



EUROPEAN UNION
DELEGATION TO THE UNITED STATES OF AMERICA

The Head of Delegation

Washington, 2 February 2012

E-NOTE DELUSW

**Subject: EU Trade, ICT and Justice Counselors meeting, Feb.1, 2012 –
A White House perspective on the current US online piracy debate
and beyond**

Summary:

In the context of the current "SOPA/PIPA" debate on US controversial proposals to fight online piracy, delegation hosted a Member State Counsellor meeting with White House "internet guru" Danny Weitzner on 1 February. The meeting was attended by a large number of Member States counsellors covering trade, ICT and justice. Weitzner explained the main elements of the White House approach to online IP protection in the wider context of internet governance, freedom of expression and privacy: all challenges which elicit a commonality of intent, if not always an identical response, on both sides of the pond.

Details:

Daniel Weitzner was appointed Deputy Chief of the White House Office of Science and Technology in 2010 and is responsible for the White House internet policy. Delegation invited him to present the elements of the current debate on the SOPA/PIPA proposed legislation (see e-note WAS/TRADEAGR/ D (2012) 141). The White House opposed the Bills by posting a negative statement on its blog in response to a petition signed by over a hundred thousand people to block the proposals (<http://www.whitehouse.gov/blog/2012/01/14/obama-administration-responds-we-people-petitions-sopa-and-online-piracy>). The decision to reply via the official blog, as opposed to other means like a letter to Senators or Congressmen,, is indicative in itself of the nature of the debate which saw the massive participation of internet users, in addition to the more traditional lobbies.

IP protection v. internet openness: how do we square the circle?

Weitzner highlighted that the current debate lies at the intersection of two major policy priorities for the US government: on the one hand, global IP protection and, on the other, preserving the openness of the internet. While there is a strong need for new tools to improve IP protection in the online world, the approaches chosen should not be harmful to the freedom of expression, security and the internet economy. In this context the role of the internet intermediaries, such as search engines, social networks and filesharing sites, is crucial because in the online environment it is difficult to reach the actual wrongdoers, especially if they are located outside US territory, without involving those who

provide access. Yet, key economic actors such as Google and Facebook were able to develop their business model in the US exactly because they are not held liable for content they host. In this respect, the balance to be found is a delicate one. The White House also believed the proposed legislation could have unintended harmful consequences in terms of security due to the intervention at DNS (domain name system) level: in other words, allowing to mingle with the transmission of internet addresses because of possible IP infringements, would weaken the security of the internet architecture based on DNS and create vulnerabilities (e.g. identity theft, misleading or hidden information). In addition, from a freedom of expression angle, it was felt that SOPA could have the consequence of blocking websites with legitimate material.

Freedom of expression v. regulating internet activities

The massive public response by the internet community to the SOPA/PIPA proposals signaled the sensitivity of the issue but also demonstrates the need to inform the public opinion on the real issues. Very often what is a legitimate concern about freedom of expression is interpreted extensively as the freedom to do any kind of activities over the internet, whether illegal or not. In his view, people must know we can enforce a law that will control internet activities without squashing the freedom of expression. In other words, it is legitimate to regulate behaviors over the internet which would be infringing behaviors also in the offline world.

The way forward on the US debate

Weitzner said the way forward, as supported by the White House, is likely to be on two main tracks: 1) re-launching the legislative process on a sounder basis and 2) inviting the industry to develop voluntary commitments and mechanisms. On the legislative process, the White House has invited all parties to sit at the negotiating table and find compromise solutions. In his view both SOPA and PIPA were rushed and not sufficiently thought through, and addressing very complex issues. He said that a lot of focus was now on the OPEN Act in the House, introduced by Wyden and Issa as an alternative to SOPA and favoured by the internet community. It was applying the "follow the money" approach, and was not much different from the latest version of SOPA after its most controversial provisions had been removed, except for the key question what requirements to put on search engines to remove search results. At any rate, the legislative process will take time and it is difficult to predict whether there will be any developments in 2012, also due to the presidential elections. On private sector led solutions, Weitzner showed more optimism and believed some results could be reached already this year. There are best practice examples in the pharmaceutical sector, where advertising companies and payment processors have put in place effective ways to identify and cut money to sites of counterfeit pharmaceuticals. Another successful example is the fight, together with the EU, against child pornography where the money flow is cut with the help of credit card companies.

Towards an international framework of interoperable legislative approaches

Asked about the extent to which we need identical legislation across the Atlantic, notably in the privacy field, Weitzner expressed doubts about the feasibility of international harmonization in the short term. If we look at how long it took to elaborate a set of privacy rules on both sides (the current EU data protection proposals and the upcoming USG white paper), it would seem hard to go this way. In his view the best way to achieve a global privacy environment is via interoperability of the legislative frameworks. This

second option should be encouraged as it is feasible and there is already a fair amount of commonality, also witnessed by the fact that most "Fortune 500" companies are aligning their practices around "global norms" and that there is an evolving global consensus regardless of the differences which may persist in specific national laws. An interoperable model would rely on a mutual recognition mechanism (like the "Safe harbour" concept in EU legislation) with effective cross-border enforcement cooperation. This solution should be pursued also in other areas of conflicting legislation. In passing Weitzner noted that the US is increasingly concerned about proposals obliging the national storage of data, ostensibly to protect one's citizens, which goes against the very nature of the internet and the cloud. This could in his view have devastating effects for cloud computing and drastically reduce the benefits from the internet.

Internet governance

The debate also highlighted the importance of 2012 as a defining year for the future of the internet and the need to find international approaches, in a context where new actors, not only BRICS but African and other developing countries are increasingly claiming an active role in internet governance. Weitzner stressed that we have already achieved a high-level agreement on the principles governing the internet, notably the December 2011 OECD Recommendation. We also have the right fora to discuss, notably the Internet Governance Forum (IGF). What is needed now is action.



EUROPEAN UNION
DELEGATION TO THE UNITED STATES OF AMERICA

The Head of Delegation

Washington,

E-NOTE DELUSW

Subject: Silicon Valley vs. Hollywood: update on controversial US online piracy legislation

Summary

The controversy over pending legislation to better combat online piracy (notably from websites operating outside US territory) burst into the open last week, conferring a significant victory to Silicon Valley companies like Google and Facebook over content providers from the film and music industries. Demonstrating their growing political clout, and with White House support for some of their grievances, several social media and internet companies took down their web-sites on 18 January. This further hastened a retreat by the content industry and their supporters in Congress.

Supporters of the SOPA and PIPA bills, which seemed certain to pass just a few weeks ago, are scrambling to reposition themselves including by offering to withdraw some of the more controversial aspects of the legislation, i.e. the Domain Name System (DNS) blocking provisions for offending websites. The ability of the internet companies to marshal their supporters at short notice has enabled them to influence the political process. Reflecting the media hype, all four Republican candidates for the Presidency said during their debate on 19 January that they were opposed to the Bills. Senate Majority Leader Reid then decided on 20 January to postpone a vote on PIPA in the Senate, followed by an announcement by House Judiciary Chairman Smith, postponing a vote on the parallel SOPA bill going through the House. The fate of the legislation, even in amended form, looks increasingly uncertain, at least for the near future.

The climb-down demonstrates the tension between the US' long-standing policy of 'zero tolerance' for theft of intellectual property on the one hand, and broader Internet policy considerations on the other hand. There remains strong consensus in this country about the need to protect US intellectual property rights and the growing threats coming from foreign websites in particular. In fact, experts say that last week's widely publicised arrest in New Zealand of the wealthy owner of Megaupload, which specialised in illegal downloading, was only possible because some of its servers were based inside US territory.

SOPA and PIPA aimed to repair these weaknesses in US law. But they ignited a new debate about liability and about the broader means to address these problems. In the end it was the details in the Bills which undermined Hollywood's case. SOPA sought to make

Web sites liable for their users' activities and move the burden of policing onto them. Web-sites would have actively to monitor their users and block any transmissions or postings that could possibly result in copyright violations. "Two internet entrepreneurs working out of a garage would have to hire twenty lawyers to protect themselves", was the refrain. PIPA was more measured, allowing action against a site only if a federal judge concluded it was "dedicated to" profiting from the unauthorised selling of others' work, but it got fatally wounded in the public onslaught last week.

On the positive side, the developments will squarely support the US government as it unfolds a wide-reaching international Internet diplomacy focused on "do not block", Internet freedom, and the preservation of the Internet architecture.

Detail

The legislative process

The Stop Online Piracy Act in the House (SOPA), HR3261, and the PROTECT IP Act (PIPA) in the Senate, S.968, aim to give the US government and copyright holders additional tools to curb access to "rogue websites dedicated to infringing or counterfeit goods", especially those registered outside the U.S.

The originally proposed SOPA bill would allow the US Department of Justice as well as copyright holders, to seek court orders against websites accused of enabling or facilitating copyright infringement. Depending on who makes the request, the court order could include barring online advertising on US networks, and prohibiting credit card companies from doing business with the allegedly infringing website, barring search engines from linking to such sites, and requiring ISPs to block access to such sites. The bill would make unauthorized streaming of copyrighted content a crime, with a maximum penalty of five years in prison for ten such infringements within six months. The bill would also give immunity to Internet services that voluntarily take action against websites dedicated to infringement, while making liable for damages any copyright holder who knowingly misrepresents that a website is dedicated to infringement. PIPA is similar but slightly less far reaching.

Both bills have been supported by a wide group of copyright owners, including Hollywood film studios and the recording industry, but sparked an unexpectedly (and arguably disproportionately) vigorous backlash from Internet freedom advocates and Web companies, including Google, Yahoo and Facebook, who say it would censor free speech, increase cybersecurity risk, and undermine the dynamic, innovative global Internet.

In the face of growing controversy, key sponsors of both the SOPA and PIPA bills agreed late last week to strip the bills of the most controversial aspects, i.e. the Domain Name System (DNS) blocking provisions, that would require Internet service providers to block access to overseas Web sites accused of piracy. (There are examples in Member State laws of similar provisions, for example against child pornography.) However, opponents to the bills have made clear that deletion of the DNS provisions is not sufficient since the bills still target financial transaction providers, Internet advertising services, and providers of "information location tools," or ILTs, including search engines and other Web sites.

On the House side, Oversight Chairman Darrell Issa (R-Calif.) moved on 14 January to accommodate Majority Leader Eric Cantor (R-Va.) promising him the House would not vote on the controversial Stop Online Piracy Act (SOPA) unless there was consensus on

the bill. Issa, who had introduced alternative legislation, OPEN Act, postponed the hearing on the issue which was scheduled for 18 January. Bill sponsor and Chairman of the Judiciary Committee Lamar Smith who had initially vowed to move ahead and bring the bill up for mark up in February, has in the meantime also agreed to postpone a vote indefinitely.

On the Senate side, Majority Leader Reid then announced on 20 January his intention to postpone a vote, effectively kicking the Bill into the long grass.

The US government position

In response to two petitions opposing the bills, the White House on 15 January issued the attached statement, in form of a blog by Victoria Espinel, Intellectual Property Enforcement Coordinator at Office of Management and Budget, Aneesh Chopra, U.S. Chief Technology Officer, and Howard Schmidt, Special Assistant to the President and Cybersecurity Coordinator for National Security Staff. While staying short of a formal veto threat, the Administration, who had until now not taken a formal position on the bills, clearly signals opposition to the pending legislation: "While we believe that online piracy by foreign websites is a serious problem that requires a serious legislative response, we will not support legislation that reduces freedom of expression, increases cybersecurity risk, or undermines the dynamic, innovative global Internet." However, the Administration also invites petitioners to come forward with ideas how to tackle the growing problem of online piracy, and the White House announces that it will seek further input through an online event to be announced shortly.

Delegation comments

The "SOPA debate" has to be seen in the wider context of the debate over Internet governance and Internet freedoms. The preservation of the Internet "as we know it" today, as reflected in the OECD principles for Internet policy agreed in December 2011, has become a cornerstone of US Internet policy. On the other hand policymakers will have to work through how this interacts with the US' traditional approach of zero tolerance for IP piracy of its content industries by web-sites operating outside US territory. And there can be no doubt that the internet companies' ability to drum up public support quickly has affected the political calculus of decision makers.

More politically, it is relevant to take note that, maybe for the first time ever, a Democratic President decided to challenge Hollywood.

White House blog of 14 Jan:

Combating Online Piracy while Protecting an Open and Innovative Internet

By Victoria Espinel, Aneesh Chopra, and Howard Schmidt

Thanks for taking the time to sign this petition. Both your words and actions illustrate the importance of maintaining an open and democratic Internet.

Right now, Congress is debating a few pieces of legislation concerning the very real issue of online piracy, including the Stop Online Piracy Act (SOPA), the PROTECT IP Act, and the Online Protection and Digital Enforcement Act (OPEN). We want to take this opportunity to tell you what the Administration will support—and what we will not support. Any effective legislation should reflect a wide range of stakeholders, including everyone from content creators to the engineers that build and maintain the infrastructure of the Internet.

While we believe that online piracy by foreign websites is a serious problem that requires a serious legislative response, we will not support legislation that reduces freedom of expression, increases cybersecurity risk, or undermines the dynamic, innovative global Internet.

Any effort to combat online piracy must guard against the risk of online censorship of lawful activity and must not inhibit innovation by our dynamic businesses large and small. Across the globe, the openness of the Internet is increasingly central to innovation in business, government, and society and it must be protected. To minimize this risk, new legislation must be narrowly targeted only at sites beyond the reach of current U.S. law, cover activity clearly prohibited under existing U.S. laws, and be effectively tailored, with strong due process and focused on criminal activity. Any provision covering Internet intermediaries such as online advertising networks, payment processors, or search engines must be transparent and designed to prevent overly broad private rights of action that could encourage unjustified litigation that could discourage startup businesses and innovative firms from growing.

We must avoid creating new cybersecurity risks or disrupting the underlying architecture of the Internet. Proposed laws must not tamper with the technical architecture of the Internet through manipulation of the Domain Name System (DNS), a foundation of Internet security. Our analysis of the DNS filtering provisions in some proposed legislation suggests that they pose a real risk to cybersecurity and yet leave contraband goods and services accessible online. We must avoid legislation that drives users to dangerous, unreliable DNS servers and puts next-generation security policies, such as the deployment of DNSSEC, at risk.

Let us be clear—online piracy is a real problem that harms the American economy, threatens jobs for significant numbers of middle class workers and hurts some of our nation's most creative and innovative companies and entrepreneurs. It harms everyone from struggling artists to production crews, and from startup social media companies to large movie studios. While we are strongly committed to the vigorous enforcement of intellectual property rights, existing tools are not strong enough to root out the worst online pirates beyond our borders. **That is why the Administration calls on all sides to work together to pass sound legislation this year that provides prosecutors and rights holders new legal tools to combat online piracy originating beyond U.S. borders while staying true to the principles outlined above in this response.** We should never let criminals hide behind a hollow embrace of legitimate American values.

This is not just a matter for legislation. **We expect and encourage all private parties, including both content creators and Internet platform providers working together, to adopt voluntary measures and best practices to reduce online piracy.**

So, rather than just look at how legislation can be stopped, ask yourself: Where do we go from here? Don't limit your opinion to what's the wrong thing to do, ask yourself what's right. Already, many members of Congress are asking for public input around the issue. We are paying close attention to those opportunities, as well as to public input to the Administration. The organizer of this petition and a random sample of the signers will be invited to a conference call to discuss this issue further with Administration officials and soon after that, we will host an online event to get more input and answer your questions. Details on that will follow in the coming days.

Washington needs to hear your best ideas about how to clamp down on rogue websites and other criminals who make money off the creative efforts of American artists and rights holders. We should all be committed to working with all interested constituencies to develop new legal tools to protect global intellectual property rights without jeopardizing the openness of the Internet. Our hope is that you will bring enthusiasm and know-how to this important challenge.

Moving forward, we will continue to work with Congress on a bipartisan basis on legislation that provides new tools needed in the global fight against piracy and counterfeiting, while vigorously defending an open Internet based on the values of free expression, privacy, security and innovation. Again, thank you for taking the time to participate in this important process. We hope you'll continue to be part of it.

Victoria Espinel is Intellectual Property Enforcement Coordinator at Office of Management and Budget

Aneesh Chopra is the U.S. Chief Technology Officer and Assistant to the President and Associate Director for Technology at the Office of Science and Technology Policy

Howard Schmidt is Special Assistant to the President and Cybersecurity Coordinator for National Security Staff