

December 12, 2011

The Honorable Patrick Leahy  
United States Senate  
437 Russell Senate Building  
Washington, DC 20510

The Honorable Chuck Grassley  
United States Senate  
135 Hart Senate Office Building  
Washington, DC 20510

The Honorable Orrin Hatch  
United States Senate  
104 Hart Senate Office Building  
Washington, DC 20510

The Honorable Lamar Smith  
United States House of Representatives  
2409 Rayburn House Office Building  
Washington, DC 20515

The Honorable John Conyers, Jr.  
United States House of Representatives  
2426 Rayburn House Office Building  
Washington, DC 20515

Re: The Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968 (“Protect IP Act”); The Stop Online Piracy Act, H.R. 3261 (“SOPA”)

Dear Senators Leahy, Grassley and Hatch and Congressmen Smith and Conyers:

We write in regard to recently introduced legislation intended to empower the Attorney General and intellectual property owners to take action against blatant and persistent violations of federal copyright law: specifically, the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968 (“Protect IP Act”), and the Stop Online Piracy Act, H.R. 3261 (“SOPA”). Some opponents of the Protect IP Act and SOPA recently have suggested that the safeguards in these bills conflict with First Amendment values. As attorneys who regularly practice law on issues related to the First Amendment, intellectual property, free expression, creative content and consumer protection, we strongly disagree with this assertion and hope to set the record straight.

At the outset, we note that Floyd Abrams, a leading First Amendment lawyer who has argued and won many important First Amendment victories in the Supreme Court and other courts, has written to Congress providing detailed opinions explaining that the Protect IP Act and SOPA not only are entirely consistent with the First Amendment, but also further important goals of promoting free speech principles. Letter from Floyd Abrams to Senate Judiciary Committee, Re: The Protect IP Act (May 23, 2011); Letter from Floyd Abrams to House Judiciary Committee, Re: Stop Online Piracy Act (November 7, 2011). We agree with Mr. Abrams's opinions and explanations, and we associate ourselves with them.

The First Amendment and copyright protection are not in tension. Instead, the First Amendment and copyright protection are twin pillars which foster free expression and creative content. Free speech and intellectual property rights have served complementary, and mutually reinforcing, goals since our Nation's founding. As a means to "promote the Progress of Science and useful Arts," the Constitution authorizes Congress to grant "Authors the exclusive Right to their respective Writings." This authority was put into practice by the Copyright Act of 1790, enacted by the First Congress—the very same Congress that proposed the First Amendment.

These two provisions—Congress's power to grant copyrights and its responsibility not to "abridge[e] the freedom of speech"—do not conflict. To the contrary, they have the same goal: promoting vigorous expression in the public sphere. By permitting authors to profit from their efforts, and by protecting against appropriation by others, intellectual property law provides incentives for authors to create and to share their contributions with the public. The Supreme Court accordingly has emphasized that "copyright is intended to increase, and not to impede, the harvest of knowledge," by "fostering the original works that provide the seed and substance of this harvest." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 545-46 (1985); *see also Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (Copyright protection "is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward . . ."). Far from stifling speech, intellectual property rights and protection serve as an "engine of free expression." *Harper & Row*, 471 U.S. at 558.

The theft of intellectual property poses a serious threat to our nation's creative industries. In the digital age, protected works can be copied and immediately distributed globally, cheaply, and easily—with or without permission. Those who engage in piracy can evade prosecution by setting up shop beyond the reach of the American legal system, while directing enormous amounts of infringing content to this country and profiting at the expense of U.S. copyright owners. The result has been a surge in intellectual property theft, and a corresponding harmful effect on individuals and enterprises that produce new content. This has taken a serious toll on a number of American industries and enterprises that depend on the production and distribution of content—including music, movie, and television producers; book publishers; and newspapers and magazines. Jobs in creative industries are lost, and consumers, left with an impoverished and diminished set of choices, suffer as well.

The Protect IP Act and SOPA take necessary steps towards combating piracy by helping content owners and federal law enforcement crack down on foreign websites that engage in massive intellectual property theft. They target only those websites that are wholly or almost entirely devoted to piracy—in the Act’s language, those that are “dedicated to infringing activities.” It is indisputable that such illicit activities are not protected by the First Amendment. Moreover, the Act contains several procedural safeguards and substantive protections to ensure that any court-ordered relief is narrowly tailored to address only the illegality, not legitimate speech. The Protect IP Act and SOPA thus further the goal that intellectual property protections traditionally have served: fostering a safe environment for creativity and speech. As Mr. Abrams has explained, “[t]his legislation does not impair or overcome the constitutional right to engage in speech; it protects creators of speech, as Congress has since this Nation was founded, by combating its theft.” Letter from Floyd Abrams to Senate Judiciary Committee, Re: The Protect IP Act, at 12.

In our considered opinion, the Protect IP Act and SOPA further the goal of free expression. Far from conflicting with the First Amendment, the proposed legislation will serve as an important contribution to ensuring an environment in which free speech and creative expression can thrive and flourish.

Sincerely yours,\*

Charles S. Barquist

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Lathrop & Gage LLP

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Robins, Kaplan, Miller & Ciresi L.L.P.

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cc: The United States Senate Committee on the Judiciary  
The United States House Committee on the Judiciary

*\*Note that firm names are listed in this letter solely to assist in attorney identification.*