under H.R. 3261, an entire site can be taken down if a single page on it is infringing.”

Reality: False. It’s the opposite. H.R. 3261 allows a court to target *only* the portion of the site that is engaging in criminal activity or infringing, leaving access to or funding of the rest of the site alone. Contrary to the allegations of opponents, the site-centric nature of H.R. 3261 actually narrows the scope of a claim, not broadens it. By focusing on specific sites rather than entire domains, action can be taken against a single page or IP address if it falls within the rogue site definition rather than having to take action against the entire website and all its subdomains. The focus on sites, however, does not mean that action can be taken against an entire site if a single page on it is infringing.

Rhetoric: “H.R. 3261 allows a content owner to require an ad network or payment processor to cut off a site without any proof of infringement or legal responsibility.”

Reality: False. H.R. 3261 requires stakeholder victims to follow a strict set of rules when notifying payment processors or ad networks that are funding the rogue site. The property owner must identify the specific site and facts to support the claim that they fall within the definition of a site “dedicated to the theft of U.S. property.” Further, they must clearly show, as they would under Federal Rule of Civil Procedure 65, that immediate and irreparable injury, loss, or damage will result in the absence of timely action. Finally, misrepresentation of these claims results in damages, including costs and attorneys’ fees. These rules borrow directly from the Federal Rules as well as the DMCA and, in adding an additional notice and counter-notice step before any court filing, provide even more than usual due process protection for any site.

Rhetoric: “H.R. 3261 violates due process.”

Reality: False. Actually, H.R. 3261, in an abundance of caution, provides even more process to foreign sites than the constitutional process in place under current law for domestic sites. It places considerable burdens on enforcement, including specific parameters to determine whether a site qualifies, and the steps necessary before any action to block access or funding. Further, in adding an additional notice and counter-notice step before any private action court filing, H.R. 3261 provides even more than usual due process protection for any accused site.

Rhetoric: “H.R. 3261 creates new tech mandates.”

Reality: False. H.R. 3261 creates no new tech mandates. The legislation requires no change to an entity’s existing technology and requires only “technically feasible and reasonable measures” to implement. In fact, service providers are specifically not required to “modify network, software, systems, or facilities.” The legislation further provides an affirmative defense for an entity that “does not have the technical means to comply...without incurring an unreasonable economic burden.” The bill is also tech neutral, allowing the intermediary to choose how best to implement its provisions. It focuses on behavior, not technology.

Rhetoric: “H.R. 3261 adds more unnecessary government regulation to business and the Internet.”

Reality: False. H.R. 3261 provides for no government regulation or regulatory action whatsoever. The legislation only creates a framework for voluntary and legal action against sites falling within a clearly defined set of criteria. Investigation of and enforcement against criminal activity by law enforcement and the courts is not government regulation of the Internet, any more than police and court enforcement against theft of property in one’s home or neighborhood is regulation. No regulatory agency is involved, no rules are promulgated.

Rhetoric: “Domain name blocking can be easily circumvented, and thus will have little effect on online piracy.”

Reality: The bill does not require domain name blocking as the only solution, and allows the Attorney General to take action against those who purposefully offer tools to circumvent court orders. The bill is technology neutral and flexible to allow intermediaries to engage in the way they feel makes the most sense. While we can never completely prevent criminal Internet enterprises from threatening legitimate on-line businesses, the United States should be empowered to take action against the worst of the worst counterfeiters, pirates and criminal syndicates online – sites that engage in conduct that every one of the 153 WTO member countries consider illegal and worthy of imposing civil and criminal penalties against their operators.

H.R. 3261 will, in fact, severely hamper, if not halt, the illegal activity engaged in on these rogue sites. The potential for a workaround by a small portion of determined users should not preclude protection of American products and jobs.

Rhetoric: “ISPs should not be required to police their networks.”

Reality: H.R. 3261 does not require ISPs to engage in any monitoring, supervising, or policing of their networks. It only requires them to take action at the direction of the Attorney General if a federal court rules that a foreign site is engaged in criminal activity for which seizure would apply if it were in the U.S. Just like the DMCA, ISPs are only required to take minimum steps, with no duty to monitor.

Rhetoric: “H.R. 3261 threatens the First Amendment and imposes ‘prior restraints’ on speech.”

Reality: False. H.R. 3261 imposes no prior restraint on speech and its underlying principle is well-established in U.S. law. As the Supreme Court stated in *Alexander v. U.S.*, 509 U.S. 544, 553 (1993), the closure of distributors engaging in illegal activity is “not a prior restraint on speech, but a punishment for past criminal conduct.” In another relevant case, the Supreme Court found no prior restraint when it upheld the closure of a bookstore based on the illegal activity occurring inside:

First, the order would impose no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited -- indeed, the imposition of the closure order has nothing to do with any expressive conduct at all. *Arcara v. Cloud*, 478 U.S. 697, 706 n.2 (1986).

Similarly, under H.R. 3261, the website operators are free to carry on legitimate expression elsewhere (and even under the original domain if the illegal activity is corrected), and the blocking “has nothing to do with any expressive conduct at all.” If, as the Court stated, “neither the press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities,” why may sites dedicated solely to theft?

Noted First Amendment scholar Floyd Abrams has stated that H.R. 3261’s companion bill, S. 968, imposes no prior restraint on speech and its underlying principle is well-established in U.S. law. The same holds true for H.R. 3261, which was deliberately written to protect against any abridgement of First Amendment rights. The legislation *only* allows action against sites that fall within an extremely narrow set of criteria. Such language thoroughly protects sites against unconstitutional action based on speech.

Rhetoric: “H.R. 3261 threatens venture capitalism and investment in technology.”

Reality: False. We’ve heard this argument before. In 2004, a unanimous U.S. Supreme Court decision led to a finding that file-sharing service Grokster had contributed to infringement. Some VCs warned that ruling against Grokster would dry up venture capital investment. Instead, media and entertainment venture capital investment grew to 7.1% of total VC dollars (from just 4.6% before Grokster) and licensed music services grew to more than 400 in 2008, from less than 50 in 2003. The “threat to investment” argument was wrong then and it’s wrong now. IP enforcement will grow to foster a thriving legitimate marketplace, inviting further robust investment, while investment in illegal activity is diminished.

Rhetoric: “H.R. 3261 also raises significant risk that foreign governments will be able to restrict the speech that is available to American Internet users.”

Reality: Many other countries already block access to and funding of foreign rogue sites that engage in the theft of their property. There is a key distinction in protecting property vs. restricting speech. That distinction is enshrined in the U.S. Constitution and in the International Declaration of Human Rights. H.R. 3261 will serve as an example of protecting speech while preventing theft.

Rhetoric: “If the United States sets the precedent that any country can seize or order the blocking of a domain name if some of the content on the domain (wherever located) violates the country's local laws, the effort to protect the rights of Internet users, human rights defenders, and citizen journalists to speak and access lawful content online will be critically harmed.”

Reality: H.R. 3261 in no way prompts other countries to censor expression; it simply provides for reasonable action against theft of property using specific and narrowly defined parameters. In truth, we can only hope that other countries follow our lead in further strengthening the protection of intellectual property. But, of course, the threat of any negative action by bad actors should never preclude our own response to illegal activity – particularly activity that harms our national interests.

Further, there is already precedent for U.S. regulation in this regard: the Anticybersquatting Consumer Protection Act, which requires precisely the kind of *in rem* forfeiture action in H.R. 3261, has been in force since 1999; and section 337 actions adjudicated by the U.S. International Trade Commission (ITC), which prohibits importation of infringing goods through exclusion orders, have been available since 1930. H.R. 3261 reaches no further than what U.S. law has provided for years.