

SOPA and its effects in SA and on open education

The seeds for this post came almost 3 weeks ago when a friend of mine commented that SOPA is not a big deal in South Africa because it's outside of US jurisdiction so we had nothing to be bothered about – I disagreed (and started making notes for a future blogpost). And about a week ago a colleague of mine asked what the effects of SOPA would be in South Africa and on open education particularly. Given the comments, I decided to analyse the SOPA bill and look at its potential impact focusing on open education.

What is SOPA?

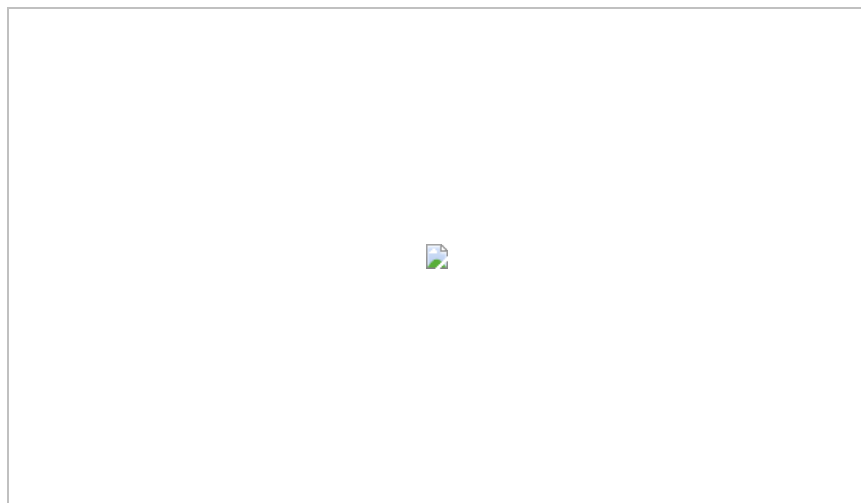
SOPA (**Stop Online Piracy Act**) was introduced in the House by Republican Lamar Smith on 26 October 2011 and its purpose is “to promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of US property, and for other purposes”. This bill is similar to the Protect IP Act (PIPA) which was introduced in Senate in May 2011 by Democrat Patrick Leahy. Previously in US law there was very little if anything that could be done to remedy any intellectual property infringing actions by outsiders to the US, so any foreign sites could carry with on illegal activity but no legal recourse could be had because it was outside of US jurisdiction. With the introduction of SOPA, this could change.

SOPA defines a foreign infringing site as:

A US directed site and used by users in USA,

Owner or operator is committing or facilitating commission of criminal violations,

If for other than the fact that the site is outside the US, the criminal violations would result in legal actions had been a domestic site.



What this means is that a site in South Africa would be deemed a foreign infringing site if USA users visited the site at any time, and the owner of the site or the operator allowed materials or resources on the site that infringes on a US person's copyright or other intellectual property. Once a site has been deemed a foreign infringing site the Attorney General will either pursue an in personam (against a person – in this case the owner of the domain of the infringing site or owner of the site) or in rem (against the site itself) action and will send a notice of the alleged violation to the courts. If the courts are satisfied, they can either issue a temporary restraining order, preliminary injunction or an injunction against the site or persons to cease and desist from undertaking any further activity as a foreign site. But it doesn't end there. Once the court order has been issued, various other mechanisms and actions then come into play.

Firstly, within 5 days of the court order being issued, the following must happen:

service providers must prevent access to the site by persons in the US and must prevent the domain name from resolving to the domain name's IP address (it simply means the URL that you would type in would not associate with the IP address of the site – so unless you know the IP address, you won't be able to access the site by typing in the URL),

therefore when a user tries to access the site, a notice will be displayed that was written by the Attorney General – and will specify that action is being taken against the site in terms of SOPA,

search engines such as Yahoo and Google must prevent access to the site and cannot link to the site by means of a direct hypertext link,

payment network providers like PayPal must prevent affiliation to the site and suspend all account services to the site to prevent completing of transactions,

internet advertising services that advertise that site must pull all those ads, all search results, all link and all placements to the site – this will include ceasing all compensation that they would provide to the site or receive as a result of the ads.

Failure to comply with the court order by any these actors will lead to legal action taken against them and any attempt to circumvent any of the above actions will be deemed an offence!

To add further misery to the alleged infringing site, the person/s who made the infringement claim will have discretion as to how to communicate to users the news of the claim and all that is needed for the claim to rise is a belief of infringement. So if you think that a foreign site is infringing on your copyright, you can claim, the site will be taken

down and investigations will be made afterwards. And what about suing for wrongful claims of infringement? Well that's going to be a tough one as the bill states that for claims of misrepresentations, it will have to be proven that the person/s knowingly and materially misrepresented.

Effects of SOPA on educational websites

A website can be effectively 'shut down' by the various mechanisms employed by the actors described above which will prevent users from accessing the materials on a website. Any action by the owners of the website to counter this would be an offence and any recourse to sue infringement claimants is burdened by the required "knowingly materially misrepresents" proof. Let's take a look at some of the key consequences of this bill for open education in South Africa .

Fair Dealing

In South Africa, fair dealing is a complex and uncertain legal construct and based entirely on subjective reasoning in the absence of clear guidelines and updated laws. So making judgments about what constitutes fair dealing is already risky with the already present uncertainty in law and now with the added fear of having to face SOPA enforcements it has become more so. In my opinion, South African higher education institutions are not making adequate and effective use of the fair dealing defence and are ending up paying more than what they should for the use of copyrighted materials. This is because fair dealing is so complex and uncertain, that it is not understood and with SOPA enforcements the argument for using fair dealing as a defence weakens as it add greater risks.

On the other hand, those academics who are unaware of the ambit of fair dealing make assumptions about usage of copyrighted materials – these assumptions include using any image or any other resource on the basis that its for educational use, without acknowledging the source or attributing the author or scanning whole textbooks and uploading them to websites. With SOPA, these kinds of actions by academics could lead to the decreased functionality and prevention of access to the site containing the infringing materials, a consequence which is even worse when the site is an academic one from an institution.

Operational burdens

These judgments on whether use is fair dealing or not becomes something that has to be taken quite seriously to prevent SOPA enforcement measures. For many educational and particularly OER websites, users take the responsibility for uploading materials that can be used as open educational resources. If your institution does not have a copyright moderation process in place, there would need to be one to ensure all materials uploaded are compliant with copyright law and does not infringe on another's rights. This places an operational burden on OER teams and groups (where sustainability is an ever present issue) since appropriately skilled persons would have to be employed to moderate the resources for copyright compliance. As someone who daily undertakes copyright clearance processes, this is not easy or quick tasks. In addition, many institutions including UCT requires academics when uploading to the OpenContent directory to state that they have acquired the necessary permissions to use 3rd party copyright materials. While this protects UCT from liability, it doesn't matter in the case of SOPA. If an infringement claim is made against any of the OER materials on the OpenContent directory – access to the site will be prevented until the investigations of the alleged copyright infringements are final. Looking at the definitions of a "foreign infringing site" the OpenContent directory will fall into the ambit of that definition and all sites linking to, listing or referring to the directory will be forced to prevent access to the site.

Take down notices as 'safety net'

Previously website owners had a safety net (albeit flawed) in the DMCA enforcement measures in the form of takedown notices. So if you allege a copyright infringement on a website, you have to approach the owner or operator, inform them of this and give them the opportunity to take down the offending materials. With SOPA this is eliminated by the introduction of these new enforcement measures as detailed in the bill. This take down process served as an opportunity to prevent litigation even though it has various restrictive requirements and flaws.

OER Community effects

The risks associated with SOPA enforcement measures has the potential to discourage the creation of OER and adaptation of materials into open resources particularly where 3rd party materials are involved. From my own experience in copyright clearance and providing solutions for IP management, in most cases as soon as copyright is raised in a conversation, the argument for investing time and effort in OER weakens. This is mainly because of the time consuming permissions process in some cases and in other cases all adaptations involves revisiting your materials and finding alternatively licensed resources such as images. Other consequences involves restricted access to OER sites in the case of alleged copyright infringements, prevention of access to social media sites where users share and host resources that feed into OER resources and potential damages to the reputation of an institution and the academic by the display of the notice (mentioned elsewhere in this post) when trying to access the site.

What's happening with SOPA and PIPA?

Both bills have been put on hold for now until "[wider agreement on a solution](#)" is decided upon. While it is shelved for now, there are rumblings in Washington that a [new SOPA like bill is being introduced](#) – guess we'll have to wait and see.

by Shihaam



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