

Marvin Ammori
Affiliate Scholar, Center for Internet & Society, Stanford Law School
and Principal, The Ammori Group
Washington, DC, 20009
marvin@ammorigroup.com

Members
U.S. House of Representatives and U.S. Senate
United States Congress
Washington, D.C. 20515 and 20510

Thursday, December 8, 2011

Re: PROTECT IP Act (S.968) and Stop Online Privacy Act (H.R.3261)

Dear Members of Congress:

I write regarding companion bills introduced in the Senate and House--Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (S.968) (or PROTECT IP) and the Stop Online Privacy Act (H.R.3261) (or SOPA). PROTECT IP is before the full Senate and SOPA is currently under the consideration of the House's Committee on the Judiciary.

I write specifically to highlight First Amendment problems concerning the bills' copyright provisions. These problems would render the core provisions of the bills, if passed, unconstitutional. While the bills pursue at least one important goal—targeting infringement by particular “rogue” foreign sites—as drafted, the bills burden considerable protected speech beyond copyright infringement. As a result of burdening speech far beyond copyright infringement, the bills' provisions would not receive the more relaxed First Amendment scrutiny generally available for run-of-the-mill copyright statutes. Rather, standard First Amendment scrutiny would apply, and the core provisions of PROTECT IP and SOPA clearly fail to withstand that scrutiny.

To my knowledge, nobody has provided Congress necessary guidance on this key point—the First Amendment exceptions that generally apply to copyright statutes simply would not apply to these bills, as drafted.

These bills have already sparked some controversy for their effect on free speech. Harvard law professor Laurence Tribe, perhaps the nation's leading constitutional scholar, published a compelling opinion piece in *Politico* explaining why SOPA violates the First Amendment's standard principles.¹ Over 90 professors raised First Amendment objections to PROTECT IP² and to SOPA.³ On the other side, Floyd Abrams, partner at Cahill, Gordon & Reindel LLP, has written the relevant Committees to opine that the two bills, as drafted, do not violate the First Amendment.⁴ This

¹ Laurence Tribe, *Opinion: Stop Online Piracy Act meets the First Amendment*, POLITICO, Nov. 16, 2011.

² Letter from John R. Allison, et al., to Members of the United States Congress (July 5, 2011), <http://blogs.law.stanford.edu/newsfeed/files/2011/07/PROTECT-IP-letter-final.pdf>.

³ Letter from Mark A. Lemley, et al., to the House of Representatives (Nov. 15, 2011), <http://politechbot.com/docs/sopa.law.professor.letter.111511.pdf>.

⁴ Letter from Floyd Abrams, Partner, Cahill Gordon & Reindel LLP, to Lamar Smith, Chairman, Committee on the Judiciary, US House of Representatives (Nov. 7, 2011), <http://www.mppaa.org/Resources/1227ef12-e209-4edf-b8b8-bb4af768430c.pdf>; Letter from Floyd Abrams, Partner, Cahill Gordon & Reindel, to Patrick Leahy, Chairman, Committee on the Judiciary, United States Senate, et al., (May 24, 2011),

fundamental question of freedom of speech has also struck a nerve in the court of public opinion. Both bills have prompted opposition by civil liberties organizations on the right and left,⁵ and from those who provide or use platforms for user speech, such as Twitter, Facebook, Tumblr, members of Consumer Electronics Association, and others.⁶ SOPA even inspired leading civil liberties organizations and technology companies to declare an American Censorship Day.⁷

In the attached memorandum, I explain that the core provisions of PROTECT IP and SOPA would be subject to standard First Amendment scrutiny and would fail to meet it. Stated simply, if the bills would burden considerable protected speech that does not infringe copyrights, then standard scrutiny applies. These bills would in fact burden such protected, non-infringing speech. Therefore, standard scrutiny applies. These bills would fail standard First Amendment scrutiny. This legal conclusion derives from a basic non-legal fact: these bills would in practice restrict individuals' power to speak freely and democratically online.

The attached memorandum provides the legal evidence for this opinion. Generally, run-of-the-mill copyright statutes are not subject to heightened constitutional standards. This is because some categories of speech, such as defamation or obscenity or copyright infringement, have traditionally received far less protection under the First Amendment than other speech. PROTECT IP and SOPA, however, would trigger standard First Amendment scrutiny, which is a far more demanding standard, because the bills punish non-infringing, protected speech far beyond copyright-infringing speech. The courts have introduced several doctrines and tests designed to limit the government's power to suppress protected speech. As a result, multiple tests point in the same direction—towards standard, not copyright-specific, judicial scrutiny. These bills' provisions would have to meet, but ultimately would fail, standard scrutiny (1) under the Supreme Court's overbreadth jurisprudence that forbids Congress from suppressing substantial protected speech in attempting to restrict unprotected speech; (2) under its vagueness jurisprudence that requires heightened clarity in defining the categories of proscribed speech, to provider speakers notice and preclude discriminatory enforcement; (3) under its 2003 decision *Eldred v. Ashcroft* requiring heightened scrutiny for copyright statutes that alter the "traditional contours of copyright protection"; (4) under the line of cases most recently adjudicated including *United States v. Stevens*, decided in 2010, and *Brown v. Entertainment Merchants Association*, decided in 2011 that forbid Congress from creating new categories of proscribable speech beyond traditional categories such as obscenity, libel, or infringing speech; and (5) under the line of cases holding that standard prior restraint analysis applies to traditionally protected content such as the non-infringing speech that would be restricted by these bills.⁸ Certain of the bills' provisions also directly burden specific categories of protected speech, including truthful search results (which receive constitutional protection as "opinions"), domain

<http://www.dga.org/News/PressReleases/2011/~media/Files/Internet%20Theft/110524ProtectIPActLetterFloydAbrams.pdf>

⁵ Neil Stevens, *SOPA Is a Threat to American Internet Leadership*, THE DAILY CALLER, Nov. 21, 2011; Larry Downes, *SOPA: Hollywood's Latest Effort to Turn Back Time*, CNET, Nov. 1, 2011; Growing Chorus of Opposition to "Stop Online Piracy Act," <http://www.cdt.org/report/growing-chorus-opposition-stop-online-piracy-act>.

⁶ Declan McCullagh, *Google, Facebook, Zynga oppose new SOPA copyright bill*, CNET, Nov. 15, 2011; Protect Creativity & Innovation, ETSY, <http://www.etsy.com/protect-innovation>; Letter from AOL Inc., et al., to Patrick Leahy, Chairman, Committee on the Judiciary, United States Senate (Nov. 15, 2011), <http://www.protectinnovation.com/downloads/letter.pdf>; Letter from Ed Black, President and CEO, Computer and Communications Industry Association, et al., to Patrick Leahy, Chairman, Committee on the Judiciary, United States Senate (May 25, 2011), http://cdt.org/files/Tech_Assn_Letter_re_PIPA_5-25-11.pdf.

⁷ AMERICAN CENSORSHIP DAY NOVEMBER 16 – JOIN THE FIGHT TO STOP SOPA, <http://americancensorship.org/>.

⁸ See below, Part I (discussing *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *United States v. Stevens*, 130 S. Ct. 1577 (2010); *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011)).

name service (or DNS, which may receive protection as speech), and truthful commercial advertisements (which have long received constitutional protection under the Court's *Central Hudson* commercial speech test).⁹ Regulation of these categories of speech, none of which consist in copyright infringement, would not receive copyright-specific but standard First Amendment scrutiny.

Floyd Abrams' assessments concede this established framework. He notes that government restrictions must "avoid unnecessarily burdening protected speech," that courts "closely scrutinize statutes that may hinder protected speech, and give special attention to rules that could sweep too broadly."¹⁰ He also agrees that Congress must consider these bills' "potential overbreadth," both in their text and application.¹¹ Where Mr. Abrams and I disagree is in the application of these principles. The bills would in fact impose significant burdens on protected speech by non-infringing domestic and foreign websites, search engines, and advertisers.

I provide these thoughts to Congress as a recognized expert in the constitutional law of freedom of speech, particularly as it applies its to Internet and media technologies.¹² I am now an Affiliate Scholar at Stanford Law School's Center for Internet & Society and have previously taught law at Nebraska, Georgetown, and Yale. I currently represent and advise advocacy groups and technology companies, including Google and other companies that oppose PROTECT IP and SOPA.

Because these bills raise such important questions regarding the future of free speech and copyright enforcement on the Internet, the attached memorandum provides detailed analysis of specific provisions for you and your staff to evaluate the bills' constitutionality. The bills, as drafted, fail to meet the established principles of our nation's First Amendment jurisprudence. Congress should abandon the proposed legislation or modify these two bills to meet constitutional standards.

I am humbly at your service to discuss any of these issues with you or your staff.

Sincerely,



Marvin Ammori

⁹ See below, Part I (discussing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980)).

¹⁰ Abrams, *SOPA Letter*, above note 4, at 10.

¹¹ *Id.*

¹² I have published several law review articles on the First Amendment and technology in journals at Harvard, Michigan, Wisconsin, Indiana, and Missouri, among others. These articles are currently assigned in courses offered at Harvard, Georgetown, and other schools. I have also been quoted in the *New York Times*, *Wall Street Journal*, and other sources as an expert in First Amendment doctrine.

Memorandum to Congress PROTECT IP, SOPA, and Standard First Amendment Analysis

The core provisions of PROTECT IP and SOPA would be struck down as unconstitutional under the rules of standard First Amendment scrutiny.

This memorandum explains why such standard scrutiny would apply, and why the bills would fail such scrutiny, in four parts. **First**, it sets out the relevant Supreme Court jurisprudence that would apply to these bills, should these bills burden protected, non-infringing content. With non-specialists in mind, the first part explains the basic First Amendment doctrines of overbreadth and vagueness, the holdings of *Eldred* and *Stevens*, principles of prior restraints, and the speech doctrine applying to search, DNS, and commercial speech. **Second**, the memorandum examines the bills before Congress to determine whether they do in fact burden such protected speech. This part sets out the provisions in the bill that do so and explains how they would burden particular examples of protected speech. They appear to suppress anti-censorship technologies supported by the U.S. State Department, and to burden legitimate services for user speech, from Twitter to YouTube, as well as non-infringing speech by the users of such platforms, by online advertisers, and by search engines. As a result, standard First Amendment scrutiny applies. **Third**, the memorandum applies that scrutiny, and demonstrates that the bills would fail to pass it. **Fourth**, based on this analysis, I provide brief guidance on how to modify the bills so that they may more likely conform to established First Amendment principles.

I. Standard First Amendment Scrutiny Applies to Laws Restricting Non-Copyright-Infringing Speech

When a law burdens protected speech, standard First Amendment principles apply. The Constitution's First Amendment demands Congress make "no law... abridging the freedom of speech, or of the press."¹³ That Amendment has produced a complex judicial doctrine of categories, standards of scrutiny, and exceptions.¹⁴ Under this doctrine, not all speech is equal. At one end, political speech is the most highly protected; at the other, some categories receive minimal to no protection, including obscenity, fighting words, sexual harassment, anticompetitive collusion, fraud, true threats,¹⁵ and (to some extent) copyright.¹⁶

Outside of categories receiving minimal protection, courts generally apply a standard two-track analysis to laws burdening speech. Laws that target speech on the basis of content must meet "strict scrutiny," a stringent test requiring both a "compelling" governmental interest and a means "narrowly tailored" to that interest. Generally, to be narrowly tailored for strict scrutiny, a law should set forth the means "least restrictive" on protected speech.¹⁷ Laws that do not target speech on the basis of content must meet a lower standard, called "intermediate scrutiny," which requires both an "important" governmental interest and a means "narrowly tailored" to that interest. Narrow tailoring under intermediate scrutiny does not require a least restrictive means, but it does require Congress to

¹³ U.S. CONST. amend. I.

¹⁴ David A. Strauss, *Freedom of Speech and the Common Law Question*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 32 (Lee Bollinger & Geoffrey Stone eds., 2001).

¹⁵ See, e.g., *United States v. Stevens*, 130 S. Ct. 1577, 1584; Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of a Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

¹⁶ See *Eldred*, 537 U.S. at 219-220.

¹⁷ See *Playboy v. US*, 529 U.S. 803, 813 (2000).

choose a means whose scope is in proportion to the interest served.¹⁸ Laws not subject to these two heightened scrutiny levels must merely meet a “rational basis” standard that permits the federal government wide discretion to regulate under the powers enumerated in the Constitution.

Some may erroneously believe that PROTECT IP and SOPA would avoid these scrutiny standards because special constitutional principles apply to copyright infringement.¹⁹ Copyright statutes generally do not face the heightened analysis of strict or intermediate scrutiny; they appear generally to receive mere rational basis.²⁰ While copyright statutes burden individuals’ right to “speak” in the form of speech displaying or reproducing another’s copyrighted materials without authorization, this burden does not prompt heightened scrutiny for several reasons. *First*, the Constitution grants Congress the power to promote the progress of the arts by “securing for limited Times to Authors ... the exclusive Right to their respective Writings.”²¹ Authors’ “Writings,” defined broadly, therefore, may be subject to exclusive rights. *Second*, these exclusive rights include traditional, generally judicially created, exemptions to mediate the conflict between copyright and free speech. These exemptions include the judicially created idea/expression dichotomy (dictating that no copyright obtains in abstract ideas) and the exemption for fair use (including criticism, comment, and parody).²² *Third*, traditionally, the liability for *indirect* infringement (also called “secondary liability”) has generally required deep involvement in the infringement, and so does not generally burden large amounts of protected speech. There are two judicially recognized forms of indirect liability. Contributory liability requires both “knowledge” of the specific infringing activity and a “material” contribution to, or inducement or causing of, that “infringing conduct of another.”²³ The Supreme Court has clarified that a company can meet the inducement prong by distributing “a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement,” beyond “mere knowledge of infringing potential or [even] of actual infringing uses.”²⁴ Vicarious liability would require both “profiting from direct infringement” and “declining to exercise a right [and ability] to stop or limit it.”²⁵ Neither judicial test extends liability to merely enabling, facilitating, or not monitoring for copyright infringement.²⁶ *Fourth*, related to the limitations for indirect liability, the punishment for copyright infringement generally applies to infringers, rather than to advertising partners, payment processors, or service

¹⁸ See Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 478-82 (1989) (discussing narrow tailoring for commercial speech’s intermediate scrutiny test, though relying on content-neutral precedents in analysis relied upon in later content-neutral decisions).

¹⁹ For example, the exceptions for libel, fraud, and obscenity are not implicated. Further, standard scrutiny applies even though private parties, not government officials, send the Section 103 notices. Government-created private rights of action, such as libel, are subject to constitutional scrutiny. See New York Times v. Sullivan, 376 U.S. 254, 265 (1964) (libel); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (intentional infliction of emotional distress). Moreover, standard scrutiny applies to all sites used by Americans, even though some of those sites are foreign. As the Supreme Court has decided, Americans have rights as viewers, listeners, and users, even when speakers are abroad. Lamont v Postmaster, 381 U.S. 301, 305 (1965).

²⁰ Cf. Eldred v. Ashcroft, 537 U.S. 186, 245 (2003) (Breyer, J., dissenting) (arguing for “heightened rational basis” suggesting that courts generally apply standard rational basis).

²¹ See U.S. CONST. art. I, §8, cl. 8.

²² See Eldred, 537 U.S. at 221.

²³ Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

²⁴ *Id.* at 937.

²⁵ Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005).

²⁶ Congress used the definition for the active inducement, one part of the contributory infringement test, for the third definition of “dedicated to theft.” Compare Grokster, 545 U.S. at 930, with SOPA §103 (a)(1)(B)(ii)(II) (targeting a site operated “with the object of promoting, or has promoted, its use to carry out acts that constitute a violation of section 501, or 1201 of title 17, United States Code, as shown by clear expression or other affirmative steps taken to foster infringement.”).

providers of the copyright infringer. Because of these factors, and at least partly dependent on them, copyright statutes generally need not face heightened scrutiny.

As these factors make clear, however, Congress can figuratively “color outside the lines” and pass copyright-related laws that would in fact be subject to standard scrutiny. Specifically, if Congress passes laws burdening speech *beyond* copyright-infringement, then logic dictates that copyright-specific scrutiny does not apply. While this principle is logical, if not tautological, it is also embodied in several official doctrines.

First, under the First Amendment’s overbreadth doctrine, originally invoked in 1940, courts strike down laws that are constitutional regarding only some of the speech that they target (perhaps obscenity or copyright infringement), but that are unconstitutional regarding a “substantial number of its applications.”²⁷ Overbroad laws therefore chill protected speech by their very terms, so overbroad laws cannot apply *even* to speech that Congress could have otherwise proscribed.²⁸ As I explain below, the provisions of PROTECT IP and SOPA would have a substantial number of unconstitutional applications, applying to truthful, non-infringing speech on social networks, other websites, search engines, and in advertising. By burdening speech beyond copyright infringement, the bills implicate the overbreadth doctrine and would be unconstitutional for this reason alone.

Second, under the Supreme Court’s vagueness jurisprudence, laws that proscribe speech must not be overly vague. According to the Supreme Court, a statute is “void, on its face” if it is “so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech.”²⁹ Vagueness applies where a statute incorporates “wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.”³⁰ Language is vague particularly when words of degree are used in a “context” lacking a “settled usage or tradition of interpretation in law.”³¹ The Court is particularly concerned with the vagueness of content-based laws.³² Vagueness is a distinct ground for invalidation, in addition to overbreadth.³³ A vague statute is problematic because it provides government so much discretion in enforcement that it injects an “impermissible risk of discriminatory enforcement, for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law.”³⁴ Vague laws also fail to provide “fair notice to those to whom [it] is directed.”³⁵ Laws that define and punish speech beyond copyright infringement may be void for such vagueness. As discussed below, PROTECT IP and SOPA are unconstitutionally vague in their core terms, apparently (though in a vague manner) burdening considerable protected speech.

²⁷ See *Thornhill v. Alabama*, 310 U.S. 88 (1940). See also Richard H. Fallon Jr. *Making Sense of Overbreadth*, 100 YALE L. J. 853 (1991); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

²⁸ The Supreme Court has held that, “In the First Amendment context . . . [beyond usual facial challenges] this Court recognizes ‘a second type of facial challenge,’ whereby a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (citations omitted). See also *Gooding v. Wilson*, 405 U.S. 518, 530-31 (1972).

²⁹ *Winters v. New York*, 333 U.S. 507, 509 (1948).

³⁰ *United States v. Williams*, 553 U.S. 285, 305 (2008).

³¹ See *id.* at 1049.

³² See *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (noting “special concern” over the vagueness of the law at issue because it was content-based).

³³ While a law could be overbroad targeting constitutionally protected speech in perfectly clear language, many laws are overbroad vaguely. As a result, under overbreadth, the Court permits “plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.” See *United States v. Williams*, 553 U.S. 285, 304 (2008).

³⁴ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1050 (1991) (citations omitted).

³⁵ *Id.* at 1048.

Third, in *Eldred v. Ashcroft*,³⁶ the Supreme Court noted that, while heightened First Amendment scrutiny does not generally apply to copyright statutes, heightened scrutiny would apply when Congress has in fact “altered the traditional contours of copyright protection.”³⁷ The Court specifically mentioned two traditional contours—the idea/expression dichotomy and fair use. There are others. The traditional rules of indirect copyright infringement should be included as key features of copyright’s traditional contours. When Congress does alter copyright’s traditional contours, either strict or intermediate scrutiny may apply, although the Supreme Court has not yet decided this point.³⁸ As explained below, PROTECT IP and SOPA alter copyright’s traditional contours and would fail either strict or intermediate scrutiny.

These bills would fail either scrutiny standard because their mechanisms are not nearly narrowly tailored to the government’s important interests, and would have the predictable effect of burdening far more protected speech than necessary. The bills have broad definitions suppressing considerable protected speech. Further, the bills include mechanisms that predictably encourage over-blocking even beyond those broad definitions. Even if these bills, on their face, only targeted speech that can be entirely banned, they would still burden speech under the First Amendment if “the majority of distributors [faced with alternatives for compliance] reasonably choose an alternative that has the effect of burdening protected speech.”³⁹ The immunity provisions and punishments for intermediaries would encourage rational actors to choose more restrictive rather than less restrictive alternatives in suppressing speech.⁴⁰

Fourth, under the line of cases including *United States v. Stevens*,⁴¹ *Brown v. Entertainment Merchants Association*,⁴² and *Reno v. ACLU*,⁴³ Congress cannot create a novel category of speech for punishment, and any laws attempting to do so must meet standard First Amendment scrutiny. In those cases, Congress had viewed the traditional list of categories of speech that receive limited scrutiny—such as “defamation, fraud, incitement, and speech integral to criminal conduct”⁴⁴—and attempted to add a novel category merely by borrowing *some* language from, and invoking, the existing categories. *Stevens*, a recent 8-1 decision, struck down an attempt to target never-before-regulated speech—commercial production, sale, or possession of depictions of cruelty to animals.⁴⁵ Since the law succeeded in outlawing considerable previously-protected speech, the Court rejected the argument that Congress could create this category if it modeled the category on obscenity. The next term, the Court in *Brown v. Entertainment Merchants Association*⁴⁶ followed the precedent of *Stevens* to strike down a state law banning violent video games. It did so because violent speech is

³⁶ 537 U.S. 186 (2003).

³⁷ *Id.* at 221.

³⁸ For a discussion, see Brief for Information Society Project At Yale Law School Professors and Fellows, as Amici Curiae Supporting Petitioners, *Golan v. Holder*, No. 10-545, 2011 WL 2470834 (2011).

³⁹ *Center for Democracy & Technology v. Pappert*, 337 F. Supp. 2d 606, 652 (E.D. Pa. 2004) (interpreting *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000)).

⁴⁰ See *Center for Democracy & Technology*, 337 F. Supp. 2d at 650 (discussing *Playboy*, where a “rational cable operator” faced with possible sanctions would choose a more restrictive alternative to comply with a law). In *Center for Democracy & Technology*, Internet service providers were complying with a Pennsylvania law requiring DNS and IP filtering of child pornography sites by suppressing considerable amounts of unrelated speech. The court used this fact to demonstrate a burden on speech—as the law on its face was “unusual” by only targeting unprotected speech. See *id.* at 649. This same kind of burden, here, is evidence not only of a speech burden but, as in *Playboy*, of a failure to narrowly tailor the remedies. See *Playboy*, 529 U.S. at 827.

⁴¹ *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010).

⁴² *Brown v. Entm’t Merch. Ass’n.*, 131 S. Ct. 2729 (2011).

⁴³ *Reno v. ACLU*, 521 U.S. 844 (1997).

⁴⁴ *Stevens*, 130 S. Ct. at 1584 (citations omitted).

⁴⁵ See *Stevens*, 559 U.S. at 1591 (citing *Miller v. California*, 413 U.S. 15 (1973)).

⁴⁶ *Brown*, 131 S. Ct. 2729 (2011).

not a traditional category subject to exceptional First Amendment protection. In *Brown*, a state government had modeled its definition of violent speech on the Court's existing definition of unprotected obscenity, but the Court held again that "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."⁴⁷ Finally, in *Reno v. ACLU*,⁴⁸ the celebrated 1997 Supreme Court decision, the Court struck down a bill that burdened a category of speech whose definition also borrowed some, and not all, elements of an existing, exceptional, category.⁴⁹ The Court held that borrowing two of three features of an exceptional category is not enough; standard First Amendment scrutiny would apply to this novel category of speech. As I explain below, in PROTECT IP and SOPA, Congress would be targeting a new category of speech, far beyond copyright infringement, even if *some* of the language in the bills echoes language in existing Supreme Court definitions and tests involving copyright or other areas of law.

Fifth, standard prior restraint analysis applies to traditionally protected content. "Prior restraints" entail restraining the publication of speech or removing speech from circulation.⁵⁰ Generally, doctrine prefers monetary damages after the fact, rather than enjoining speech.⁵¹ As a result, prior restraints are heavily disfavored and, according to the Supreme Court, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."⁵² This presumption is weighty: "Under the First Amendment, more procedures are necessary before speech can be suppressed than are required before an individual can be arrested."⁵³ The Seventh Circuit has explained: "the distinction reflects this country's great concern with the chilling effect on protected speech brought on by a government seizure."⁵⁴

By contrast, injunctive relief is often appropriate for copyright infringement when, in the Supreme Court's words, the "infringements are simple piracy,"⁵⁵ involving clearly unauthorized wholesale copying that meet the tests for direct or indirect infringement. But injunctions are inappropriate in several situations, including some involving actual infringement that adds creative material and when there is a potential fair use defense. Noting "special circumstances" forbidding a court from imposing an injunction for infringement, the Court has relied on a decision where a film infringed derivative rights in a short story but the film included considerable non-infringing matter.⁵⁶ Similarly, when a parodist adds new material, the Supreme Court has cautioned that injunctive relief

⁴⁷ *Id.* at 2734.

⁴⁸ *Reno v. ACLU*, 521 U.S. 844 (1997).

⁴⁹ *Id.* at 872-74.

⁵⁰ See *Bantam Books v. Sullivan*, 372 U.S. 58 (1962); *Near v. Minnesota Ex Rel. Olson, County Attorney*, 283 U.S. 697 (1931). See also *Center For Democracy & Technology v. Pappert*, 337 F.Supp.2d 606, 656 (E.D. Pa. 2004) (using the term administrative prior restraints to describe removing already-published material from circulation).

⁵¹ See *id.*

⁵² See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books*, 372 U.S. at 70).

⁵³ See *Center for Democracy & Technology*, 337 F. Supp. 2d, at 658.

⁵⁴ See *United States v. Moore*, 215 F.3d 681, 685 (7th Cir. 2000).

⁵⁵ See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276-77 (2001). See also Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 158-163 (1998).

⁵⁶ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n. 10 (1994) (citing *Abend v. MCA, Inc.*, 863 F.2d 1465, 1470 (9th Cir. 1988)). See *Abend*, 863 F.2d at 1470 ("[The infringing film] resulted from the collaborative efforts of many talented individuals other than ... the author of the underlying story. The success of the movie resulted in large part from factors completely unrelated to the underlying story. ... An injunction would also effectively foreclose defendants from enjoying legitimate profits derived from exploitation of the "new matter" comprising the derivative work, which is given express copyright protection. ... We also note that an injunction could cause public injury by denying the public the opportunity to view a classic film for many years to come.").

is often not appropriate even when the parodist does engage in *actual infringement*.⁵⁷ Beyond actual infringement, however, courts have held that prior restraints are subject to standard First Amendment principles when applied to non-infringing content, such as speech that does meet the fair use standard or otherwise does not violate copyright.⁵⁸

Beyond these five exceptions for copyright, standard First Amendment scrutiny applies to the regulation of truthful, non-infringing speech by search engines delivering search results, to DNS provision, and to advertising. Copyright-specific scrutiny does not apply in these circumstances for the logical reason that these categories of speech do not actually infringe a copyright.

First, First Amendment protection applies to search results. According to court decisions, search results are “opinion,” rather than fact, warranting even more constitutional solicitude.⁵⁹ Not only is the choice of links protected as speech, so is linking.⁶⁰ Merely linking to infringing material, without more, generally does not constitute direct or secondary infringement. In the words of a federal district court, “[a]nything that would impose strict liability on a Web site operator for the entire contents of any Web site to which the operator linked therefore would raise *grave constitutional concerns*,” partly because “possible chilling effect of a rule permitting liability for or injunctions against Internet hyperlinks is a genuine concern.”⁶¹ Linking is not direct infringement because no “copy” is made,⁶² and could only be indirect infringement if other factors demonstrate contributory or vicarious liability. Further, under the four-part affirmative defense of fair use, a search engine’s linking likely consists in a transformative use—as does even displaying a copy of copyrighted content.⁶³

Second, standard free-speech principles, not copyright-specific principles, apply to connecting domain names to IP addresses through DNS. DNS provision generally does not consist in direct or indirect infringement. It is akin to linking or rudimentary search—matching user’s query (a URL) to a relevant site (an IP address). Burdening DNS restricts speech, as China and other repressive nations are well aware. Our courts have recognized that, “[a]lthough domain names do have a functional purpose,” they may be “sufficiently imbued with the elements of communication”

⁵⁷ See *Campbell*, 510 U.S. at 578 n. 10 (noting there may be “a strong public interest in the publication of the secondary work and the copyright owner’s interest may be adequately protected by an award of damages for whatever infringement is found.”). See also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1277-78 (2001).

⁵⁸ See *Religious Technology Center v. Lerma*, 897 F.Supp. 260, 262-65 (E.D. Va. 1995). The Second Circuit has suggested that prior restraints regarding copyright infringement are acceptable only to the extent that the fair use defense remains. See *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999) (“We have repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine.”).

⁵⁹ See *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630 (D. Del. 2007) (ruling that an injunction to alter search results in Google, Microsoft, and Yahoo! was precluded by the First Amendment); *Search King v. Google Technology, Inc.* 2003 WL 21464568, at **3-4 (W.D. Okla.) (ruling that search results are protected speech as opinions).

⁶⁰ See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 455-57 (2d Cir. 2001) (upholding the district court’s analysis of a content-neutral restriction on linking based on intermediate First Amendment scrutiny).

⁶¹ See *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp.2d 294, 340 (S.D. N.Y. 2000).

⁶² See *Field v. Google*, 412 F. Supp. 2d 1106, 1123 (2006); *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146, 1161 (2007).

⁶³ As the Ninth Circuit has observed, “even making an exact copy of a work may be transformative so long as the copy serves a different function than the original work.” See *Perfect 10*, 508 F.3d at 1165 (collecting sources including *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 811-19 (9th Cir. 2003) and *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22-23 (1st Cir. 2000) (using photos in a modeling portfolio for a newspaper); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (using thumbnails of concert-ticket art in a historical book); *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (using fashion photographs for a commentary on media representations).

depending “on the domain name in question, the intentions of the registrant, the contents of the website, and the technical protocols that govern the DNS.”⁶⁴ Courts have held that use of certain domains amounts to speech.⁶⁵

Third, regulations of truthful advertising are subject to an intermediate scrutiny far more stringent than the scrutiny applicable to copyright-infringing speech.⁶⁶ The regulation of advertising receives an intermediate scrutiny specific to “commercial speech,” as set out in the 1980 Supreme Court decision, *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁶⁷ As a threshold matter, commercial speech must not concern “unlawful activity” and/or be “misleading.” Of course, PROTECT IP and SOPA affect advertising that will overwhelmingly concern legal services and products. Even the advertising of cigarettes,⁶⁸ alcohol,⁶⁹ combination-medicines,⁷⁰ and gambling⁷¹ receive intermediate scrutiny under *Central Hudson*. As a result, under *Central Hudson*, (1) “the asserted governmental interest” must be “substantial,” (2) the regulation must “directly advance [] the governmental interest asserted,” and (3) the regulation must not be “more extensive than is necessary to serve that interest.”⁷² As discussed below, the provisions of PROTECT IP and SOPA regulating such non-infringing, truthful commercial speech would fail such scrutiny.

In sum, when one of these five exceptions to copyright-specific scrutiny applies, or when the targeted speech is not even subject to copyright law at all, courts must apply standard First Amendment principles. That is, courts would apply standard scrutiny tests—strict or intermediate—rather than a more lax copyright-specific standard. Each of the exceptions and each of the non-copyright tests is triggered in some fashion by restrictions applying to content that does not infringe copyright or (for injunctions) also for content that infringes copyright but had a reasonable argument for non-infringement or transformed the infringed work. The next part explains that the pending bills will target enormous amounts of non-copyright-infringing speech.

II. The Bills Target Speech Far Beyond Traditional Copyright-Infringing Speech

Understanding these five doctrines, we can turn to PROTECT IP and SOPA to determine whether and how they restrict speech that does not consist of copyright infringement. The bills do so for websites (foreign *and* domestic), for non-infringing users of such websites, and for intermediaries dealing with such websites, including search engines and advertisers. Without comprehensively analyzing all parts of the bills, I highlight the key operative language that extends speech restrictions far beyond copyright-infringement.

⁶⁴ See *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 585-86 (2000).

⁶⁵ See, e.g., *Bally Total Fitness Holding Corp. v. Faber*, 29 F.Supp.2d 1161 (C.D.Cal.1998) (using *BallySucks* in domain name is protected speech). See also *Name.Space*, 202 F.3d at 585 (noting that, while top-level domains (TLDs) such as .com, .edu, and .gov do not constitute protected speech, future TLDs may: “There is nothing inherent in the architecture of the Internet that prevents new gTLDs from constituting expressive speech.”).

⁶⁶ *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York*, 447 U.S. 557 (1980).

⁶⁷ *Id.* at 563-64 (1980).

⁶⁸ See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

⁶⁹ See *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

⁷⁰ See *Thompson*, 535 U.S. 357.

⁷¹ See *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173 (1999).

⁷² See *Thompson v. Western States Medical Center*, 535 U.S. 357, 367 (2002) (referencing the test tracing back to *Central Hudson*).

A. The Bills Target Websites For Speech that Consists in Neither Direct or Indirect Copyright Infringement

The bills define and restrict targeted content far beyond any relevant court's definition of direct or indirect infringement. Both PROTECT IP and SOPA target speech that merely *enables* or *facilitates* infringement. They also target the speech of sites that, even if not engaged in actual indirect infringement, have a *limited purpose* (or no *significant purpose*) other than infringement. SOPA also targets speech where, even if not engaged in indirect infringement, the site has *avoided confirming* a high probability of infringement. These categories of speech are subject to penalties that include technical inaccessibility (through the domain name system), search inaccessibility, and lack of financial services and advertising revenue.⁷³ While some of these defined categories echo definitions used in court decisions or previous legislation, they borrow the definitions incompletely and out of context (as discussed below, regarding vagueness)⁷⁴. As a result, these categories include considerable protected, non-infringing speech; the bills also encourage overblocking beyond these categories in enforcement by third parties.

1. Non-Infringing Speech Facilitating or Enabling Infringement

The restricted speech goes far beyond copyright-infringement to include speech *facilitating or enabling* infringement. While the language is highly vague (a problem in its own right), targeting websites that merely enable or facilitate infringement would burden even legitimate sites such as Hotmail, Twitter, and YouTube, which clearly facilitate even criminal infringement for some. Indeed, the Department of Justice's interpretation of the word "facilitate" includes mere linking and would easily sweep up much social media.⁷⁵ Targeting sites that merely "facilitate" infringement (even criminal infringement) has prompted pro-democracy and pro-journalism groups such as Human Rights Watch, Freedom House, and Reporters Without Borders to file a brief with the Second Circuit explaining the threat to social media-- an "instrument of human rights advocacy" and "government accountability" facing censorship threats elsewhere in the world.⁷⁶ In the words of these organizations, social media sites importantly "*facilitate* citizen activism, expose official abuses, and focus world attention on struggles for universal values such as freedom of association and the rule of law."⁷⁷ These companies are subject to considerable potential liability to the extent legislation would punish sites that (though not indirect infringers themselves) merely facilitate or enable another's infringement.

The bills' language clearly would punish sites that merely facilitate or enable another's infringement. Section 2 of the PROTECT IP Act defines restricted speech on the basis of content in this way:

Sec. 2 (7) the term "Internet site dedicated to infringing activities" means an Internet site that—

⁷³ PROTECT IP § 3 (d)(2)(A) and SOPA § 102 (c)(2)(A) (interfering with DNS resolution); SOPA § 102 (c)(2)(B) (interfering with search accessibility); PROTECT IP § 3 (d)(B) & (C) and SOPA § 102 (c)(2)(B) and (C) (cutting off financial services and advertising revenue).

⁷⁴ See below, Part III.B.

⁷⁵ See Opening Brief and Special Appendix for Petitioner-Appellant Puerto 80 Projects, S.L.U., Puerto 80 Projects, S.L.U. v. United States, No. 11-3390 (2d Cir. Sept. 16, 2011).

⁷⁶ See, e.g., Brief for Human Rights Watch, et al. as Amici Curiae Supporting Appellees, Viacom Int'l, Inc., et al. v. YouTube, Inc., et al., No. 10-3270, 33 n.8. (2d Cir. Apr. 7, 2011).

⁷⁷ *Id.* at 9 (emphasis added).

- (A) has no significant use other than engaging in, **enabling**, or **facilitating** the –
- i. reproduction, distribution, or public performance of copyrighted works, in complete or substantially complete form, in a manner that constitutes copyright infringement under section 501 of title 17, United States Code [civil copyright infringement]; ... [or]
- (B) is designed, operated, or marketed by its operator or persons operating in concert with the operator, and facts or circumstances suggest it is used, primarily as a means for engaging in, **enabling**, or **facilitating** the activities described under clauses (i), (ii), or (iii) of subparagraph (A).⁷⁸

In the House, SOPA defines proscribed content similarly, targeting speech that merely facilitates or enables infringement, rather than consisting in actual direct or indirect infringement. Section 102 of SOPA pertains to enforcement by the Attorney General.

Sec. 102(a) DEFINITION.—For purposes of this section, a foreign Internet site or portion thereof is a “foreign infringing site” if—

- 1) the Internet site or portion thereof is a U.S.-directed site and is used by users in the United States; [and]
- 2) the owner or operator of such Internet site is committing or **facilitating** the commission of criminal [copyright] violations punishable under section ... 2319, 2319A, 2319B ... of title 18, United States Code.⁷⁹

As a result of this language, both bills punish non-infringing speech that merely enables or facilitates copyright infringement, rather than speech that consists in direct *or indirect* infringement.

2. Non-Infringing Sites With Limited Use Beyond Infringement

The bills also sweep up and punish speech that does not consist in indirect infringement but is on sites that have *limited or no significant purpose or use* other than facilitating or enabling infringement. The language concerning use or purpose includes sites whose purposes are non-commercial or educational. To give just one example of this language’s broad sweep, it would cut off the site torproject.org from any funding or accessibility. This site, for the non-profit Tor Project, has little to no significant purpose beyond promoting the use of Tor. Tor is a technology to preserve anonymity online, particularly in repressive countries where governments censor and punish online speakers. Indeed, “[t]he Tor software was originally created by the US government and because of its role in protecting democracy activists still receives most of its funding from the State Department.”⁸⁰ Nonetheless, even though the “Tor Project has been praised for offering people

⁷⁸ PROTECT IP§ 2.

⁷⁹ SOPA§102.

⁸⁰ *Amazon Cloud Boosts Tor Dissident Network*, THE TELEGRAPH (UK), Nov. 23, 2011, <http://www.telegraph.co.uk/technology/news/8910287/Amazon-cloud-boosts-Tor-dissident-network.html>.

living in repressive regimes [including Iran and Egypt] an opportunity to communicate freely with others without fear of punishment. ... ‘Studies suggest that most of the bandwidth is taken by pirated content.’⁸¹ As most of Tor’s bandwidth may be used for pirated content, even though Tor is non-commercial and promotes freedom of speech in repressive regimes, these bills may shut off and financially cripple the Tor Project’s website because its purposes and uses beyond the considerable piracy are “limited” and not “significant” relative to its facilitation of infringement. Suppressing Tor’s site would burden protected speech generally, and anonymous speech specifically, which receives constitutional protection.⁸²

Beyond Tor, this language likely could implicate social media sites relying on user-generated content, such as YouTube. No doubt, intellectual property holders will argue that such sites have only a limited use beyond facilitating infringement.⁸³

The bills’ language indeed burdens sites without “significant” uses beyond facilitating infringement. As quoted above, PROTECT IP targets speech that “has no significant use other than engaging in, enabling, or facilitating” copyright infringement.⁸⁴ Section 103 of SOPA, which authorizes private parties to send notification letters to advertisers and financial providers,⁸⁵ and apparently to bring *in personam* actions against them for failing to comply with the notices,⁸⁶ similarly defines the restricted speech on the basis of content that has no relation to judicial tests for direct or indirect infringement including those with a “limited purpose” other than facilitating infringement.

Sec. 103(a)(1) DEDICATED TO THEFT OF U.S. PROPERTY.—An

“Internet site is dedicated to theft of U.S. property” if—

(A) it is an Internet site, or a portion thereof, that is a U.S.-directed site and is used by users within the United States; and

(i) the U.S.-directed site is primarily designed or operated for the purpose of, **has only limited purpose or use other than**, or is marketed by its operator or another acting in concert with that operator for use in, offering goods or services in a manner that engages in, **enables, or facilitates** -

(I) a violation of section 501 of title 17, United States Code[.]

As a result of this language, the bills would punish speech whose purposes are purely noncommercial and much speech that courts have never considered to be indirect infringement. Again, vicarious

⁸¹ *Secret Net Tor Asks Users To Sign Up To Cloud Services*, BBC.CO.UK, Nov. 24, 2011, <http://www.bbc.co.uk/news/technology-15834476>.

⁸² *See, e.g.*, *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995).

⁸³ *See, e.g.*, *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D. N.Y. 2010).

⁸⁴ PROTECT IP§ 2(7)(A).

⁸⁵ SOPA§ 103(b).

⁸⁶ Both payment processors and advertising services “shall take technically feasible and reasonable measures, as expeditiously as possible.” SOPA, 103(b)(1)-(2) (emphasis added). If they fail to do so, it appears that intellectual property holders can bring *in personam* actions against the financial processors and advertisers themselves. While the bill’s language is not crystal clear, it states that suit may be brought against “(A) a registrant of a domain name used by the Internet site, or portion thereof, that is *subject to the notification* under subsection (b)(4); or (B) an owner or operator of the Internet site or portion thereof.” Those that are “subject to” the notification are financial processors and advertising services, not sites dedicated to theft.

liability would require profit from the infringement (rather than non-commercial use) and the ability to stop another's infringement; contributory liability would require both knowledge and a material contribution to the infringement of another. The bills' "limited-purpose" language goes far beyond these requirements, burdening considerable non-infringing speech.

3. Non-Infringing Sites Avoiding Confirming A High Probability of Infringement

SOPA also targets another category of constitutionally protected speech far beyond infringing speech. SOPA punishes sites that "avoid confirming" a high probability of infringing use on a site. This sweeps up every social media site, or other site where users can contribute information, as there is a high probability that *some* of the use infringes copyright. This includes instant-messaging (as noted by Judge Richard Posner, in explaining why imposing such liability would be unacceptable⁸⁷), email, Facebook, Twitter, YouTube, as well as Blogger, Wordpress, and Tumblr (popular blogging sites for individuals), and new innovative companies that have yet to change how millions of us communicate.

Further, by definition, this category would block donations to the torproject.org from the United States. There is a high probability that the Tor Project, while funded by the State Department and used to promote free speech abroad, has had (and does have) infringing uses.⁸⁸ Since the primary goal of the Tor Project is to avoid confirming the identify and speech of Tor's users, lest the Iranian and Syrian governments obtain such capabilities, Tor quite clearly takes actions to avoid confirming highly probable copyright infringement (and, in other countries, probable "blasphemy" and "illegal dissent"). As a result, in addition to burdening social media sites, these bills would serve to suppress a technology that dictators around the world would love to suppress—and which our own State Department has financed and promoted.

The language of Section 103 (a)(1)(B)(ii) undermines all of this protected speech by punishing speech where:

[T]he operator of the U.S.-directed site –

- (I) is taking, or has taken, deliberate actions to **avoid confirming a high probability of the use** of the U.S.-directed site to carry out acts that constitute a violation of section 501 ...;

As a result of this language, SOPA targets content far beyond direct or indirect infringement, burdening and potentially undermining many of the most popular speech platforms on the Internet.

B. The Bills Restrict the Speech of Advertisers, Search Engines, and DNS Providers

Beyond targeting the non-infringing speech of many websites, the bills would impose a burden on the speech of advertisers, search engines, and DNS providers. The bills regulate the speech of these companies that neither directly nor indirectly infringes copyright.

⁸⁷ In re Aimster Copyright Litigation, 334 F. 3d 643 (7th Cir. 2003).

⁸⁸ See *Secret Net Tor Asks Users To Sign Up To Cloud Services*, BBC.CO.UK, Nov. 24, 2011, <http://www.bbc.co.uk/news/technology-15834476>.

Advertising is protected speech, subject to the *Central Hudson* intermediate scrutiny test.⁸⁹ Subject to some process, PROTECT IP and SOPA would forbid advertising even for political candidates, churches, and charities if placed on a site with some infringement, or on a site engaged in protected, non-copyright-infringing speech that merely facilitates, enables, has a limited purpose other than, or avoids confirming some infringement on the site somewhere.⁹⁰ Both bills provide that Internet advertising services shall take “technically feasible and reasonable measures” to “prevent its service from providing advertisements to the Internet site associated with such domain name,” and to “cease making available advertisements for that site, or paid or sponsored search results, links or other placements that provide access to the domain name.”⁹¹ The truthful advertising is enjoined not based on the traditional four-part test for injunctions, which would require providing that such speech *itself* results in irreparable harm, but is based on documents created in separate forums (or non-judicial notification) based on separate inquiries.

Search results generally receive First Amendment protection as opinion.⁹² Yet PROTECT IP and SOPA would forbid search engines from engaging in truthful, non-infringing speech. When a user searches for a topic on a search engine, the engine provides its opinion on which links best answer the search query. That opinion, for some search engines, is driven partly by how other sites link to one another. When the force of government forbids a search engine from serving some results, as China does,⁹³ this action does not target copyright-infringement but the truthful speech of search engines. Under PROTECT IP and SOPA, search engines are enjoined from speech not based on the traditional four-part judicial test for an injunction—which would require that the *search engine’s* speech specifically results in irreparable harm. Instead, the speech of search providers can be enjoined with documents based on separate inquiries.

DNS provision receives some, but perhaps more limited, First Amendment protection. SOPA and PROTECT IP require DNS blocking even for non-infringing sites, including those merely “facilitating” infringement. Section 3 of PROTECT IP requires “nonauthoritative domain name system servers” to block domain name resolution for sites that are subject to court orders under the act.⁹⁴ Similarly, Section 102 of SOPA requires “service providers” to take measures to ensure that the domain name does not resolve to a targeted site’s IP address.⁹⁵ Language in the bills ban attempts to circumvent this technical blocking, which likely includes the mere act of publishing a truthful, non-infringing table matching domain names with IP numbers.⁹⁶

C. Remedies Result in Predictable Overblocking

Both PROTECT IP and SOPA would predictably result in suppression of protected speech.

First, injunctions against domain names often block far more protected speech than unprotected speech. The history of DNS filtering regarding child pornography demonstrates this problem. While federal and state governments can suppress child pornography because of the terrible harm it inflicts on children,⁹⁷ Pennsylvania’s state law requiring DNS filtering and IP filtering of

⁸⁹ See above, notes 66-72 (and accompanying text).

⁹⁰ See SOPA § 103(b)(2).

⁹¹ See PROTECT IP § 3 (d)(2)(C); SOPA § 102 (c)(2)(D) (using slightly different language).

⁹² See above, notes 59-62 (and accompanying text).

⁹³ See ROBERT MCMAHON AND ISABELLA BENNETT, COUNCIL ON FOREIGN RELATIONS, U.S. INTERNET PROVIDERS AND THE ‘GREAT FIREWALL OF CHINA,’ Feb. 23, 2011, <http://www.cfr.org/china/us-internet-providers-great-firewall-china/p9856>.

⁹⁴ PROTECT IP § 3(d)(2).

⁹⁵ SOPA § 102(c)(2).

⁹⁶ SOPA § 102 (c)(4)(ii).

⁹⁷ See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Osborne v. Ohio*, 495 U.S. 103 (1990).

child pornography sites resulted in blocking 1,190,000 innocent websites but only less than 400 child pornography websites.⁹⁸ That is, according to district court findings, 99.9% of the blocked sites were innocent. Stated another way, the law blocked almost 3,000 innocent sites for every one unprotected site. The court that struck down that law concluded: “all the currently available technical methods of disabling access to a web site accessible through an ISP’s service [including DNS filtering] result in significant overblocking.”⁹⁹ A second, similar example, concerns the controversial domain-name seizures by Department of Homeland Security’s Immigration and Customs Enforcement agency and the Department of Justice, which are the subject of ongoing litigation.¹⁰⁰ These agencies seized Moo.com, which resulted in making 84,000 subdomains inaccessible, even though the vast majority of the subdomains were completely unrelated to child pornography.¹⁰¹ By analogy, if *some* illegal content led the government to “seize” the blogspot.com or tumblr.com domains, the action would block millions of subdomains, including the galvanizing site for the Occupy Movement (wearethe99percent.tumblr.com/) and the well-known site of a free speech theorist and other law professors (balkin.blogspot.com).

Second, as Professor Tribe has noted, the broad immunity provisions in the bills encourage advertisers, financial processors, and search engines to burden considerable protected speech because of a legal asymmetry between overcompliance and undercompliance. These providers would have immunity from suit and liability for mere “reasonable” attempts to block non-infringing content that “facilitates” infringement or otherwise meets the bills’ definitions¹⁰²; yet, they open themselves to enforcement suits from the Attorney General and copyright holders unless they can demonstrate that they do not have the “technical means” to implement particular measures due to “unreasonable economic burden.”¹⁰³ Moreover, because the technical tools available to advertisers, financial processors, and search engines are not 100% precise, these companies must choose between undercompliance or overcompliance. Legal rules *generally* lead to overcompliance.¹⁰⁴ But the stark asymmetry between immunity from suit (for overcompliance) and bearing the burden of proof to establish a partial defense and thereby avoid liability (for undercompliance) will even more clearly push companies towards overcompliance. Here, predictable overcompliance means burdening speech far beyond unprotected speech—speech that not only does not directly or indirectly infringe copyrights, but that also does not even “facilitate” such infringement. That is, under the bills, providers would “reasonably choose an alternative that has the effect of burdening protected speech.”¹⁰⁵ Finally, targeting providers rather than infringers will itself lead to overcompliance. As courts have recognized, a service provider “has little incentive to challenge the suppression of a web site with which it has no business relationship.”¹⁰⁶ By contrast, the site itself has more incentive to defend its business and speech practices.

⁹⁸ Center For Democracy & Technology v. Pappert, 337 F.Supp.2d 606, 655 (E.D. Pa. 2004).

⁹⁹ *Id.* at 655-56.

¹⁰⁰ Nate Anderson, *Silicon Valley Congresswoman: Web Seizures Trample Due Process (and Break the Law)*, ARS TECHNICA, Mar. 14, 2011. See also Opening Brief and Special Appendix for Petitioner-Appellant Puerto 80 Projects, S.L.U., Puerto 80 Projects, S.L.U. v. United States, No. 11-3390 (2d Cir. Sept. 16, 2011).

¹⁰¹ See Anderson, above, note 100. See also Ernesto Van Der Sar, *U.S. Government Shuts Down 84,000 Websites, “By Mistake,”* TorrentFreak, Feb. 16, 2011 (“The domain in question is moo.com, which belongs to the DNS provider FreeDNS. It is the most popular shared domain at afraid.org and as a result of the authorities’ actions a massive 84,000 subdomains were wrongfully seized as well. All sites were redirected to the banner below.”).

¹⁰² See SOPA § 104; PROTECT IP § 105(a).

¹⁰³ See SOPA § 102 (c)(4)(C); SOPA § 103 (d)(4)(C).

¹⁰⁴ See John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 986 (1984).

¹⁰⁵ Center for Democracy & Technology v. Pappert, 337 F. Supp. 2d 606, 652 (E.D. Pa. 2004) (interpreting *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000)).

¹⁰⁶ See *Center for Democracy & Technology*, 337 F. Supp. 2d at 658.

III. Standard First Amendment Doctrine Applies and Would Invalidate the Core Provisions of PROTECT IP and SOPA

Having set out the applicable First Amendment doctrine and relevant provisions of PROTECT IP and SOPA, we can apply that doctrine to the provisions. Standard First Amendment principles apply to speech that does not infringe copyright, and PROTECT IP and SOPA burden considerable speech that does not infringe copyright. Therefore, under several doctrines, standard First Amendment scrutiny would apply. Further, under these doctrines, both bills would be judged unconstitutional.

A. Overbreadth

Under the overbreadth doctrine, both bills would be unconstitutional. The test for overbreadth requires construing what the statute says and then determining if a substantial number of the statute's applications burden protected speech and are unconstitutional. While Congress, of course, has some leeway in defining infringement, the courts have traditionally defined infringement with solicitude for free speech principles, and defining new categories of suppressible speech that is merely related to infringement goes far beyond what courts have traditionally defined. As discussed above, these bills burden sites engaged in protected speech, that involve no direct or indirect infringement, and that merely facilitate infringement, have limited purposes other than infringement, and avoid confirming highly likely infringement. The legislation also burdens the non-infringing speech on those sites, as well as the non-infringing speech of search engines, DNS providers, and advertisers. It even encourages overcompliance with all of these mandates, and therefore overblocking of even more protected speech. As a result, in targeting speech that Congress *can* burden with copyright laws, these bills go beyond and include numerous unconstitutional applications such as burdening users of Facebook, Google, YouTube, Tumblr, Twitter, all web-based email providers, any linking to sites with infringement on them (according to the DOJ¹⁰⁷), as well as anti-censorship tools including State Department-backed Tor. These burdens would affect millions of people engaged in protected speech of all kinds. They consist in a substantial number of applications that would be unconstitutional, rendering the bills clearly substantially overbroad and therefore unconstitutional as applied to anyone—even truly bad actors.

B. Vagueness

These bills are unconstitutionally vague. They enable “wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.”¹⁰⁸ For example, the terms “facilitating” or “enabling” copyright infringement are highly vague, welcome a wide range of degrees of facilitation or enablement, and have no settled meaning in precedent. In their vagueness, they appear to sweep up every social media site for sharing text, video, or data, as well as email, instant-messaging, and Tor and other speech tools. Even in criminal matters, the DOJ claims that “facilitate” covers any *linking* to a site with infringing content, which is not clear from the use of that word alone.¹⁰⁹

¹⁰⁷ Government's Memorandum of Law in Opposition to Petition of Puerto 80 Projects, S.L.U. Seeking Release of Seized Property Pursuant to 18 U.S.C. § 983(f), Puerto 80 Projects, S.L.U. v. United States, et al., No. 11-CV-3983-PAC.

¹⁰⁸ United States v. Williams, 553 U.S. 285, 305 (2008).

¹⁰⁹ See Opening Brief and Special Appendix for Petitioner-Appellant Puerto 80 Projects, S.L.U., Puerto 80 Projects, S.L.U. v. United States, No. 11-3390 (2d Cir. Sept. 16, 2011).

Other definitions of proscribed sites include those with a limited purpose or no significant use, other than, as well as “avoiding confirming a high probability” of, infringement. All are highly vague. They appear to sweep up Tor and every social media site; it is not clear if a company is liable merely for not confirming a “high probability” of *some* infringement or of one specific infringement.

Proponents for PROTECT IP and SOPA will argue that these bills cannot be vague because they borrow from some non-vague language from existing precedent and legislation. But echoing *some* existing non-vague language, incompletely, is not enough. The Supreme Court has held that borrowing language from decisions incompletely and out of context does not cure vagueness but in fact may contribute to it: “Just because a definition including three limitations [as in *Miller v. California* regarding obscenity] is not vague, it does not follow that one of those limitations, standing by itself [as in *Reno v. ACLU*], is not vague.”¹¹⁰

First, the definition in SOPA covering *non-monitoring* sites has no precedent as a category of proscribable speech and does not clearly pertain to avoiding confirmation of specific or general infringement. In a recent patent law decision, *Global Tech Appliances, Inc. v. SEB S.A.*,¹¹¹ the Court defined a “willfully blind defendant” in a patent case as “one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.”¹¹²

Nonetheless, the language in SOPA is still highly vague. As a threshold matter, *Global Tech*’s language involved chicken fryers, not platforms empowering individuals’ speech, and “heightened vagueness standard applicable to restrictions upon speech entitled to First Amendment protection.”¹¹³ Speech, unlike fryers, receives constitutional protection partly to thwart discriminatory enforcement from vague statutes. So, even if the language were just as vague in *Global Tech* as it is in SOPA, SOPA’s vagueness would have to meet a higher constitutional standard.

But the context of SOPA’s language renders it far more vague for two reasons: the language is unclear between general and specific knowledge, and the language removes key limiting elements. While *Global Tech* pertained to specific knowledge of a particular infringement, the language in SOPA appears to pertain to *general* knowledge of at least *some* potential infringement on an online platform for thousands or millions of speakers. In context of Internet infringement (rather than patents of a specific manufacture), the Seventh Circuit’s Judge Richard Posner has explained why general knowledge of infringement should not control liability. Discussing AOL’s instant messaging service, he wrote: “there is no doubt that *some* of the [shared] attachments that AOL’s multitudinous subscribers transfer are copyrighted,” and that some of these transfers are unauthorized.¹¹⁴ He concluded, however, that AOL should not be required to monitor all the chats and file transfers on its network because it would be too burdensome.¹¹⁵ He also concluded it would conflict with the Supreme Court’s copyright liability test in *Sony*, which is far more relevant than the *Global Tech* standard would be, because it pertains to copyright infringement and technology enabling users’ direct infringement.¹¹⁶ If Congress wants to disagree with Judge Posner and reverse *Sony* (as well as reversing the non-monitoring mandate of the DMCA¹¹⁷), the bills do so in a highly vague way,

¹¹⁰ *Reno v. ACLU*, 521 U.S. 844, 873 (1997).

¹¹¹ 131 S. Ct. 2060 (2011).

¹¹² *Global Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2071 (2011).

¹¹³ *Brown v. Entertainment Merchants Ass’n*, 131 S.Ct. 2729, 2735 (2011).

¹¹⁴ *In re Aimster Copyright Litigation*, 334 F.3d 643, 647 (2003).

¹¹⁵ *Id.* at 648 (noting it would be burdensome and conflict with *Sony*). Similarly, under the DMCA, sites take action only with “actual knowledge of infringement” or an extraordinary “red flag.” See Lital Helman & Gideon Parchomovsky, *The Best Available Technology Standard*, 111 Colum. L. Rev. 1194, 1201 (2011).

¹¹⁶ *Id.* at 648 (noting it would be burdensome and conflict with *Sony*).

¹¹⁷ 17 U.S.C. § 512(M)(1).

providing no clear guidance to speakers who would be subject to punishment under the bills. As a result, SOPA is vague in its expansion from requiring specific knowledge to general knowledge, and is also vague in regards to what would constitute general knowledge.

In addition, SOPA's use of the language is more vague because it eliminates a key prong of contributory infringement that would provide guidance on when speakers can face punishment. In *Global Tech*, the non-confirming language is merely a proxy for knowledge. That knowledge was only one element of the test for willful patent infringement. The plaintiff had to prove the other elements of this direct infringement. SOPA uses this knowledge-proxy not for willful direct infringement, but to alter the test for secondary liability. Secondary liability requires more definiteness. For example, for contributory copyright, a secondary infringer must have knowledge and must also *materially contribute* to the infringement of another. As the Supreme Court has stated as recently as *Grokster*, "mere knowledge of . . . actual infringing uses would not be enough" to subject a third-party to liability.¹¹⁸ By eliminating the necessity for a material contribution, and hinging liability purely on a highly vague knowledge-proxy, the SOPA test is even far more vague than the current contributory-infringement test or the *Global Tech* test.¹¹⁹

Second, despite borrowing some language from statutory tests in the DMCA covering anti-circumvention technologies, PROTECT IP and SOPA are more vague (and more overbroad) in several ways. The DMCA proscribes technologies that have "only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title."¹²⁰ Meanwhile, PROTECT IP targets speech that "has no significant use other than engaging in, enabling, or facilitating" copyright infringement.¹²¹ SOPA's language is similar.¹²² That is, PROTECT IP and SOPA match the limited purpose to the vague terms of merely "enabling" or "facilitating" infringement, making the entire definition inherently vague.¹²³ Moreover, PROTECT IP and SOPA remove the requirement that a site's purpose must be "commercially significant," covering even non-commercial sites without defining them, and doing so even though non-commercial speech receives far greater First Amendment protection than commercial speech.¹²⁴ As a result, under SOPA, for example, a non-commercial site like the Christian Coalition could be subject to harassing notices from motivated intellectual property holders in Hollywood aiming to cut off the Coalition's online donations and online advertisers, merely because the Coalition's site links to infringing material on YouTube or another social media site. Under either bill, the Attorney General may do the same. Indeed, the online publication *Ars Technica* has pointed out that many Members of Congress display clips from local television stations on their websites. A copyright-holder who has not authorized such display could notify advertisers and payment processors that such sites, or portions of them, are dedicated to theft, and this notification would not only deprive Americans of news clips featuring their Congressmen, but would likely lead to histrionic news coverage of "theft allegations" in many electoral campaigns.

As a result of these factors, the bills are highly vague, providing little guidance to speakers. As drafted, they would be void for vagueness.

¹¹⁸ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005).

¹¹⁹ *Cf. Reno v. ACLU*, 521 U.S. 844, 873 (1997) (noting that a test with three factors is less vague than a test borrowing one of these factors).

¹²⁰ DMCA, 17 U.S.C. § 1201 (a)(2)(B).

¹²¹ PROTECT IP § 2(7)(A).

¹²² SOPA § 103 (a)(1)(A)(1).

¹²³ *Cf.* Letter from Ed Black, President and CEO, Computer and Communications Industry Association, et al., to Patrick Leahy, Chairman, Committee on the Judiciary, United States Senate (May 25, 2011), http://cdt.org/files/Tech_Assn_Letter_re_PIPA_5-25-11.pdf (noting this vagueness).

¹²⁴ *See Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. at 561-62; *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 506 (1981).

C. *Eldred v. Ashcroft*

Under *Eldred*, standard First Amendment scrutiny applies if Congress has “altered the traditional contours of copyright protection.”¹²⁵ PROTECT IP and SOPA would alter the traditional contours of copyright protection in several ways.

First, the bills alter the contours of infringement itself, beyond the traditional contours of indirect, or secondary, infringement. They do so by targeting non-infringing speech that merely “enables” or “facilitates” (or has a limited purpose of facilitating) or “avoids confirming” infringement. These definitions go far beyond the traditional standards for direct infringement and the two forms of secondary infringement—vicarious or contributory. While linking to infringing material *may* result in contributory infringement when there is knowledge of specific infringing material and a material contribution to the infringement,¹²⁶ the DOJ suggests that “facilitating” infringement covers mere linking.¹²⁷ It is unclear what else it means, but it appears to lack the factors in indirect infringement tests. Therefore, the bills would go far beyond the traditional contours of indirect infringement. Moreover, the bills would alter the traditional contours of indirect liability by reversing the landmark case *Sony Corp. of America v. Universal Cities Studios, Inc.*¹²⁸ Three decades ago, the Supreme Court ruled that VCR-makers were not liable for indirect infringement based on home use because VCRs have “substantial non-infringing-uses.” In *Sony*, “only around 9% [of the use] was of the sort the Court referred to as authorized,” and those non-infringing uses were “substantial” enough to avoid liability.¹²⁹ While studios have argued that *Sony* should not apply to a website’s service,¹³⁰ Judge Posner in *Aimster* explicitly rejected the studios’ argument.¹³¹ So, under *Sony*’s test, assuming no active inducement,¹³² websites are not liable for others’ direct infringement if the site has substantial non-infringing uses. Here, the pending bills’ requirements would contravene *Sony*, punishing a website owner merely for facilitating or failing to monitor and confirm the high probability of some infringement, even if there are substantial non-infringing uses far beyond 9% of use.

¹²⁵ *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

¹²⁶ Linking could likely not result in vicarious infringement because the linking site lacks the ability and right to stop infringement on other sites.

¹²⁷ See Opening Brief and Special Appendix for Petitioner-Appellant Puerto 80 Projects, S.L.U., Puerto 80 Projects, S.L.U. v. United States, No. 11-3390 (2d Cir. Sept. 16, 2011).

¹²⁸ 464 U.S. 417 (1984).

¹²⁹ See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 927-935 (2005) (discussing *Sony*, 464 U.S. at 424).

¹³⁰ They argue that *Sony* should apply only to products put into the stream of commerce by a manufacturer with no further influence over the product’s use. Cf. *Arista Records LLC v. Flea World, Inc.*, 633 F.Supp.2d 124, 155-56 (S.D. N.Y. 2009). In *Arista*, a district court decision with no precedential value, the court refused to accept evidence of substantial non-infringing uses because the site operators so clearly materially contributed to infringement, and, as in *Grokster*, catered to an audience seeking free music illegally. See *Arista*, 633 F.Supp.2d at 154.

¹³¹ In re *Aimster* Copyright Litigation, 334 F. 3d 643, 648-49 (7th Cir. 2003) (“[I]f a service facilitates both infringing and noninfringing uses, as in the case of AOL’s instant-messaging service, and the detection and prevention of the infringing uses would be highly burdensome, the rule for which the recording industry is contending could result in the shutting down of the service or its annexation by the copyright owners (contrary to the clear import of the *Sony* decision).”). See also *id.* at 648 (holding, as a result, that “the ability of a service provider to prevent its customers from infringing is a factor to be considered,” not the only factor “in determining whether the provider is a contributory infringer”).

¹³² This clarification was adopted in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936 (2005).

Second, modifying indirect liability effectively alters the historical common carrier exemptions that mediate any conflict with the First Amendment by assuming passive carriers should not be subject to indirect liability. Historically, postal, telegraph, and telephone carriers clearly “facilitated” or “enabled” copyright infringement, as individuals could use such networks to spread copyrighted materials. Further, historically, these networks avoided confirming the high probability that there was *some* copyright infringement on these networks. That is, under the pending bills, all these networks might be considered “dedicated to theft” or “dedicated to infringing activities.”

But, partly to ensure the viability of platforms for free speech, carriers have been absolved of liability for individuals’ speech throughout our history. Tellingly, there are few, if any, cases involving indirect copyright liability for such carriers¹³³; libel decisions, however, serve as an example, and carriers generally have been exempt from such liability.¹³⁴ Further, Congress enshrined the assumed copyright exemptions for common carriers in the 1976 Copyright Act.¹³⁵ Two decades later and faced with the Internet, Congress enacted the DMCA and extended copyright exemptions through liability safe-harbors for transmission and routing, system caching, storing information at the direction of users, and providing location tools.¹³⁶ Nothing in the Court’s jurisprudence suggests that Congress could force the postal service or phone companies to confirm the high probability of some copyright infringement happening through the mails.¹³⁷ Nothing suggests it could empower the Attorney General to punish those networks merely for “facilitating” or “enabling” basic copyright violations. While Congress can shape some details of copyright liability,¹³⁸ these exemptions reflect the long understood copyright contours that indirect liability should only apply to those with knowledge, material contributions such as active inducement, clear control of the infringers, rather than those who merely transmit the speech of others. Today, email, instant-messaging, Tumblr, Blogger, YouTube, and Facebook are platforms for others’ speech no less than common carriers or the postal service.

Third, PROTECT IP and SOPA could be said to provide enforcement mechanisms that alter the traditional contours of copyright. Specifically, copyright holders usually have had to meet the traditional four-part test for a permanent injunction and the different, but also four-part, traditional test for a preliminary injunction,¹³⁹ and would seek injunctions against the infringers, not the advertisers or financial intermediaries with less at stake in the speech.¹⁴⁰ For many years, some lower courts improperly weighed some of the factors (by assuming “irreparable harm” and thereby overly

¹³³ See Matt Jackson, *One Step Forward, Two Steps Back: An Historical Analysis of Copyright Liability*, 20 CARDOZO ARTS & ENT. L.J. 367, n.47 (2002) (“A search through Lexis-Nexis and Westlaw turned up no cases where a [phone company] was sued for third-party infringement. ... As a general matter, common carriers are not considered liable for most forms of third-party content.”).

¹³⁴ O’Brien v. Western Union, 113 F.2d 539, 540-43 (1st Cir. 1940).

¹³⁵ See 17 U.S.C. §111(a)(3). Carriers are exempted as passive carriers making a secondary transmission regarding both performance and display rights.

¹³⁶ See 17 U.S.C. §512(a)-(d).

¹³⁷ See Seth Kreimer, *Censorship by Proxy*, 55 U. PA. L. REV. 11 (2006).

¹³⁸ Congress would, of course, have latitude to apply a constitutional requirement to new technology or to particular facts, but the constitutional requirement remains a bare minimum. Cf. 42 U.S.C. § 2000aa (2000) (providing more protection than the Fourth Amendment requires under *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); 18 U.S.C. § 3121 (2000) (providing more protection for pen registers than the Fourth Amendment requires under *Smith v. Maryland*, 442 U.S. 735 (1979)).

¹³⁹ See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001) (preliminary injunctions); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F.Supp.2d 1197, 1209-1210 (C.D. Cal. 2007) (subsequent to Supreme Court decision in *Grokster*, explaining reliance on *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006)).

¹⁴⁰ Injunctions against third-parties would require meeting the tests for indirect infringement as well as the tests for injunctions.

weighing “likelihood of success”). While the Supreme Court had clarified how to apply the four-part test for injunctions, ensuring a *higher* showing to obtain an injunction than some courts had required, SOPA reverses this unbroken practice in the opposite direction.¹⁴¹ Under SOPA, copyright holders can merely send notifications to intermediaries, and without going to court, effectively gain indefinite injunctions if there is no counter-notification in five days. Under PROTECT IP, the Attorney General can take an *ex parte* order against a domain name and enjoin advertisers, search engines, and DNS providers, without a judicial determination that the speech of such advertisers, search engines, or DNS providers meets constitutional standards. Of course, as noted above, intermediaries are more likely not to challenge orders and more likely to overcomply than a website owner or operator.

As a result of modifying these four contours of traditional copyright liability (indirect liability, common carriage, and remedies), standard scrutiny should apply rather than copyright-specific scrutiny. Such scrutiny may be strict or intermediate.¹⁴² As discussed in below, these bills would fail under either level of scrutiny.

D. *United States v. Stevens*, *Brown v. EMA*, *Reno v. ACLU*

PROTECT IP and SOPA would be subject to standard scrutiny also for going so far beyond targeting traditional copyright infringement that they would create novel categories of allegedly proscribable speech. Congress cannot create a novel category of proscribable speech, under the line of Supreme Court decisions discussed above, including *United States v. Stevens*,¹⁴³ involving videos of cruelty to animals, *Brown v. Entertainment Merchants Association*,¹⁴⁴ involving violent video games, and *Reno v. ACLU*,¹⁴⁵ involving online indecency. Congress cannot simply piggy-back on a traditionally proscribed category of speech to extend punishments far beyond that traditional category by creating a new category, even if it defines that novel category *in relation to* the existing category.¹⁴⁶

Here, as with the laws struck down in *Stevens*, *EMA*, *Reno v. ACLU*, PROTECT IP and SOPA would apply to, and punish, novel categories of speech beyond copyright. These novel categories do not consist of copyright infringement. Copyright is rooted in the constitutional provision granting Congress the power to promote the progress of the arts and sciences by securing for limited times to authors the exclusive right to their respective writings and discoveries.¹⁴⁷ Congress has exercised that constitutional authority by granting to authors the exclusive right to reproduce and perform their original works.¹⁴⁸ The restrictions in these bills extend to and punish a wide range of speech that is currently legal and that does not consist in exclusive rights to authors’ writings, including speech facilitating or enabling infringement, non-infringing speech on sites that have not avoided confirming the high likelihood of censorship, search results about such speech, and advertising on certain sites.

In short, while Congress can change and refine the copyright statutes without much constitutional scrutiny, and has done so historically,¹⁴⁹ Congress cannot target and regulate a novel

¹⁴¹ See *Salinger v. Colting*, 607 F.3d 68, 73-81 (2nd Cir. 2010) (discussing this history).

¹⁴² For a discussion of this issue, see Brief for Information Society Project at Yale Law School Professors and Fellows, as Amici Curiae Supporting Petitioners, *Golan v. Eric Holder*, No. 10-545, 2011 WL 2470834 (2011); Brief for the Respondents, *Golan v. Holder*, No. 10-545, 2011 WL 3379598 (2011).

¹⁴³ *United States v. Stevens*, 130 S. Ct. 1577 (2010).

¹⁴⁴ 131 S. Ct. 2729 (2011).

¹⁴⁵ *Reno v. ACLU*, 521 U.S. 844 (1997).

¹⁴⁶ *Stevens*, 130 S. Ct. 1584-87.

¹⁴⁷ U.S. CONST. art. I, §8, cl. 8.

¹⁴⁸ 47 U.S.C. § 106.

¹⁴⁹ For discussion, see Brief for the Respondents, *Golan v. Holder*, No. 10-545, 2011 WL 3379598 (2011).

category of speech, far beyond copyright-infringing speech, just as Congress could not suppress speech merely somehow related to, but not consisting in, libel or obscenity.

Once standard scrutiny applies, under *Eldred* or *Stevens*, that scrutiny would be either strict or intermediate.¹⁵⁰ Again, strict scrutiny applies to content-based laws.¹⁵¹ Laws are content-based when they target and suppress speech based on its content,¹⁵² and are content-neutral when they burden speech without regard to content.¹⁵³ While the Supreme Court has noted that “[d]eciding whether a particular regulation is content-based or content-neutral is not always a simple task,”¹⁵⁴ the bills do define *categories of content* for suppression (e.g., those that facilitate, but are not, infringement). Moreover, one must look at the *content* of the site’s speech to determine if the bills would apply, suggesting the bills would burden speech on the basis of content. But this question is somewhat academic, as the bills would fail strict or intermediate scrutiny.¹⁵⁵

These bills would clearly fail strict scrutiny. To pass strict scrutiny, the government must show evidence of both a compelling non-speech-restrictive interest and narrow tailoring to that interest. Even if it could demonstrate a compelling interest, the government would be unable to demonstrate narrow tailoring to that interest. If the interest is subjecting popular, legitimate social media sites like YouTube and Twitter to punishment, that interest is likely neither compelling nor important; the same would be true for a speech-restrictive interest undermining platforms for user-generated, participatory speech.

If the interest is, rather, the publicly stated interest of targeting the most egregious foreign sites trafficking in copyrighted materials, the definitions in PROTECT IP and SOPA are not nearly narrowly tailored to that interest. Narrow tailoring requires a law to burden no more protected speech than necessary to advance the governmental interest and to be the least restrictive means of achieving its compelling interest. Instead, the bills’ definitions burden a range of foreign and domestic sites, whether or not their site owners follow the DMCA’s notice-and-takedown provisions, and whether or not the sites’ owners or operators have any secondary copyright liability. They also restrict all the speech on a site rather than restricting merely the infringing speech. They encourage overcompliance and rely on DNS blocking, which has a track record of blocking innocent sites far more often than targeted sites. Moreover, according to technical experts, the technical means employed may undermine the universality of the Internet, undermine the Internet’s security,¹⁵⁶ and thereby burden far more speech than necessary to advance the government’s interest. There are far less restrictive means, including relying on regular judicial process targeted to actual direct and indirect infringement, and perhaps reliance on payment processors rather than DNS filtering. Because the bills are so poorly tailored and adopt several highly restrictive means, these bills are not narrowly tailored to withstand constitutional scrutiny.

Moreover, even if these bills were content-neutral, their provisions would fail the relevant intermediate scrutiny test. Intermediate scrutiny requires an important (rather than compelling)

¹⁵⁰ *Stevens*, *EMA*, and *Reno* all applied strict scrutiny as Congress targeted a category of speech that was not traditionally subject to an exceptional standard.

¹⁵¹ See *Playboy v. US*, 529 U.S. 803, 813 (2000).

¹⁵² See *id.* at 811-12.

¹⁵³ See *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

¹⁵⁴ See *Turner*, 512 U.S. at 642.

¹⁵⁵ Cf. *Center For Democracy & Technology v. Pappert*, 337 F.Supp.2d 606, 655 (E.D. Pa. 2004) (“[T]he Court need not choose between the two because, even under the less demanding standard – intermediate scrutiny – the Act does not pass Constitutional muster.”).

¹⁵⁶ See STEVE CROCKER, ET AL., SECURITY AND OTHER TECHNICAL CONCERNS RAISED BY THE DNS FILTERING REQUIREMENTS IN THE PROTECT IP BILL (May 2011), <http://www.circleid.com/pdf/PROTECT-IP-Technical-Whitepaper-Final.pdf>.

interest; it also requires narrow tailoring, though the looser tailoring requires merely no obvious less restrictive alternatives.¹⁵⁷ Even under the intermediate test, assuming the importance of the interest to target egregious foreign infringing sites, the bills are so poorly tailored to any important interest that they could not stand. The bills target considerable non-infringing speech and manage to target participatory, popular, legitimate, influential, and pro-democratic speech platforms and speech tools, as well as non-infringing search results and truthful advertising. The less restrictive alternatives are abundantly obvious, and include relying on existing law, diplomacy, and merely on payment processors.

To the extent advertisers are burdened, these burdens must meet the intermediate scrutiny of *Central Hudson*. Therefore, the government would have to show a substantial interest (which is likely met for targeting egregious sites) and narrow tailoring to that interest (not met for reasons discussed above). The government would also need to show evidence that the bills' provisions advance the government's interest, which may not be met. Not only is DNS blocking often ineffective,¹⁵⁸ denying American-based advertising may not stop a foreign site's piracy, as they would have access to international advertisers and other financial resources.

E. Prior Restraints

Over 90 law professors, including Professor Tribe, have put forth reasons why the bills will result in prior restraints.¹⁵⁹

I add merely that, the standard First Amendment presumption against prior restraints, rather than the tolerance for prior restraints found for many copyright suits, would apply to injunctions under the pending bills. Injunctions for copyright are most appropriate for obvious "piracy," not for highly transformative uses or even, I would presume, for mere "facilitation" of infringement that does not even consist in indirect infringement.¹⁶⁰ Further, the standard presumption against prior restraints certainly applies to non-infringing speech by websites and search engines. Once the standard presumption against prior restraints applies, the bills clearly fail. The DNS filtering, search filtering, and financial shutdowns are clearly unconstitutional under the logic of *Near v. Minnesota*¹⁶¹ and *Vance v. Universal Amusement Co.*¹⁶², which struck down injunctions silencing the future speech of a newspaper and a movie theater, respectively, based on material published in the past.¹⁶³

IV. Recommendations

These bills, as written, are unconstitutional. They must meet standard First Amendment scrutiny because of overbreadth, vagueness, *Eldred v. Ashcroft*, *United States v. Stevens*, and prior

¹⁵⁷ See *Turner*, 512 U.S. at 662 ("To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests.").

¹⁵⁸ See e.g., *Center For Democracy & Technology v. Pappert*, 337 F.Supp.2d 606, 655 (E.D. Pa. 2004) ("[B]oth IP filtering and DNS filtering can be avoided by a person using an anonymous proxy server or an anonymizer. ... A user attempting to evade a DNS filter can manually enter the IP address for a DNS server not controlled by his ISP to avoid the block.").

¹⁵⁹ Letter from Mark A. Lemley, Professor, Stanford Law School, to the House of Representatives (Nov. 15, 2011), <http://politechbot.com/docs/sopa.law.professor.letter.111511.pdf>; Laurence Tribe, *Opinion: Stop Online Piracy Act meets the First Amendment*, POLITICO, Nov. 16, 2011.

¹⁶⁰ See above, notes 56-57.

¹⁶¹ 283 U.S. 697 (1931).

¹⁶² 445 U.S. 308 (1980).

¹⁶³ See also *Center For Democracy & Technology v. Pappert*, 337 F.Supp.2d 606, 657 (E.D. Pa. 2004) (discussing these cases).

restraints imposed on content beyond hardcore piracy. Congress cannot burden so much speech so far beyond copyright infringement without meeting the standard tests applied under the First Amendment. The bills would clearly fail such tests because of their overbroad and vague definitions, their highly speech-restrictive mechanisms ensuring both overcompliance and harm to the workings of the global DNS system. They also unconstitutionally enjoin non-infringing speech of websites, search engines, or advertisers.

Congress can, and should, remedy these constitutional infirmities.

Congress should:

- regulate speech that actually infringes copyright, directly or indirectly, under traditional judicial standards rather than burdening substantial speech beyond copyright infringement;
- impose only narrowly tailored burdens on advertisers, such as limiting the advertiser-regulation to sites engaged in indirect infringement, providing sufficient due process for those sites and the advertisers, and removing incentives for overcompliance;
- impose obligations on payment processing that are focused on copyright-infringing speech and include procedural and substantive safeguards for protected, non-infringing speech;
- avoid silencing speech without the due process of an adversary hearing;
- avoid regulating search results, as search regulation will require meeting intermediate, or even strict, scrutiny under traditional First Amendment standards and avoid regulating DNS, as any DNS-regulation is likely to be overbroad on its face or not narrowly tailored to an important or compelling interest.