Forget SOPA, Hollywood Already Had a Field Day with the Justice System

Copyright justice: Steal a subway ride and pay a $100 fine. Steal a song and pay $150,000.

The controversial Stop Online Piracy Act (SOPA) and the PROTECT IP Act (PIPA) bills and their backers employ striking language to describe the problem they supposedly attack, “theft of U.S. property” and “IP theft.” They use that language to argue for sweeping new powers affecting the domain name system, Internet search, online advertising, and electronic payments.

It’s a great example of the way Hollywood chooses its words carefully in constructing its propaganda wars. The old-fashioned and accurate word is “infringement,” but that word doesn’t trigger the visceral responses that “theft” does. So the bills refer exclusively to “theft.”

The trigger for this was Hollywood’s frustration several years ago that “file sharing” didn’t sound bad enough. After all, we learned in kindergarten that “sharing” is a good thing. The movie industry spokesperson, Jack Valenti, hated the term. He liked to compare a chocolate cake to files on the Internet: if you share some of your cake, you’re not supposed to still have all of it; but when you share a file you still have the file. Thus, he argued, it’s not “sharing” at all. He couldn’t distinguish between chocolate cake and information — which is what music stored as bits really is. This resembles Hollywood’s profound misunderstanding of the Internet today. One can indeed share information while keeping it.

Over the last ten years I have watched Hollywood loyalists, undoubtedly responding to some coor industry messaging directive, start talking exclusively about “theft” when they refer to infringement. And accurate word is “infringement,” the visceral responses that “theft” directs exclusively to “theft.”

I can tell who has signed on as a Hollywood partisan in the current debates by seeing who now use the loaded term “theft” instead of the accurate term “infringement.” The facts that the bills overflow with references to “theft,” and that many government officials have changed their vocabularies to use the new, industrially correct language, reveal a lot about Hollywood’s capture of government.
When the big content companies talk about “IP theft” or “copyright theft,” what are they really talking about? The essence of theft is deprivation – when someone steals your wallet and you don’t have it any longer. But if I like your haircut and get one just like it, I haven’t stolen your hair. I have just copied it. Theft and copying are inherently different things.

But let’s stick with the “theft” concept for a while and see where Hollywood would “copyright theft” mean? How does one steal a copyright, which is just a form of ownership? The same way one can steal someone’s real estate ownership, by forging a deed (or assignment) or tricking someone into signing one. That’s pretty rare. Looking at it differently, one can steal a copyrighted work, say by shoplifting a book. But neither stealing copyright types of so-called IP “theft” that the pending bills try to stop. The bills try to attack reproductions (copying/downloading), transmissions (streaming), and other traditional forms of infringement.

Under the “theft” conception of copyright law, what, exactly, is the deprivation illegal copies? It really boils down to just one thing: money. Copyright infringement — renamed copyright theft — deprives the copyright holder of some of his or her expected profit from exploiting copyright.

What are other, similar kinds of “theft” by depriving someone of expected money? Failure of a tenant to pay the agreed rent to a landlord is one. Parking in a parking space without paying is another. Jumping the turnstile to ride on a subway without paying the fare is a third. (And, failure of a studio or record label to pay artists or actors the promised contractual royalties for a song on a record or film is a fourth. But something tells me the studios and labels sponsoring the current bills won’t go near that topic. The bills don’t include rogue studios and labels in their scope.)

How do the civil damages or penalties for the different types of such “theft” expected money under a contract doesn’t trigger a penalty: contract law usually says that a party recover the money she expected but not punitive damages or attorneys fees (unless parties have specifically bargained to pay attorneys fees for a breach). Failure to pay rent to cure the default. Failure to put money in the parking meter prompts a ticket for $60. In New York City, failure to pay the $2.50 subway fare results in a maximum fine of $100.

Copyright “theft” is a very different story. Copyright infringement statutory damages in civil litigation can be as high as $150,000 for infringement of a single work. Yes, a single song an iTunes download value of $1. A copyright holder can claim such statutory to prove a single penny of damage or loss. Think such sky-high damages ridiculous and reduced the total award to $54,000 – and the RIAA and MPAA strenuously on appeal that the jury verdict should return to the original figure, $62,500 per download song.

If we take copyright law’s maximum-penalty-to-price ratio as applied to an illegal download, that same penalty-to-price ratio to the New York subway, the maximum per and avoiding the $2.50 fare would be $375,000 instead of $100. Copyright
good thing under current law. One could say it’s a steal.

And the copyright industries haven’t gotten their fill of penalties and enforcers. They are back in Washington today, enlisting an army of Senators and Congress members to give more power in the PIPA and SOPA bills to distort the domain name system secret amendments not yet released), to censor search results and online advertising, and to turn payment systems into enforcers.

They say that the legislation targets “foreign rogue sites,” even though cum foreign rogues such as Grokster and Kazaa, and even though there are express persons within the US, and even though the legislation regulates American different ways. On five occasions I have asked the backers to identify any issued in the US without being able to secure legal relief to which they are entitled, and they haven't given me a single example. They say that the legislation doesn’t change copyright law, but it creates new laws that distort the principles of current copyright law.

The backers are trying to rush this legislation through without truly open hearings with a wide variety of interests, including the public interest. Read up on these bills and call your Senator or Member of Congress to let them know whether you believe Hollywood needs more power.

Andrew P. Bridges
Andrew P. Bridges is a San Francisco/Silicon Valley lawyer at Fenwick & West who has handled many important high-stakes and cutting-edge cases for tech, Internet, and consumer-focused industries, starting with the defense of the first MP3 player (the Diamond Rio PMP 300), which the RIAA tried to ban as a “piracy” device.

Great post. Keep fighting, Andrew.
Pingback: Urheberrechtsverletzungen haben das teuerste Strafe-Preis-Verhältnis von allen Arten von ‘Diebstahl’

Stu Rees
on January 18, 2012 at 9:31 am said:

We have five new SOPA cartoons at http://www.stus.com/techwars that anyone can use to raise awareness. The execution cartoon would have been a good choice for this article.

Chris Rindone (@chrisrindone)
on January 18, 2012 at 10:46 am said:

The labels/studios have only themselves to blame. They missed out on the greatest distribution medium ever, and they’d rather sue than make an honest buck by selling their works online at a reasonable price (see iTunes). Co-sponsors of both SOPA and PIPA bills have already withdrawn…even congress is starting to wake up to what a farce this really is.
Corbin Smith on January 18, 2012 at 12:19 pm said:

Great post, Andrew. Thanks for putting it out there so clearly...

irritant on January 18, 2012 at 1:13 pm said:

It’s worth noting that it’s not just “rogue studios” that swindle artists out of promised or expected royalties and other payments. It’s in the DNA of the entertainment industry to screw the primary producers at every opportunity. Of course a lucky few end up making more money than they know what to do with, but for every Jay-Z there are thousands of forgotten chumps whose first or second albums got stuck in the web of studio ownership, never to see the light of day, effectively killing their careers. I often wonder how much the average music industry “star” really takes home. My guess is not much more than your run of the mill office worker, and significantly less than those with advanced degrees and/or lots of experience.

harvey on January 18, 2012 at 2:39 pm said:

well done andrew. nice to see your voice in the interwebs.

SteveG on January 18, 2012 at 3:48 pm said:

Many of the old school content providers have seen the writing on the wall and all of this is simply a delaying tactic to allow
them to grab as much cash as they can while they can. As the old men get replaced with people who grew up never knowing how to record music off of the radio we will finally see real change happen and those industries will learn and explore new territory, along with new revenue models.

Too bad all of this posturing has kept them from leading the revolution through things like iTunes, Pandora, Spotify, Hulu and a host of others. When they finally realize that they can't stop it and need to evolve, they will be on the endangered species list.
Agreed. Legislators need to take a step back and ask themselves what problem they’re trying to solve.

“Piracy” Oh, buccaneers off the coast of Somalia is it? (no, not ‘piracy’)

“Theft” Oh, ninja infiltrates MGM studios and makes off with priceless master reels? (that incidentally will never see the light of day, are disintegrating in the can and will not reach the age of public domain for decades)

“We’re not making as much money” Oh, the film industry is shrinking because box offices are closing allover the country? (revenues did finally actually go down this year after rising since 1995, but probably more because of stupid 3d movies, high prices, and big cheap tvs)

“We’re not making as much money as we imagine” Oh, you dreamed up a number that you wish would come out of thin air, despite not offering any new services or tapping new markets created by innovation like you’ve been forced to do in the past when your attempts to block progress through litigation and legislation failed. (the player piano, the radio, the television, the photocopier, the phonograph, cable tv, the vcr, the mp3 player, the DVR)

MAN UP and start adapting to the market instead of whining about how your legacy gatekeeper status is fading into the 20th century.

The US constitution authorizes copyright with one sentence: “The Congress shall have Power … To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”
The keyword there is “limited”.

According to Wikipedia, a copyright endures for 70 years AFTER the death of the author. For corporations, it endures for 120 years after the creation of the work or 95 years after first publication, whichever is shorter. In what world are these durations “limited”? In fact, copyright will last forever. Nothing of note created after 1923 is in the public domain. When these latest durations threaten them, it will continue to be extended.

Hollywood wants it all ways. Copyright that lasts forever, complete control of enforcement and draconian punishments.

Ed on January 20, 2012 at 4:09 pm said:

Andrew, in case you didn’t catch it, Jon Stewart did a hilarious bit on SOPA.

Pingback: Hollywood and the Justice System — Matt Mullenweg

Pingback: Matt: Hollywood and the Justice System | WordPress Planet

Pingback: Killing Hollywood | Social Proof

Pingback: Two interesting blog postings on #SOPA, Hollywood and the legal system | Thoughts and Rantings

Gary on January 21, 2012 at 4:17 pm said:

Great article. Thanks Andrew. It’s going to be very interesting how the whole SOPA and PIPA saga gets settled.
I’ve been arguing for years that the correct german term is “schwarzkopieren”, and I think it was used in the nineties. The term happens to be analogous to “schwarzfahren”, which means “riding without paying the fare”.

Seegras
on February 14, 2012 at 2:08 am said: