CHICKEN LITTLE WAS WRONG: A SITE BLOCKING RETROSPECTIVE AND ROAD MAP FOR THE FUTURE

Karyn A. Temple[*]

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Good evening, it is an honor and privilege to be here today to deliver the annual Greg Lastowka Memorial Lecture.[1] In reflecting on Professor Lastowka's legacy as I prepared for this lecture, I was struck by the

[*] Karyn A. Temple previously served as the 13th Register and Director of the U.S. Copyright Office as well as the Associate Register of Policy and International Affairs for the U.S. Copyright Office. She currently serves as the Senior Executive Vice President and Global General Counsel of the Motion Picture Association. Ms. Temple prepared this Article in her personal capacity and not on behalf of her current or former employers. The views expressed in this Article do not purport to represent the views of her current or former employers.

1. This Article is a version of a speech originally delivered for the Annual Greg Lastowka Memorial Lecture at Rutgers University Law School on March 21, 2024. I would like to thank the tremendously talented legal staff of the Motion Picture Association, who have more than a decade of experience with site-blocking regimes around the world, for their helpful background materials and data on site blocking.

prescient nature of his scholarship from nearly two decades ago. As one of the most preeminent cyberlaw scholars of his time, Professor Lastowka was already contemplating the complex technological and legal world we are now confronting with his seminal writings *Virtual Justice: The New Laws of Online Worlds*, *The Laws of the Virtual World* and his study of online user-generated content.[2] I can only imagine the ardor and vision with which he would have approached other recent topics, such as generative AI and a favorite of this news cycle, TikTok. Professor Lastowka, from all accounts, also had the rare skill of being an exceptional academic scholar and true classroom educator loved by his peers and students. So, it is truly a pleasure to deliver the memorial lecture bearing his name.

When I first came up with the title of my lecture today, *Chicken Little Was Wrong: A Site Blocking Retrospective and Road Map for the Future*, I thought naively that the theme and point of my talk would be immediately recognizable on both a domestic and global basis and to the young and old alike. Little did I know that this—in my view, witty—title would serve to firmly place me outside the Gen Z range as many of my international and more junior colleagues had not heard of Chicken Little or his cautionary tale. In fact, several colleagues could only recall the 2005 Disney movie (where Chicken Little was actually proclaimed a hero after his warning saved the world from invading aliens).[3]

So, for those in the audience who may be more familiar with the movie than the original folk tale, I'll give a little background. In the original folk tale from the 1800s, Chicken Little, or as he is referred to in Europe, Henny Penny, is out for a walk when an acorn falls and hits him on the head.[4] Convinced that it was a piece of the sky, Chicken Little and his feathered friends descend into utter panic as they rush to inform the king of the calamity unfolding in the kingdom.[5] Unfortunately, the story has a somewhat gruesome end for poor Chicken Little and his friends as they run into Foxy Loxy (who is—you guessed it—a fox), who kindly

2. *See generally* GREG LASTOWKA, VIRTUAL JUSTICE: THE NEW LAWS OF ONLINE WORLDS (2010); F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1 (2004); Greg Lastowka, *User-Generated Content and Virtual Worlds*, 10 VAND. J. ENT. & TECH. L. 893 (2008).

3. *See Chicken Little (2005)*, IMDB, https://www.imdb.com/title/tt0371606/ (last visited Feb. 11, 2025) ("After ruining his reputation with the town, a courageous chicken must come to the rescue of his fellow citizens when aliens start an invasion.").

4. *See* Oliver Tearle, *A Summary and Analysis of the Chicken Little Folk Tale*, INTERESTING LITERATURE, https://interestingliterature.com/2022/02/chicken-little-folk-tale-summary-analysis/ (last visited Feb. 11, 2025).

5. *Id.*

agrees to take them to the king, but instead detours to his den, where they are never seen from again.[6]

Those who have studied the Chicken Little folk tale say there are three main moral messages to the story: "(1) don't form incorrect conclusions from insufficient data; (2) don't stoke fear in others without good cause to do so; and (3) don't take other people's word for things, especially when those other people are making extraordinary claims (which should require extraordinary evidence)."[7] In other words—facts matter.

The history and politicization surrounding the establishment of no-fault injunctive relief to prevent access to illegal/criminal websites (otherwise known as site blocking) stands as a classic example of those morals gone awry. In 2010–2011, when the idea of judicial site blocking was first introduced to America, the loudest response was not a fact-based analysis and discussion of the legal and technical issues implicated by the legislation, but a sound bite designed to strike fear into the hearts of everyone with a computer or mobile phone: it will "break the internet."[8] In other words, "the sky is falling." Every moral of the Chicken Little fable was on prominent display during the discussion of this legislation.

The most scrutinized site-blocking proposals were introduced in Congress in 2011—the Stop Online Piracy Act ("SOPA") introduced in the House of Representatives and the PROTECT IP Act ("PIPA") introduced in the Senate.[9] The introduction of the bills followed hearings and congressional debates about online piracy that had occurred throughout early 2011 with testimony from the White House Intellectual Property Enforcement Coordinator, representatives from U.S. Immigration and Customs Enforcement ("ICE"), rights holders, technology companies, and civic society.[10] The initial version authorized the U.S. Attorney General

6. *Id.*

7. *Id.*

8. *See, e.g.*, Richard Esguerra, *Censorship of the Internet Takes Center Stage in "Online Infringement" Bill*, ELEC. FRONTIER FOUND. (Sept. 21, 2010), https://www.eff.org/deeplinks/2010/09/censorship-internet-takes-center-stage-online ("This flawed bill [COICA] would allow the Attorney General and the Department of Justice to break the [i]nternet one domain at a time . . . ."); Corynne McSherry, *SOPA: Hollywood Finally Gets A Chance to Break the Internet*, ELEC. FRONTIER FOUND. (Oct. 28, 2011), https://www.eff.org/deeplinks/2011/10/sopa-hollywood-finally-gets-chance-break-internet.

9. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968, 112th Cong. (2011).

10. In 2011, there were more than six hearings in the House and Senate to examine the issue of online piracy enforcement and potential remedies such as site blocking. *See, e.g.*, *Targeting Websites Dedicated to Stealing American Intellectual Property: Hearing Before*

to seek a court order requiring a host of intermediaries—such as domain name servers, search engines, and payment processors—to block access to illegal foreign websites dedicated to infringing activities.[11] SOPA also allowed a notice- and take down-like procedure to be used to disable payment services to illegal websites.[12]

Foes of the legislation argued, without supporting data, that the bills would "cause entire domains to vanish from the Web, not just infringing pages or files. Worse, an incredible range of useful, law-abiding sites can be blacklisted under these proposals."[13] They argued that it would substantially and irreversibly harm the overall structure and security of the internet[14] and would even "stifle investment in [i]nternet services, throttle innovation, and hurt American competitiveness."[15]

Much of this was intentionally sensationalist. And, congressional authors repeatedly offered to address legitimate concerns and listen to

the S. Comm. on the Judiciary, 112th Cong. 5, 8, 10, 12 (2011) (hearing included witnesses from Rosetta Stone, Go Daddy Group, Verizon, and Visa); *Office of the U.S. Intellectual Property Enforcement Coordinator: Hearing Before the Subcomm. on Intell. Prop., Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 5–25 (2011) (testimony and prepared statement of Victoria A. Espinel, U.S. Intell. Prop. Enf't Coordinator, Executive Office of the President); *Promoting Investments and Protecting Commerce Online: Legitimate Sites v. Parasites (Part I & II): Hearing Before the Subcomm. on Intell. Prop., Competition, and the Internet of the H. Comm. of the Judiciary*, 112th Cong. 14, 27, 162, 200, 211 (2011) [hereinafter *Promoting Investments Hearing*] (including testimony from the Acting Reg. of Copyrights at the U.S. Copyright Office and representatives from ICE, Google, GoDaddy Group and the Center for Democracy and Technology); *Oversight of Intellectual Property Law Enforcement Efforts: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4, 7, 9, 12 (2011) (hearings included witnesses from the Criminal Division of the Department of Justice, the Federal Bureau of Investigations, ICE, and the Office of Management and Budget); *Stop Online Piracy Act: Hearing on H.R. 3261 Before the H. Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter *SOPA Hearing*].

11. S. 968 § 3; H.R. 3261 § 102.

12. H.R. 3261 § 103.

13. Parker Higgins & Peter Eckersley, *An Open Letter from Internet Engineers to the U.S. Congress*, ELEC. FRONTIER FOUND. (Dec. 15, 2011), https://www.eff.org/deeplinks/2011/12/internet-inventors-warn-against-sopa-and-piparespectively.

14. *See id.* ("Censorship of [i]nternet infrastructure will inevitably cause network errors and security problems. This is true in China, Iran and other countries that censor the network today; it will be just as true of American censorship. It is also true regardless of whether censorship is implemented via the DNS, proxies, firewalls, or any other method.").

15. *SOPA Hearing*, *supra* note 10, at 224–26 (June 23, 2011 open letter from venture capitalists); *see also id.* at 200–01 (statement of Rep. Zoe Lofgren, Member, H. Comm. on the Judiciary); Marc Andreessen et al., *Venture Capitalists' Opposition Letter on the PROTECT IP Act*, PROTECT INNOVATION 27 (June 23, 2011), https://www.protectinnovation.com/pdf/opposition/14-jun_23_2011_venture_capitalists.pdf.

fact-based counterproposals from the tech community.[16] Congress urged everyone to "set aside all of the hyperbole and accusations"[17] while witnesses in hearings attempted to address the concerns. For example, testimony in March 2011 from the U.S. Copyright Office acknowledged the importance of due process and freedom of expression principles.[18] But, armed with a soundbite and hyperbolic claims, bill opponents altered the narrative from a technical discussion about how the internet works and whether site blocking would affect the technological infrastructure to a climate of urgency and fear.

The true technical concern that underlay most of the opposition was that allowing domain name system ("DNS") blocking, where a DNS service would fail to return the right internet protocol ("IP") address in response to a domain name look-up request for an infringing website, would not have followed the rules of the domain name system security extension ("DNSSEC") and would encourage the use of rogue internet service providers ("ISPs").[19] This explanation, of course, does not have quite the same resonance as "it will break the internet," so actual discussions on the potential effect on the DNSSEC were limited. It also discounted the fact that DNS blocking was already in operation for

16. *See SOPA Hearing*, *supra* note 10, at 37–39 (statement of Rep. Bob Goodlatte, Chairman, Subcomm. on Intell. Prop. Competition, and the Internet) ("I stand ready to work with the tech community to address any legitimate concerns they have. I have requested detailed comments from the tech community about their concerns, and look forward to continuing to work with them . . . to ensure that this legislation punishes lawbreakers while protecting content owners as well as legitimate online innovators and startups.").

17. *Id.* at 40 (statement of Rep. Melvin L. Watt, Member, Subcomm. on Intell. Prop., Competition, and the Internet).

18. *See Promoting Investments Hearing*, *supra* note 10, at 14–27 (testimony and prepared statement of Maria A. Pallante, Acting Reg. of Copyrights, U.S. Copyright Office) ("Principles of due process and freedom of expression are also critical. Even the worst of the worst should receive notice as well as an opportunity to be heard, and relief should be narrowly tailored.").

19. S*ee, e.g.*, *SOPA Hearing*, *supra* note 10, at 76–77 (prepared statement of Michael P. O'Leary, Senior Exec. Vice President, Glob. Policy & External Affs., Motion Picture Association of America) ("Critics claim that requiring [i]nternet intermediaries to take steps that would prevent links to rogue sites from functioning would 'break the [i]nternet' and jeopardize the online security protocol known as Secure DNS, or DNSSEC."); *id.* at 106–07, 142 (testimony and prepared statement of Katherine Oyama, Copyright Couns., Google, Inc.) ("[T]here is a big concern that if we play certain obligations on you as DNS providers, that users are going to reroute their traffic to offshore rogue providers."); *id.* at 144–200 (materials submitted by Rep. Zoe Lofgren, Member, H. Comm. on the Judiciary) (expressing concerns with SOPA); *Promoting Investments Hearing*, *supra* note 10, at 29, 35 (testimony and prepared statement of David Sohn, Senior Policy Couns., Center for Democracy & Technology) ("Domain-name seizure and blocking can be easily circumvented, and thus will have little ultimate effect on online infringement.").

certain matters.[20] Once a sound bite became the rallying cry, true discourse on this issue was impossible.

So, back to the Chicken Little fable: ***Don't form incorrect conclusions from insufficient data***—**check**.

Scholars also referenced the "disastrous consequences for the stability and security of the [i]nternet[]," the "unprecedented, legally sanctioned assault on the [i]nternet's critical technical infrastructure," the "potentially catastrophic consequences" to the internet DNS system, and likened it to taking a "sledgehammer" to the core technical infrastructure of the internet.[21] Members of Congress claimed that the House bill "would mean the end of the internet as we know it."[22] Sites that so much as "discuss[ed]" piracy would be targeted.[23]

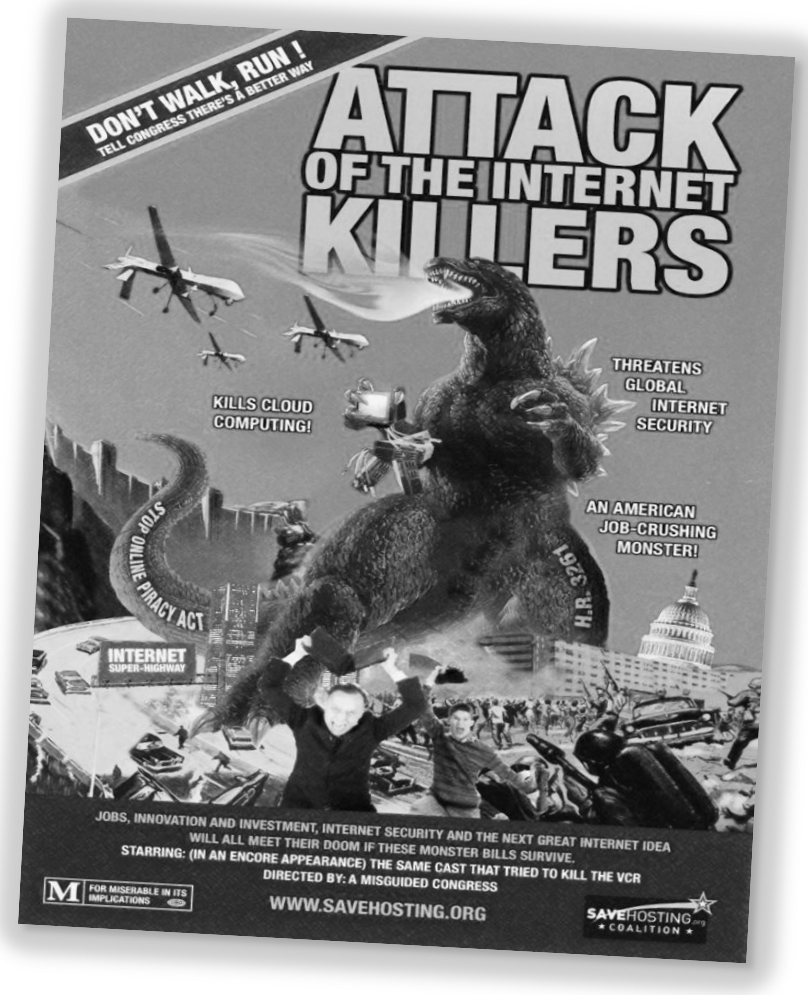
20. *See, e.g.*, Press Release, U.S. Immigr. and Customs Enf't, Operation in Our Sites Targets Internet Movie Pirates, https://www.ice.gov/news/releases/operation-our-sites-targets-internet-movie-pirates (Jan. 24, 2025); Press Release, U.S. Dep't of Just., Federal Courts Order Seizure of 82 Website Domains Involved in Selling Counterfeit Goods as Part of DOJ and ICE Cyber Monday Crackdown, https://www.justice.gov/archives/opa/pr/federal-courts-order-seizure-82-website-domains-involved-selling-counterfeit-goods-part-doj (Feb. 26, 2025); Press Release, U.S. Immigr. and Customs Enf't, Operation in Our Sites Protects American Online Shoppers, Cracks Down on Counterfeiters (Nov. 27, 2011), https://www.ice.gov/news/releases/operation-our-sites-protects-american-online-shoppers-cracks-down-counterfeiters; *Securing Our Supply Chain*, INTELL. PROP. SPOTLIGHT, Feb.–Mar. 2011, at 2, https://obamawhitehouse.archives.gov/sites/default/files/omb/IPEC/spotlight/IPEC_Spotlight_February_2011_March_2011.pdf; Annemarie Bridy, *Three Notice Failures in Copyright Law*, 96 B.U. L. REV. 777, 796–98 (2016) ("The legal authority for domain name seizures comes from the PRO-IP Act of 2008, which gave the federal government power to seize and civilly forfeit property allegedly tainted by copyright crime. . . . DHS agents initiated [Operation in Our Sites] in 2010 by securing seizure warrants against ten domain names of websites offering first-run movies. By 2012, [Operation in Our Sites] was operating at full throttle. . . .U.S.-based operators of the relevant domain name registries were ordered to redirect web traffic from the seized domains to a site displaying an anti-piracy banner featuring the logos of the [DOJ] and DHS's Homeland Security Investigations." (footnotes omitted)).

21. Mark Lemley et al., *Don't Break the Internet*, 64 STAN. L. REV. ONLINE 34, 34–35 (2011).

22. David Kravets, *Analysis: Internet Blacklist Bill Is Roadmap to 'the End' of the Internet*, WIRED (Nov. 17, 2011, 6:39 PM) (quoting Rep. Zoe Lofgren, Member, H. Comm. on the Judiciary), https://www.wired.com/2011/11/blacklist-bill-analysis/.

23. *SOPA/PIPA: Internet Blacklist Legislation*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/coica-internet-censorship-and-copyright-bill (last visited Feb. 11, 2025).

Straight from central casting, a monster-like Godzilla warned of the "Attack of the Internet Killers,"[24] and a *New York Times* op-ed urged the public to "Stop the Great Firewall of America."[25]



24. *SOPA Hearing*, *supra* note 10, at 22–24 (statement and material submitted by Rep. John Conyers, Jr., Member, H. Comm. on the Judiciary).

25. Rebecca MacKinnon, Opinion, *Stop the Great Firewall of America*, N.Y. TIMES (Nov. 15, 2011), https://www.nytimes.com/2011/11/16/opinion/firewall-law-could-infringe-on-free-speech.html.

Google, Wikipedia, Mozilla, Craigslist, Reddit—and more than 115,000 other websites—went black on January 18, 2012 to show to the public what was on the verge of happening to the beloved World Wide Web.[26] Of course, this directly contradicted previous testimony from internet policy organizations that site blocking would in fact be *ineffective* because "it does not actually remove bad sites from the [i]nternet. Nothing gets shut down."[27]

Unfortunately, at the time there was a general dearth of factual information on the true contours and potential effect of judicial site blocking as the United Kingdom was the only country that had begun heavily using this process to address copyright infringement.[28] So, reasonable discourse was able to be drowned out by hyperbole.

In the twelve-plus years since, SOPA/PIPA has become the bogeyman defense to every contemplated copyright law even remotely related to enforcement, from the Anti-Counterfeiting Trade Agreement ("ACTA"), which was called "worse than SOPA and PIPA,"[29] to felony streaming

26. *See* Jenna Wortham, *Public Outcry Over Antipiracy Bills Began as Grass-Roots Grumbling*, N.Y. TIMES (Jan. 19, 2012), https://www.nytimes.com/2012/01/20/technology/public-outcry-over-antipiracy-bills-began-as-grass-roots-grumbling.html; Vlad Savov, *The SOPA Blackout: Wikipedia, Reddit, Mozilla, Google, and Many Others Protest Proposed Law*, VERGE (Jan 18, 2012, 12:10 AM), https://www.theverge.com/2012/1/18/2715300/sopa-blackout-wikipedia-reddit-mozilla-google-protest.

27. *Promoting Investments Hearing*, *supra* note 10, at 28, 35 (testimony and prepared statement of David Sohn, Senior Policy Couns., Center for Democracy & Technology) (explaining that DNS blocking is "wholly unrelated to the content available at any given site [and] [i]mportantly, neither seizing nor blocking a website's domain name *removes* the site from the [i]nternet. The servers are still connected and users can still reach the site, including any infringing content.").

28. *See, e.g.*, NIGEL CORY, INFO. TECH & INNOVATION FOUND., A DECADE AFTER SOPA/PIPA, IT'S TIME TO REVISIT WEBSITE BLOCKING 3 (2022), https://www2.itif.org/2022-revisiting-website-blocking.pdf ("At the time of the SOPA/PIPA debate, which was 2010 to 2012, the United Kingdom was the only country (starting in 2011) that allowed rightsholders to get injunctions to ask ISPs to block access to piracy sites involved in the mass distribution of copyright-infringing content."); GIANCARLO FROSIO & OLEKSANDR BULAYENKO, STUDY ON DYNAMIC BLOCKING INJUNCTIONS IN THE EUROPEAN UNION: IPR ENFORCEMENT CASE-LAW COLLECTION 36–37, 36 n.157, 37 n.158 (2021) (citing Twentieth Century Fox Film Corp. v. British Telecommunications Plc (*Newzbin2*) [2011] EWHC (Ch) 2714, [2012] 1 All ER 869; then citing Twentieth Century Fox Film Corp v. British Telecommunications Plc [2011] EWHC (Ch) 1981, [2012] 1 All ER 806), https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2021_Dynamic_Blocking_Injuctions/2021_Study_on_Dynamic_Blocking_Injuctions_in_the_European_Union_FullR_en.pdf.

29. Kimberlee Weatherall, *Three Lessons from ACTA and Its Political Aftermath*, 35 SUFFOLK TRANSNAT'L L. REV. 575, 584 (2012).

legislation,[30] to even legislation for a copyright small claims court.[31] Copyright foes learned quickly that scare tactics worked.

In 2011, in response to a proposal to enhance criminal penalties for illegal streaming from a misdemeanor to a felony, the Free Justin Bieber Movement was born. A website, www.freebieber.org, popped up and articles asked, "Do We Really Want Congress to Make Bieber a Felon?"[32] Of course, that legislation failed.[33]

Even years later, felony streaming proposals continued to generate the same rhetoric: The online news outlet *Sludge* proclaimed, "Tillis Pushes Prison Time for Online Streamers."[34] One opponent tweeted out Senator Tillis's official phone number.[35] And, Fight for the Future, the coalition behind the SOPA/PIPA protest, created a petition.[36]

In 2019, during consideration of legislation to establish a small copyright claims court for individual creators who lacked access to the costly federal court system,[37] the Electronic Frontier Foundation ("EFF")

30. *See, e.g.*, Commercial Felony Streaming Act, S. 978, 112th Cong. (2011). Various organizations argued that bills designed to align penalties for illegal streaming with pre-existing penalties for illegal downloading and copying, would "make[] posting a video containing any copyrighted work a felony." Fight for the Future, *Could This Really Happen?*, FREE BIEBER, https://freebieber.org (last visited Feb. 11, 2025). But these arguments directly conflicted with the actual provisions of the bill which required "willful[] infringe[ment] [of] a copyright . . . for purposes of commercial advantage." *See* H.R. 3261 §201 (proposing amendments to 18 U.S.C. § 2319(d)); 17 U.S.C. § 506(a)).

31. *See, e.g.*, CASE Act of 2019, H.R. 2426, 116th Cong. (2019); Katharine Trendacosta, *It's Copyright Week 2022: Ten Years Later, How Has SOPA/PIPA Shaped Online Copyright Enforcement?*, ELEC. FRONTIER FOUND. (Jan. 17, 2022), https://www.eff.org/deeplinks/2022/01/its-copyright-week-2022-ten-years-later-how-has-sopapipa-shaped-online-copyright. ("While SOPA and PIPA were ultimately defeated, their spirits live on. They live on in legislation like the CASE Act . . . .").

32. Mike Masnick, *Free Justin Bieber: Do We Really Want Congress to Make Bieber a Felon?*, TECHDIRT (Oct. 19, 2011, 1:52 PM), https://www.techdirt.com/2011/10/19/free-justin-bieber-do-we-really-want-congress-to-make-bieber-felon/; Mark Guarino, *What Justin Bieber Has to Do with Online Streaming Bill*, CS MONITOR (Oct. 25, 2011, 4:41 PM), https://mark-guarino.com/s978-what-justin-bieber-has-to-do-with-online-streaming-bill/; FREE BIEBER, *supra* note 30.

33. *See* S. 978 (112th), GOVTRACK.US, https://www.govtrack.us/congress/bills/112/s978 (last visited Feb. 11, 2025).

34. Donald Shaw, *Tillis Pushes Prison Time for Online Streamers*, SLUDGE (Dec. 7, 2020), https://readsludge.com/2020/12/07/tillis-pushes-prison-time-for-online-streamers-after-pre-election-hollywood-cash-blitz.

35. *See* @KreekCraft, X (formerly TWITTER) (Dec. 16, 2020, 3:41 PM), https://x.com/KreekCraft/status/1339309813885513731 (last visited Feb. 11, 2025).

36. *See* Fight for the Future, *Tell Congress: Don't Ram Through Dangerous Copyright Provisions in a Must-Pass Spending Bill*, ACTION NETWORK, https://actionnetwork.org/petitions/tell-congress-dont-threaten-streamers-with-prison-time-keep-sopapipa-like-copyright-provisions-out-of-the-must-pass-spending-bill/ (last visited Feb. 11, 2025).

37. CASE Act of 2019, H.R. 2426, 116th Cong. (2019).

called it a "[d]isaster for [i]nternet [u]sers" that "[r]adically [c]hanges [c]opyright [l]aw" and includes "life altering penalties" because it would "slap $30,000 fines on [i]nternet users who share a copyrighted work they don't own online."[38] They asked rhetorically whether the public was "[r]eady to [p]ay $30,000 for [s]haring a [p]hoto [o]nline?"[39]

The EFF proclaimed ten years after SOPA/PIPA that while those bills "were ultimately defeated, their spirits live on. They live on in legislation like the CASE Act and the EU Copyright Directive . . . . They live on in the licensing agreements that prevent us from owning digital goods."[40] Essentially, to EFF, they live on in any type of enforcement or copyright provisions that might apply to the internet.

***Moral from Chicken Little: Don't stoke fear in others without good cause to do so*—check.**

Two days after the internet blackout day, the bills were essentially dead.[41] The general public, like Chicken Little's friends, had been convinced that the internet was on the verge of "breaking," and one million emails were sent to Congress, which briefly brought down the Senate website.[42] More than seven million people signed a Google

38. Ernesto Falcon, *Ready to Pay $30,000 for Sharing a Photo Online? The House of Representatives Thinks You Are*, ELEC. FRONTIER FOUND. (Oct. 21, 2019), https://www.eff.org/deeplinks/2019/10/ready-pay-30000-sharing-photo-online-house-representatives-thinks-you-are.

39. *Id.*

40. Trendacosta, *supra* note 31.

41. *See* Senator Harry Reid (@SenatorReid), X (formerly TWITTER) (Jan. 20, 2012, 9:27 AM), https://x.com/senatorreid/status/160367959464878080 ("In light of recent events, I have decided to postpone Tuesday's vote on the PROTECT IP Act"); Press Release, Lamar Smith, Chairman, H.R. Judiciary Comm., Statement from Chairman Smith on Senate Delay of Vote on PROTECT IP Act (Jan. 20, 2012), https://judiciary.house.gov/media/press-releases/statement-from-chairman-smith-on-senate-delay-of-vote-on-protect-ip-act ("The House Judiciary Committee will postpone consideration of the legislation until there is wider agreement on a solution."); *see also* Jen Chung, *Good Work, Internet: SOPA, PIPA Postponed (Dead) for Now*, GOTHAMIST (Jan. 20, 2012), https://gothamist.com/news/good-work-internet-sopa-pipa-postponed-dead-for-now ("Congress has decided to postpone the vote on the [i]nternet anti-piracy bills, Stop Online Piracy Act and Protect IP Act, after widespread outrage from [i]nternet companies and most anyone who uses the [i]nternet."); Larry Downes, *Who Really Stopped SOPA, and Why?*, FORBES (Jan. 25, 2012, 1:15 AM), https://www.forbes.com/sites/larrydownes/2012/01/25/who-really-stopped-sopa-and-why/ (noting that within days "what had long been seen even by opponents as a done deal had become a deal undone").

42. *See* Trevor Timm, *After Historic Protest, Members of Congress Abandon PIPA and SOPA in Droves*, ELEC. FRONTIER FOUND. (Jan. 19, 2012), https://www.eff.org/deeplinks/2012/01/after-historic-protest-members-congress-abandon-pipa-and-sopa-droves.

petition against the proposals.[43] As a result, several original sponsors of the bills were forced to withdraw support.[44] Within a day of the blackout, the bills went from eighty supporters and thirty-one opponents to more than 100 opponents and only sixty-three supporters.[45] This was despite the DNS blocking provisions being removed from SOPA shortly before the internet blackout protest.[46] Indeed, in a congressional summary of the DNS provisions from the Judiciary Committee in December 2011, they noted:

> The manager's amendment ensures no harm can come to DNSSEC by eliminating any suggestion that there is a requirement to direct or redirect users (see 102(c)(2)(A)(iii)(V)) to another site. It protects the security and integrity of the DNS by establishing a "kill switch" that

43. *See* Andy Greenberg, *PIPA Vote And SOPA Hearing Pushed off as Copyright Bills' Congressional Support Collapses*, FORBES (Jan. 20, 2012, 10:47 PM), https://www.forbes.com/sites/andygreenberg/2012/01/20/pipa-vote-and-sopa-hearing-pushed-off-as-copyright-bills-congressional-support-crumbles/.

44. *Id.*

45. *See* Josh Constine, *SOPA Protests Sway Congress: 31 Opponents Yesterday, 122 Now*, TECHCRUNCH (Jan. 19, 2012, 5:37 PM), https://techcrunch.com/2012/01/19/sopa-opponents-supporters/; Dan Nguyen, *SOPA Opera Where Do Your Members of Congress Stand on SOPA and PIPA?*, PROPUBLICA, https://projects.propublica.org/sopa/ (Jan. 20, 2012) (reporting fifty-five supporters and 205 opponents two days after the blackout).

46. *See* Corynne McSherry, *SOPA Manager's Amendment: It's Still a Blacklist and It's Still a Disaster*, ELEC. FRONTIER FOUND. (Dec. 13, 2011), https://www.eff.org/deeplinks/2011/12/sopa-managers-amendment-sorry-folks-its-still-blacklist-and-still-disaster; *see also* H.R. COMM. ON THE JUDICIARY, 112TH CONG., MANAGER'S AMENDMENT SUMMARY (2011), https://web.archive.org/web/20120105134557/https://judiciary.house.gov/issues/Rogue%20Websites/Summary%20Manager's%20Amendment.pdf (summarizing revisions); AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 3261 OFFERED BY MR. SMITH OF TEXAS, H.R. COMM. ON THE JUDICIARY, 112TH CONG. (Dec. 12, 2011) https://cyberlaw.stanford.edu/content/files/2011/12/hr-3261-managers-amendment.pdf, [hereinafter MANAGER'S AMENDMENT]; *cf.* Mike Masnick, *As SOPA/PIPA Becomes Toxic, Frantic Congress Test Runs Dropping DNS Blocking Provisions*, TECHDIRT (Jan. 11, 2012, 10:51 AM), https://www.techdirt.com/2012/01/11/as-sopapipa-becomes-toxic-frantic-congress-test-runs-dropping-dns-blocking-provisions/; Mike Masnick, *Lamar Smith Proposes New Version of SOPA, With Just A Few Changes*, TECHDIRT (Dec. 12, 2011, 2:31 PM), https://www.techdirt.com/2011/12/12/lamar-smith-proposes-new-version-sopa-with-just-few-changes/ (describing a DNS blocking in favor of a technologically neutral approach that would allow service providers to themselves "determine what is the least burdensome, technically feasible means, and go with that, then that 'shall fully satisfy such service provider's obligation'") (quoting § 102(c)(2)(A)(ii) of MANAGER'S AMENDMENT). The amendment also removed a five-day requirement for implementation of the DNS provisions and restricted the sites directed only to foreign-directed sites. *See* Bruce E. Boyden, *Son of SOPA*, MARQ. UNIV. L. SCH. FAC. BLOG (Dec. 15, 2011), https://law.marquette.edu/facultyblog/2011/12/son-of-sopa/ ("[T]he amendment change[d] the definition of 'U.S.-directed site' to include only 'foreign [i]nternet sites,' meaning sites for which the domain name is registered with a foreign entity, or if there is no domain name, the IP address is assigned by a foreign ISP.").

allows a provider to not carry out an order on a finding that it would "impair the security or integrity of the system" (see 102(d)(2)(B) and Section 2(a)(5)). The amendment ensures that the bill cannot be construed to require any order that would harm the DNS, and requires a study to ensure no DNS harm.[47]

And that leads me to the final moral of Chicken Little: ***Don't take other people's word for things, especially when those other people are making extraordinary claims (which would require extraordinary evidence)***[48]—**check, check, check**!

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Today, fortunately, the facts on judicial site blocking are clear and unequivocal, including dozens of studies by private organizations and governments around the world.[49]

In noting that facts matter, it is first important to discuss why legislation of this sort is needed at all, which, of course, requires a discussion of the way creative works are currently stolen online.

I. HISTORY OF PIRACY OF CREATIVE WORKS

Prior to the internet, most theft of intellectual property was physical—the classic cops and robbers case—whether it was tapes or DVDs, physical products were copied and sold at flea markets, Canal

47. H.R. COMM. ON THE JUDICIARY, *supra* note 46.

48. On January 20, 2012, upon withdrawal of PIPA, Senator Patrick Leahy stated,

> I understand and respect Majority Leader [Harry] Reid's decision to seek consent to vitiate cloture on the motion to proceed to the PROTECT IP Act. *But the day will come when the Senators who forced this move will look back and realize they made a knee-jerk reaction to a monumental problem*. Somewhere in China today, in Russia today, and in many other countries that do not respect American intellectual property, criminals who do nothing but peddle in counterfeit products and stolen American content are smugly watching how the United States Senate decided it was not even worth debating how to stop the overseas criminals from draining our economy.

SOPA Opera: Profile of Sen. Patrick J. Leahy, PROPUBLICA (emphasis added), https://projects.propublica.org/sopa/L000174.html (Jan. 20, 2012). Looking back more than a dozen years and site-blocking regimes in fifty-plus countries later, Senator Leahy's words are particularly prescient.

49. Adam Mossoff, *Congress Should Protect the Rights of American Creators with Site-Blocking Legislation*, HERITAGE FOUND. (Feb. 14, 2024), https://www.heritage.org/crime-and-justice/report/congress-should-protect-the-rights-american-creators-site-blocking ("A decade of studies and data from the operation of these site-blocking laws have proven these laws work without chilling speech or 'breaking the internet.' Site-blocking laws are a proven, effective mechanism in protecting copyrights and promoting legitimate online commercial services.").

Street in New York City, and your neighborhood hair salon.[50] This type of theft required a physical operation either in the United States or physical goods shipped to the United States, where they could be intercepted by the International Trade Commission ("ITC") and U.S. Customs and Border Protection ("CBP") who work in collaboration to prevent the importation of illegal goods.[51] Unfortunately, while the ITC provisions work quite effectively to address physical piracy importation into the United States, we do not have a similar provision, yet, for digital goods.[52]

Piracy methods changed drastically in 1999 with the rise of online file-sharing led by Napster.[53] As one scholar noted, "[t]his represented a

50. *Cf.* Gustav Guldberg & Johannes Sundén, Pirates & Merchants—An Ongoing Struggle on the Hightech Seas 12–14 (2004) (M.A. thesis, Växjö University) (ResearchGate) (providing a brief history of digital piracy). *See, e.g.*, U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 13–14 (2020) [hereinafter SECTION 512 REPORT], https://www.copyright.gov/policy/section512/section-512-full-report.pdf ("Prior to the internet, music infringement primarily occurred in the form of the distribution of physical media."); *RIAA Details Anti-Piracy War*, STEREOPHILE (Oct. 27, 2003), https://www.stereophile.com/news/11765/index.html (detailing efforts to curb mass sales of pirated CDs and the Recording Industry Association of America's (RIAA) "Ongoing Flea Market Initiative"); Oliver Burkeman, *FBI Sinks Global DVD Piracy Ring*, GUARDIAN (June 30, 2006, 3:06 PM), https://www.theguardian.com/media/2006/jun/30/usnews.filmnews ("FBI officials . . . discovered that one [counterfeiter] was regularly selling pirated [film] recordings to a distributor in a Dunkin' Donuts outlet in Harlem."). *See generally Canal Street: From "Five Points" to "Counterfeit Triangle,"* FASHION LAW WIKI, http://fashionlawwiki.pbworks.com/w/page/11611148/Canal%20Street:%20%20From%20%22Five%20Points%22%20to%20%22Counterfeit%20Triangle%22 (April 11, 2009, 5:18 PM) (providing brief history of physical piracy in New York City).

51. ITC investigates complaints alleging the importation of infringing goods, and if it determines that the law has in fact been violated, ITC issues an order directing CBP to deny entry of those infringing products into the United States—this is known as an exclusion order. CBP is then tasked with enforcing that order by seizing or denying entry of any goods that fall within the scope of the order. *See* U.S. CUSTOMS & BORDER PROT., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: CBP ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS 6–7, 12 (2012), https://www.cbp.gov/sites/default/files/assets/documents/2017-Feb/enforce_ipr_3_0.pdf.

52. This issue was litigated in *ClearCorrect Operating, LLC v. International Trade Commission*, where the court ruled that ITC procedures did not apply to digital goods. 810 F.3d 1283, 1299 (Fed. Cir. 2015) ("In sum, . . . , the context in which the text is found within [19 U.S.C. § 1337], and the text's role in the totality of the statutory scheme all indicate that the unambiguously expressed intent of Congress is that 'articles' means 'material things' and does not extend to electronically transmitted digital data.") (footnotes omitted).

53. *See* Bill D. Herman, *A Political History of DRM and Related Copyright Debates, 1987–2012*, 14 YALE J.L. & TECH. 162, 186 (2012); *see also* Guldberg & Sundén, *supra* note 50, at 14 ("The event that really got the ball moving was the release of Napster, a program written by a student named Shawn Fanning that allows users to share music with each other."); SECTION 512 REPORT, *supra* note 50, at 31 ("Internet piracy has evolved alongside

tectonic shift in the media industry; suddenly, the music industry wished that its biggest threat were from illicit cassette recordings (digital or otherwise) rather than the [i]nternet."[54]

Online piracy is a much different animal than the piracy of physical goods and requires a much, much different response. It often involves global networks of individuals and groups, some with ties to organized crime in their respective countries, which are adept at evading detection.[55] These criminals often deliberately operate in countries with weaker intellectual property protections, where traditional enforcement is costly, complex, and difficult to achieve.[56] And their reach is worldwide, with staggering statistics: According to some studies, U.S.-produced movies are illegally downloaded or streamed nearly twenty-seven billion times, and television episodes are illegally downloaded or streamed almost 127 billion times annually.[57] And in 2022, there were an estimated 191.8 billion visits to movie and TV piracy sites globally.[58] One study estimated that our recent Super Bowl was watched by seventeen million viewers through illegal pirate streams.[59]

This leads me to the facts that should shape any discussion of legislation dealing with online piracy and judicial site blocking.

II. WHAT IS NO-FAULT INJUNCTIVE RELIEF?

First, it is important to understand that the legal traditions that underpin judicial site blocking are not new. Injunctions to prevent or stop illegal activities have existed in legal systems around the world for

. . . substantial gains in internet services, speed, and access. The technology that allows copyright owners to distribute content directly to consumers' living rooms via streaming services also enables new forms of piracy: streaming of unlicensed content and stream-ripping—that is, using software to make an unlicensed copy of streamed content that would otherwise be licensed.").

54. Herman, *supra* note 53, at 186.

55. *Digital Piracy*, INTERPOL, https://www.interpol.int/en/Crimes/Illicit-goods/Shop-safely/Digital-piracy (last visited Feb. 11, 2025).

56. *See* Sanmit Ahuja, *Intellectual Property Crime: The Urgent Need for Global Attention*, 1 GLOB. POL'Y 318, 319 (2010).

57. DAVID BLACKBURN ET AL., IMPACTS OF DIGITAL VIDEO PIRACY ON THE U.S. ECONOMY, at ii (2019), https://www.uschamber.com/assets/documents/Digital_Video_Piracy_June_2019.pdf.

58. *See What Do We Know About 2022 Movie & TV Piracy Trends Worldwide*, ALL. FOR CREATIVITY & ENT., https://www.alliance4creativity.com/wp-content/uploads/2023/12/WDWK-2022-worldwide-071223.pdf (last visited Feb. 11, 2025).

59. *See* Brett Danaher et al., *Pro Sports Has a Piracy Problem*, HARV. BUS. REV. (Feb. 14, 2024), https://hbr.org/2024/02/pro-sports-has-a-piracy-problem ("The piracy-tracking firm VFT estimates that 17 million viewers watched [the February 11] Super Bowl on illegal pirate streams.").

centuries, some tracing it to the biblical "Love Thy Neighbor" concept.[60] Many legal systems have incorporated traditional concepts that include requesting action from non-liable parties—not because of their specific guilt but because of their control over the harmful conduct. Under the Roman legal doctrine, *actio in rem*, orders could be directed against anyone who had the ability to address the unlawful conduct,[61] which was notably reflected in the German Civil Code section 1004.[62] A 1900 German case found a landlord to be a potential party to address noise nuisances committed by his tenant.[63] This concept to impose orders against innocent parties was also recognized in the United Kingdom in a case from 1871, *Upmann v. Elkan*,[64] and a 1973 patent case, *Norwich Pharmacal Co. v. Excise Commissioners*,[65] which concluded that:

> [I]f through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.[66]

60. *See, e.g.*, Donoghue v. Stevenson [1932] AC 562 (HL) 580 (appeal taken from Scot.), ("The rule that you are to love your neighbour becomes in law, you must not injure your neighbour . . . ."), https://www.bailii.org/uk/cases/UKHL/1932/100.pdf.

61. *See* MARTIN HUSOVEC. INJUNCTIONS AGAINST INTERMEDIARIES IN THE EUROPEAN UNION: ACCOUNTABLE BUT NOT LIABLE? 147 (2017).

62. *Id*. at 148*; see also* Bürgerliches Gesetzbuch [BGB] [German Civil Code], § 1004(1), https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p4702 ("If the ownership is interfered with by means other than removal or retention of possession, the owner may demand that the disturber remove the interference. If there is the concern that further interferences will ensue, the owner may seek a prohibitory injunction."); Ctr. for Internet & Soc'y at Stanford L. Sch., *Legislation, Germany: Civil Code*, WORLD INTERMEDIARY LIAB. MAP, https://wilmap.stanford.edu/entries/civil-code (last visited Feb. 11, 2025) ("According to Section 1004 BGB, the person affected may bring an action for injunction against an intermediary.").

63. *See* Reichsgericht [RG] [Imperial Court of Justice] Dec. 27, 1900, 316 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 47, 164.

64. *See* Upmann v. Elkan (1871) 12 L.R. Eq. 140 at 145–46, http://www.commonlii.org/uk/cases/UKLawRpEq/1871/101.html ("It may be that without notice, and when he sees the trademark, he does not know that it belongs to another; if so, he may deal with them innocently; but as soon as he is informed of the fact, he should act at once, so as not to be in any event, either from wilful or from accidental ignorance, made a party to the fraud committed by another.") (injunction issued to restrain third party from any action as to counterfeit products unwittingly in his possession).

65. Norwich Pharmacal Co. v. Customs and Excise Comm'rs, [1974] AC 133 (HL), https://www.bailii.org/uk/cases/UKHL/1973/6.html.

66. *Id*. at 175.

Canada adopted a similar provision through *Mareva* injunctions.[67] And, the United States has similar concepts such as the "active concert or participation" provision of Federal Rule of Civil Procedure 65[68] and the All Writs Act,[69] which have been used by some technology companies such as Google to address botnet attacks by requesting that the court order intermediaries to disable domains, IP addresses and servers used by criminals to distribute malware.[70] There are no specific provisions, however, to address copyright infringement blocking more broadly.[71]

In typical copyright litigation, a court first determines whether the defendant (*e.g.*, a pirate site) has violated the plaintiff's rights.[72] If the defendant is liable for copyright infringement, the court may order that the defendant cease its infringement and order other remedies, including the payment of money damages.[73]

A case under a no-fault regime proceeds differently. The copyright owner typically does not "sue" a pirate site (or any other entity) in the

67. Google Inc. v. Equustek Solutions Inc., [2017] 1 S.C.R. 824, 830 (Can.). *Mareva* injunctions, also referred to as "freezing orders," are designed to prevent defendants from transferring, concealing, or destroying assets subject to legal claims in an action. This type of order was first granted in a 1975 decision, Mareva Compania Naviera SA v. International Bulk Carriers SA, (1980) 1 All ER 213 (Eng.).

68. FED. R. CIV. P. 65(d)(2)(C).

69. 28 U.S.C. § 1651.

70. *See* Google's Memorandum of Law in Support of its Motion for a Temporary Restraining Order and Order to Show Cause at 1, 7, 19, Google LLC v. Starovikov, No. 1:21-CV-10260-DLC, 2021 WL 6754263 (S.D.N.Y. Dec. 16, 2021) ("The linchpin of Google's requested relief is a disruption plan to disable the domains, IP addresses, and servers used by Defendants to carry out their enterprise and suspend Defendants' control of the botnet. These steps will terminate Defendants' ability to sell access to victims' accounts and computers, as well as disrupt any further criminal activities by disabling Defendants' communication with infected computers.").

71. There has been some discussion of whether Section 512(j) of the Digital Millennium Copyright Act could be used to address blocking orders in the United States, however the law is not settled, and some have argued that 512(j) would require liability on the part of the ISP first. *See Copyright Law in Foreign Jurisdictions: How Are Other Countries Handling Digital Piracy? Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 116th Cong. 5–6 (2020) [hereinafter *Foreign Copyright Law Hearing*], https://www.judiciary.senate.gov/imo/media/doc/McCoy%20Testimony.pdf (written testimony of Stanford K. McCoy, President and Managing Dir., Motion Picture Association EMEA) ("It should be noted that the DMCA includes a provision for injunctive relief against intermediaries, including orders requiring reasonable steps to block access infringements occurring at specific, online locations outside the United States. In more than twenty years, however, these provisions of the DMCA have never been deployed, presumably because of uncertainty about whether it is necessary to find fault against the service provider before an injunction could issue, unlike the clear no-fault injunctive remedies available in other countries." (citing 17 U.S.C. § 512(j))).

72. *Copyright Litigation 101*, THOMSON REUTERS (Dec. 16, 2022), https://legal.thomsonreuters.com/blog/copyright-litigation-101/.

73. *Id.*

traditional sense or seek damages for copyright infringement. Rather, it merely seeks for the infringement to stop, and, without assigning blame or fault, seeks relief directed at those positioned to halt the infringement, such as intermediaries that connect the pirate site to users.[74]

The piracy site's operation, in almost all cases, is happening offshore, anonymously, and out of reach of the courts where the no-fault action is brought.[75] The intermediaries (for example, ISPs that connect their customers with the pirate site) are not "defendants" as in a typical litigation. And, to emphasize, in such a process, the intermediaries are not accused of copyright infringement, and the court does not hold them liable or order them to pay any damages to the copyright owner that brought the action.[76]

There are generally two types of site-blocking regimes adopted around the world.[77] The majority of countries that have enacted no-fault injunctive relief regimes do so through a traditional judicial system where it is the courts that issue blocking orders.[78] Judicial site blocking occurs in both common law jurisdictions, such as the United Kingdom, Australia, Singapore, and India, and in civil law jurisdictions, such as Spain, Denmark, and France.[79] Another system is no-fault relief that is granted by administrative agencies, which are authorized by statute to issue orders to intermediaries to disable access to a structurally infringing site.[80] Such administrative site blocking sometimes occurs in common law countries like Malaysia, but is more common in civil law

74. *Foreign Copyright Law Hearing*, *supra* note 71, at 3.

75. *See id.* at 8.

76. *See id.* at 3.

77. For a thorough discussion of various types of site-blocking injunctions, see FROSIO & BULAYENKO, *supra* note 28, at 14–21. *See also* EUR. UNION INTELL. PROP. OFF, LIVE EVENT PIRACY: DISCUSSION PAPER 8–10, 95–110 (2023) [hereinafter LIVE EVENT PIRACY], https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2023_Live_Event_Piracy/2023_Live_Event_Piracy_Discussion_Paper_FullR_en.pdf; CORY, *supra* note 28, at 22–28.

78. *See* FROSIO & BULAYENKO, *supra* note 28, at 20.

79. *See* NIGEL CORY, INFO. TECH & INNOVATION FOUND., HOW WEBSITE BLOCKING IS CURBING DIGITAL PIRACY WITHOUT "BREAKING THE INTERNET" 12, 13 fig.2 (2016), https://www2.itif.org/2016-website-blocking.pdf; *see also* CORY, *supra* note 28, at 22–28; Michael Schlesinger, Vice President & Reg'l Legal Couns. for Asia Pacific, Motion Picture Ass'n, Site Blocking Global Best Practices, Intell. Prop. Ass'n of Japan Content and Law Symposium 4–9 (July 28, 2018), https://www.ipaj.org/bunkakai/content_management/event/pdfs/20180728/Schlesinger_20180728_2.pdf.

80. *See* FROSIO & BULAYENKO, *supra* note 28, at 20.

countries like Greece, Italy, and Indonesia.[81] More recently, there are even hybrid approaches, such as in Germany, where, since 2021, rightsholders and ISPs have worked voluntarily to address site blocking, with a specific review mechanism by the German Federal Network Agency.[82]

So, what are the facts one needs to know when considering judicial site blocking provisions?

III. FACT 1: PIRACY IS A CRIME WITH ACTUAL ECONOMIC HARM

It is surprising that this first fact was ignored or minimized in the early site blocking debates, although it is an axiom to those in the creative business. But, despite criminal and civil penalties for intellectual property theft existing since the 1700s,[83] in the early days of the internet and even beyond, many have argued that cyber theft is a victimless crime or even more insulting, that it somehow actually benefits the victims of the theft. One prominent scholar referred to pirate file sharing networks as simply a way to "sample music before purchasing it" and that such networks were a way to capture a treasure trove of

81. *See, e.g.*, FROSIO & BULAYENKO, *supra* note 28, at 20–21 (citing administrative authorities empowered to issue site-blocking injunctions); SECTION 512 REPORT, *supra* note 50, at 59 n.309 (citing countries that have some form of no-fault injunctive relief for piracy sites).

82. *See* Verhaltenskodex, Clearingstelle Urheberrecht im Internet [CUII] [Code of Conduct, Clearing Body for Copyright on the Internet] [Ger.], as amended Aug. 25, 2023, Art. 1(d), https://cuii.info/fileadmin/files/CUII_CodeofConduct_23.pdf ("Recommendations in favour of a DNS block will be forwarded to the [German Federal Network Agency] for the purpose of checking compliance with the requirements of net neutrality according to Regulation (EU) 2015/2120."). *Id.* at Art. 6(c) ("The Parties agree that the informal statement on Regulation (EU) 2015/2120 of the [German Federal Network Agency] . . . will be taken into account in the procedure."); *see also* Press Release, Bundeskartellamt [Federal Cartel Office] Has No Objections to Launch of Online Copyright Clearance System (Mar. 11, 2021), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/11_03_2021_DNS%20Clearingstelle.html?nn=55030 (Federal Cartel Office verifying the CUII creation process).

83. *See, e.g.*, Statute of Anne 1710, 8 Ann. c. 19 (Eng.), https://avalon.law.yale.edu/18th_century/anne_1710.asp ("[E]very such offender or offenders shall forfeit one penny for every sheet which shall be found in his, her, or their custody, either printed or printing, published, or exposed to sale, contrary to the true intent and meaning of this act . . . ."); Copyright Act of 1790, Pub. L. No. 1-15, § 2, 1 Stat. 124, 125 (holding an infringer civilly liable for "the sum of fifty cents for every sheet which shall be found in his or their possession"); Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (first criminal provision added to U.S. copyright law).

nostalgic music from the past with zero economic harm to anyone.[84] Others argued that jobs lost to piracy might be recreated elsewhere.[85] Several scholars have preferred to focus on the promotional value of the online theft.[86]

84. *See* LAWRENCE LESSIG, *Chapter 5: "Piracy," in* FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY (2005), https://www.authorama.com/free-culture-8.html *("There are some who use sharing networks to sample music before purchasing it*. Thus, a friend sends another friend an MP3 of an artist he's not heard of. The other friend then buys CDs by that artist. This is a kind of targeted advertising, quite likely to succeed. . . . *The net effect of this sharing could increase the quantity of music purchased. . . . There are many who use sharing networks to get access to copyrighted content that is no longer sold or that they would not have purchased because the transaction costs off the Net are too high***.** This use of sharing networks is among the most rewarding for many. Songs that were part of your childhood but have long vanished from the marketplace magically appear again on the network. (One friend told me that when she discovered Napster, she spent a solid weekend 'recalling' old songs. She was astonished at the range and mix of content that was available.) For content not sold, this is still technically a violation of copyright, though because the copyright owner is not selling the content anymore, the economic harm is zero . . . .") (emphases added).

85. *See* Kal Raustiala & Chris Sprigman, *How Much Do Music and Movie Piracy Really Hurt the U.S. Economy?*, FREAKONOMICS (Jan. 12, 2012), https://freakonomics.com/2012/01/how-much-do-music-and-movie-piracy-really-hurt-the-u-s-economy ("There are certainly a lot of people who download music and movies without paying. It's clear that, at least in some cases, piracy substitutes for a legitimate transaction . . . . In other cases, the person pirating the movie or song would never have bought it. This is especially true if the consumer lives in a relatively poor country, like China, and is simply unable to afford to pay for the films and music he downloads. . . . [E]ven in the instances where [i]nternet piracy results in a lost sale, how does that lost sale affect the job market? While jobs may be lost in the movie or music industry, they might be created in another. Money that a pirate doesn't spend on movies and songs is almost certain to be spent elsewhere.").

86. *See, e.g.*, Shijie Lu et al., *Does Piracy Create Online Word-of-Mouth? An Empirical Analysis in the Movie Industry*, 66 MGMT. SCI. 2140, 2140 (2020) ("Anecdotal evidence suggests that counterfeiting/piracy can help create online word-of-mouth (WOM) and through this boost demand, but how powerful is such WOM?"); Ernesto Van der Sar, *Piracy Can Help Music Sales of Many Artists, Research Shows*, TORRENTFREAK (Jan. 28, 2018), https://torrentfreak.com/piracy-can-help-music-sales-of-many-artists-research-shows-180128 ("According to the researcher, *the music industry should realize that shutting down pirate sites may not always be the best option. On the contrary, file-sharing sites may be useful as promotional platforms in some cases*." (emphasis added) (citing Jonathan F. Lee, *Purchase, Pirate, Publicize: Private-Network Music Sharing and Market Album Sales*, 42 INFO. ECON. AND POL'Y 35 (2018))); Matthew Greenberg, *The Economics of Video Piracy*, PIT J. (2015), https://pitjournal.unc.edu/2023/01/12/the-economics-of-video-piracy ("Since income is a very strong indicator of how likely a person is to pirate, few people would be paying if piracy was not an option. For these people, *piracy can actually benefit studios because illegally streaming or downloading may lead to future customers that previously would not have been able to see the content alternatively*. If the pirate likes the content, he will probably become a paying customer at some point." (emphasis added) (citations omitted)); Richie Hartig, *Combatting Internet Piracy: Is the Cost Too Great?*, U. CENT. FLA. STYLUS KNIGHTS WRITE SHOWCASE, Spring 2013, at 39, https://cah.ucf.edu/wp-

This is a little like suggesting that banks should be grateful to bank robbers for generating free publicity. While such arguments are rejected outright when it comes to physical goods, similar arguments in the context of online piracy are given legitimacy to otherwise obvious absurdities.

In 2001, Napster had seventy million users (about twice the population of California) worldwide, and was supporting those users' unauthorized use of 300 billion songs a year.[87] By 2004, online piracy had skyrocketed.[88] The Motion Picture Association ("MPA") reported in 2003 that movie piracy was reaching epidemic levels and causing increasing yearly losses.[89] But, lawsuits against the initial peer-to-peer services were met with public backlash as there was a true and sincerely held belief that file "sharing" wasn't morally wrong or akin in any way to theft.[90] Some well-known academics also supported this view.[91]

It is very hard to have a factual-based discussion on how to address a problem legislatively if your opponents won't even concede that a problem exists in the first place. Surprisingly, similar arguments are still prevalent today. These arguments focus not on the criminals but on the victims of the crime, positing that creators should just sell more content.

In a December 2023 congressional hearing on site blocking, a witness for the Computer & Communications Industry Association included an entire section of testimony under the topic "The *Best* Strategy Against Piracy is Facilitating Legitimate Access."[92] But, of course, creators want

content/uploads/sites/27/2019/10/KWS1_Hartig.pdf ("*Internet piracy actually helps spread interest of artists, songs, and movies. Initially a person may illegally download a song by an artist, but upon hearing the song, that person may in turn become a fan of the artist and purchase albums and tickets to live concerts*.") (emphasis added).

87. *See* Teach Democracy, *Digital Piracy in the 21st Century*, BILL OF RIGHTS IN ACTION (2008), https://teachdemocracy.org/online-lessons/bill-of-rights-in-action/bria-23-4-b-digital-piracy-in-the-21st-century.

88. *See* Guldberg & Sundén, *supra* note 50, at 14.

89. *Id*. at 18.

90. *See* Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235, 277–79, 303 (2014)

91. *See, e.g.*, *id.* at 279 (citing Stuart P. Green, *When Stealing Isn't Stealing*, N.Y. TIMES, Mar. 28, 2012, at A27).

92. *See Digital Copyright Piracy: Protecting American Consumers, Workers, and Creators: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 118th Cong. 28 (2023) [hereinafter *Consumers Hearing*] (emphasis added) (prepared statement of Matthew Schruers, President, Computer & Communications Industrial Association); *see also SOPA Hearing*, *supra* note 10, at 225 (June 23, 2011 Open Letter from Venture Capitalists). This letter implicitly argues that providing more options for accessing content legitimately will better address the piracy issue:

> The entire set of issues surrounding copyright in an increasingly digital world are extremely complex, and there are no simple solutions. These challenges are best

to facilitate legitimate access—they are in the business of selling their works to the public. Creators are constantly looking at newer and better ways to reach their consumers—today, there are over 1,000 legitimate streaming services worldwide.[93] It is extremely difficult, however, to compete against free.[94] Those hundreds of legal streaming services have not stopped criminals from wanting to profit illegally from stolen content or obviated the need for enforcement tools to prevent them from doing so.

The reality, of course, is that cybertheft of creative works is far from a victimless crime. It is a crime that affects not only large creators but the individual workers and industries that rely on them. The film and TV industry alone supports more than two million jobs annually and contributes $261 billion to the U.S. economy.[95] Piracy of filmed entertainment costs 230,00 jobs annually and drains at least 29.2 billion from the U.S. economy.[96] Many of these jobs are skilled-labor positions that support middle-class workers and that do not require a four-year college degree. The industry also supports a nationwide network of thousands of mostly small businesses that support production and distribution, representing every state in the country, with ninety-two percent of these businesses employing fewer than ten people.[97]

> addressed by imagining, inventing, and financing new models and new services that will allow creative activities to thrive in the digital world. There is a new model for financing, distributing, and profiting from copyrighted material and it is working—just look at services like iTunes, Netflix, Pandora, Kickstarter, and more. Pirate web sites will always exist, but if rights holders make it easy to get their works through innovative [i]nternet models, they can and will have bright futures.

Id. Yet, more than ten years later, legitimate options are ubiquitous, and the piracy problem persists.

93. Motion Picture Ass'n, Comment Letter per U.S. Trade Rep.'s Request on the 2024 Special 301 Out-of-Cycle Review of Notorious Markets, at 2 (Oct. 2, 2024), https://www.motionpictures.org/wp-content/uploads/2024/10/MPA_2024-Notorious-Markets-Final-10.2.24.pdf.

94. *See The Battle Against Digital Piracy: Why We Must Stop It in Its Tracks*, RIGHTSHERO (Apr. 18, 2024), https://rightshero.com/blandit-justo-phasellus-undo-aliquam-diam-molestie-vitae ("[P]iracy creates an uneven playing field for legitimate businesses, making it difficult for them to compete against free or pirated alternatives.").

95. *See The American Motion Picture and Television Industry: Creating Jobs, Trading Around the World*, MOTION PICTURE ASS'N 1–2 (2022), https://www.motionpictures.org/wp-content/uploads/2024/03/MPA_Economic_contribution_US_infographic-1.pdf.

96. *See* BLACKBURN ET AL., *supra* note 57, at ii; *see also* OFF. OF THE U.S. TRADE REP., EXEC. OFF. OF THE PRESIDENT, 2023 REVIEW OF NOTORIOUS MARKETS FOR COUNTERFEITING AND PIRACY 17 (2023), https://ustr.gov/sites/default/files/2023_Review_of_Notorious_Markets_for_Counterfeiting_and_Piracy_Notorious_Markets_List_final.pdf.

97. *See The American Motion Picture and Television Industry: Creating Jobs, Trading Around the World*, *supra* note 95, at 1.

Those are staggering numbers, but the personal stories of individual creators really strike a chord with most. As one creator effectively explained: "I can't go to the grocery store and buy groceries with love from a piracy fan. And I certainly can't get my next film funded on it."[98]

Also often overlooked in the discussion of online piracy are the related harms that may occur. Studies show that large-scale piracy operations harvest the personal data of unsuspected users, such as credit card accounts, passwords, and contact information. Consumers are nearly thirty times more likely to be exposed to malware on piracy sites than on general websites.[99] Other studies show that nearly eighty percent of ads on piracy sites expose users to viruses and malware,[100] while seventy-two percent of consumers have reported credit card fraud within a year after using a card to buy piracy services.[101]

Cybertheft of intellectual property is a crime that has real victims and real-world consequences that should not be minimized because the theft occurs online.

IV. FACT 2: EXISTING TOOLS ARE NOT SUFFICIENT TO ADDRESS ONLINE PIRACY

The other argument that is often made against new legislation to address piracy is that there are plenty of tools already in place. These

98. *Queen of Indie: Jane Clark Talks Piracy in the Indie Film Market*, MUSO MAG., https://www.muso.com/magazine/queen-of-indie-jane-clark-talks-piracy-in-the-indie-film-market (last visited Feb. 11, 2025); *see also Creator Spotlight with Multidisciplinary Artist Kendra Dandy*, COPYRIGHT ALL.: CREATOR SPOTLIGHT (Sept. 15, 2022), https://copyrightalliance.org/multidisciplinary-artist-kendra-dandy-creator-spotlight/.

99. *See* OFF. OF THE U.S. TRADE REP., EXEC. OFF. OF THE PRESIDENT, 2019 REVIEW OF NOTORIOUS MARKETS FOR COUNTERFEITING AND PIRACY 8–11, 11 n.24 (2019), https://ustr.gov/sites/default/files/2019_Review_of_Notorious_Markets_for_Counterfeiting_and_Piracy.pdf. *See generally* DIGIT. CITIZENS ALL., GIVING PIRACY OPERATORS CREDIT: HOW SIGNING UP FOR PIRACY SUBSCRIPTION SERVICES RATCHETS UP THE USER RISK OF CREDIT CARD THEFT AND OTHER HARMS 10–11 (2023), https://www.digitalcitizensalliance.org/clientuploads/directory/Reports/Giving-Piracy-Operators-Credit.pdf.

100. *See Piracy to Ads to Ransomware: Investigation Finds $121 Million in Dangerous Malicious Ads on Piracy Sites Designed to Trick Users into Infecting Their Devices*, DIGIT. CITIZENS ALL. (Sept. 15, 2022, 8:00 AM), https://www.digitalcitizensalliance.org/news/press-releases-2022/piracy-to-ads-to-ransomware-investigation-finds-121-million-in-dangerous-malicious-ads-on-piracy-sites-designed-to-trick-users-into-infecting-their-devices/.

101. *See Piracy Subscription Services Drive Credit Card Fraud and Other Harms to Consumers, New Digital Citizens Alliance Investigation and Survey Finds*, DIGIT. CITIZENS ALL. (June 21, 2023, 8:00 AM), https://www.digitalcitizensalliance.org/news/press-releases-2023/piracy-subscription-services-drive-credit-card-fraud-and-other-harms-to-consumers-new-digital-citizens-alliance-investigation-and-survey-finds.

arguments willfully ignore the relative infrequency of enforcement actions and the rapid pace of technological advancement. As noted above, in just the last decade or so, we have seen piracy change from physical shops/stalls to centralized Napster-like peer-to-peer "file sharing" to bit torrent swarm protocols, to illegal streaming, IPTV, and apps. Notice and takedown under the Digital Millenium Copyright Act ("DMCA") now numbers in the billions, with even the U.S. Copyright Office noting that the balancing of rights holder and technology companies' interests under the statute has become "askew."[102]

But during the U.S. debate about site blocking back in 2011, leading consumer and technology organizations argued that "[c]urrent enforcement mechanisms"[103] should be used to fight online infringement and that there is an "ample array of tools"[104] available to address piracy originating overseas.[105]

V. FACT 3: SITE BLOCKING IS SUPPORTED BY THE RULE OF LAW

Around the globe, courts and governments have ensured the site-blocking remedy is used judiciously to target only the most blatantly infringing sites and is implemented with extensive safeguards and due-process protections to ensure adherence to principles of free expression and the rule of law. The legal precedents ensuring compatibility with fundamental rights have been established at the highest levels (for example, and notably, the Court of Justice of the European Union in the

102. SECTION 512 REPORT, *supra* note 50, at 1, 197.

103. Letter from Ctr. for Democracy & Tech. et al., to Lamar Smith, Chairman, H. Comm. on the Judiciary (Nov. 15, 2011), https://cdt.org/wp-content/uploads/pdfs/Public_Interest_SOPA_Letter%20(1).pdf.

104. Professors' Letter in Opposition to "Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011," to Members of Congress (July 5, 2011) [hereinafter Professors' Opposition Letter], https://www.wyden.senate.gov/imo/media/doc/Law%20Professor%20Letter%20July%202011.pdf (A group of 108 academics and professors argued the Senate's PIPA bill was unnecessary because "copyright owners already have an ample array of tools at their disposal to deal with the problem.").

105. *SOPA Hearing*, *supra* note 10, at 140 (testimony of Katherine Oyama, Copyright Couns., Google, Inc.) (Google's now-Head of Global IP Policy argued the law was unnecessary because "if a site was primarily dedicated to infringement, there [are] a lot of tools . . . ."); Neil Stevens, *Tech at Night: Dangerous Internet Censorship Bill in the House, Spectrum Crunch Ideas, FCC Subsidies Advancing*, REDSTATE (Oct. 27, 2011, 1:00 AM), https://redstate.com/neil_stevens/2011/10/27/tech-at-night-dangerous-internet-censorship-bill-in-the-house-spectrum-crunch-ideas-fcc-subsidies-advancing-n40924 (Conservative thought leader blog and news site RedState argued legislation wasn't needed because "current laws do work."); Eric Chabrow, *Are Anti-Piracy Laws Really Needed?*, BANKINFOSECURITY (Jan. 20, 2012), https://www.bankinfosecurity.com/interviews/are-anti-piracy-laws-really-needed-i-1356.

Kino.to decision).[106] In the years since site blocking has been widely adopted, courts throughout the world have assessed human rights issues, including the rights of both ISPs and the general public, principles of net neutrality, and freedom of expression.[107] These decisions demonstrate that judicial site blocking provisions can safeguard against abuse and address concerns surrounding equitability and fairness, proportionality, and potential barriers to legitimate trade.[108]

Following the confirmation of such principles, ISPs and governments alike are now supporting the remedy as a proportionate and reasonable way to counter the wholesale piracy committed by pirate sites.[109] Over the years, many cooperative arrangements between the MPA and ISPs have emerged, often supported by their governments via codes of conduct. Examples include the United Kingdom, France, Germany, Netherlands,

106. *See* Colin Mann, *MPA Welcomes kino.to Decision*, ADVANCED TELEVISION (Mar. 27, 2014), https://advanced-television.com/2014/03/27/%EF%BB%BF-mpa-welcomes-kino-to-decision/. *See generally* Case C-314/12, UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, ECLI:EU:C:2014:192, ¶¶ 55–56, 63–64 & 66.2 (Mar. 27, 2014), https://curia.europa.eu/juris/document/document_print.jsf?mode=DOC&pageIndex=0&docid=149924&part=1&doclang=EN&text=&dir=&occ=first&cid=2819770 (confirming that site blocking is compatible with EU law and fundamental rights, and finding blocking measures need not be completely effective, as long as they seriously discourage internet users from accessing the illegal website in question).

107. *See, e.g.*, FROSIO & BULAYENKO, *supra* note 28, at 22–30 & 63–99 (citing EU case law); CORY, *supra* note 28, at 1, 14.

108. *See* FROSIO & BULAYENKO, *supra* note 28, at 22–30, 63–109.

109. Governments in various EU member states—Italy, Portugal, and Germany, among others—and in the APAC region—Australia, India, and Singapore—have voiced support for site blocking. *See* CORY, *supra* note 28, at 2, 5–6, 11. For example, Mitch Fifield, Australia's Former Minister for Communications & the Arts, said in 2018: "[W]here a site exists purely to facilitate piracy, and with judicial oversight playing a crucial role, the website blocking scheme has been very successful in further reducing copyright infringement." *Id.* at 5 (citing Mitch Fifield, *The Internet—Not an Ungoverned Space*, CONTENT CAFÉ, https://contentcafe.org.au/articles-stories-everything/the-internet-not-an-ungoverned-space/). In India, Justice Manmohan Singh, Delhi High Court, said in his seminal UTV judgment on April 10, 2019: "[W]ebsite blocking in the case of rogue websites, like the defendant websites, strikes a balance between preserving the benefits of a free and open [i]nternet and efforts to stop crimes such as digital piracy." *Id.* at 6 (citing UTV Software Commc'n Ltd. v. 1337x.to, 2019 SCC Online Del 8002, ¶ 86, https://www.cmu.edu/entertainment-analytics/documents/research-pdfs/indian-high-court.pdf). In Singapore, the Intellectual Property Office of Singapore remarked on July 19, 2018: "We are glad to see rights holders utilizing the [site blocking] legal framework that we have put in place to protect their copyright works." *Id.* (alteration in original) (quoting Irene Tham, *Singapore Allows Dynamic Site Blocking in Landmark Court Ruling*, STRAITS TIMES (July 19, 2018, 5:00 AM), https://www.straitstimes.com/singapore/singapore-allows-dynamic-site-blocking-in-landmark-court-ruling).

Denmark, and Sweden.[110] In fact, the European Commission, in May 2023, adopted the EU Recommendation on combatting live-events piracy, encouraging EU member states to make available in their national legislation efficient dynamic site-blocking procedures and calling on all stakeholders to work together cooperatively to block access to infringing sport and live event streams.[111]

In other jurisdictions, such as India, the courts have taken up the question of whether seeking blocking of a website dedicated to piracy makes one an opponent of a free and open internet, answering, "advocating limits on accessing illegal content online does not violate open [i]nternet principles," and "[t]he key issue about [i]nternet freedom, therefore, is not whether the [i]nternet is and should be completely free or whether [g]overnments should have unlimited censorship authority,

110. *See, e.g.*, Code of Practice on Search and Copyright (Feb. 17, 2017) [U.K.], https://assets.publishing.service.gov.uk/media/5a822976e5274a2e8ab57d27/code-of-practice-on-search-and-copyright.pdf (voluntary agreement between Bing, BPI, Google, Motion Picture Association, and certain members of the Alliance for Intellectual Property); Modèle D'accord Adopté en Application du IV de l'Article L. 333-10 du Code du Sport [Model Agreement Adopted in Application of IV of Article L. 333-10 of the Sports Code] [Fr.], https://www.arcom.fr/sites/default/files/2023-02/Arcom_modele_ accord_sport.pdf; Press Release, Arcom Blocking Mirror Sites: Promising Cooperation Between Arcom and Audiovisual Rightholders in an Effort to Step up the Fight Against Piracy (May 22, 2023) [Fr.], https://www.arcom.fr/sites/default/files/2023-09/Arcom-%20Blocking_mirror_sites_promising_cooperation_between_Arcom_and_audiovisual_rightholders_in_an_effort_to_step_up_the_fight_against_piracy.pdf; CUII, *supra* note 82, at 2 (listing parties to the agreement); Convenant Blokkeren Websites [Covenant Blocking Websites], TWEEDE KAMER 4 (Nov. 4, 2021) [Neth.], https://www.tweedekamer.nl/kamerstukken/detail?id=2021D41853&did=2021D41853 ("The Minister for Legal Protection and the Minister of Economic Affairs and Climate have set up a working group . . . . [Rightsholders and ISPS] have been asked to participate . . . in order to contribute to reducing piracy . . . ."); Code of Conduct for Handling Decisions on Blocking Access to Services Infringe Intellectual Property Rights, RIGHTS ALL. (May 18, 2020) [Den.], https://rettighedsalliancen.com/wp-content/uploads/2020/11/CoC_ENG.eksl_.Anneks.pdf, *revised further* September 5, 2022, https://rettighedsalliancen.com/wp-content/uploads/ 2022/09/CoC_ENG.inkl_.Anneks-5-september-2022.pdf (agreement between Telecom Industry Association and Danish Rights Alliance on blocking access to intellectual property infringing services); Överenskommelse Gällande en Förenklad Process för Blockeringsföreläggande [Agreement on a Simplified Solution for Injunction Proceedings Regarding Infringing Services], RÄTTIGHETSALLIANSEN (March 23, 2022) [Swed.], https://rattighetsalliansen.se/wp-content/uploads/2022/05/Agreement-.pdf (simplifying and shortening process for issuance of site blocking injunction).

111. *See* Press Release, European Commission, IP/23/2508, Commission Recommends Actions to Combat Online Piracy of Sports and Other Live Events (May 4, 2023), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_23_2508/IP_23_2508_EN.pdf; *see also Commission Recommendation (EU) 2023/1018 of 4 May 2023 on Combating Online Piracy of Sports and Other Live Events*, 2023 O.J. (L 136) 83, http://data.europa.eu/eli/reco/2023/1018/oj.

but rather where the appropriate lines should be drawn, how they are drawn and how they are implemented."[112] Today, technology companies that have vehemently opposed judicial site blocking are cooperating with requests to demote those blocked sites from their search results.[113] Site blocking provisions have also been included in some Free Trade Agreements.[114]

VI. FACT 4: SITE BLOCKING IS EFFECTIVE

The evidence shows that site blocking is effective both in reducing traffic to pirate websites and increasing the use of legitimate services. A site-blocking order applicable to the main access providers in a given country effectively reduces traffic to the targeted piracy domains in the period after blocking is implemented.

112. UTV Software Commc'n Ltd. v. 1337x.to, 2019 SCC Online Del 8002, at 67, https://www.cmu.edu/entertainment-analytics/documents/research-pdfs/indian-high-court.pdf.

113. *See* Charles H. Rivkin, *Working Toward a Safer, Stronger Internet*, MOTION PICTURE ASS'N (Mar. 21, 2022), https://www.motionpictures.org/press/working-toward-a-safer-stronger-internet/ ("Working with [the] MPA, Google has removed a substantial number of piracy-related domains from its search results . . . to help effectively enforce court orders requiring ISPs to block access to piracy sites. To date, Google has delisted search results for nearly 10,000 domains in response to these "no fault" orders directed at ISPs."); CORY, *supra* note 28, at 15 ("[S]ome search engines . . . have moved from outright opposition to acceptance, abiding by legislation or voluntary agreements to work alongside website-blocking regimes to remove or de-index piracy sites. . . . For example, Google has removed 'The Pirate Bay' from its search results in Brazil, France, the Netherlands, Norway, and elsewhere."); Jennifer Duke, '*From Enemies to Allies': Google Removes Piracy Websites from Search Results*, SYDNEY MORNING HERALD (May 13, 2019, 12:00 AM), https://www.smh.com.au/business/companies/from-enemies-to-allies-google-removes-piracy-websites-from-search-results-20190510-p51m55.html ("The tech giant has entered into a voluntary agreement to help stop the spread of illegally downloaded material by removing sites blocked by internet service providers from its search results, allowing copyright holders to avoid taking the US-based behemoth to court.").

114. The recently concluded UK-New Zealand Free Trade Agreement contains a 'blocking' obligation for the first time in any Free Trade Agreement (FTA). *See* Free Trade Agreement Between the Government of New Zealand and the Government of the United Kingdom of Great Britain and Northern Ireland (signed 28 February 2022, entered into force 31 May 2005), arts. 17.67, 17.81, and 17.82, https://www.mfat.govt.nz/assets/Trade-agreements/UK-NZ-FTA/NZ-UK-Free-Trade-Agreement.pdf. Language mirroring article 8.3 of the Information Society Directive is also included in the EU-New Zealand FTA. *Compare* Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, 18 (EC), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001L0029, *with* Free Trade Agreement Between the European Union and New Zealand [2024] O.J. (L 866) (signed 9 July 2023, entered into force 5 January 2024), art 18.53, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:22024A00866.

For example, blocking fifty-three piracy websites in the United Kingdom caused an eighty-eight percent drop in visits to the blocked sites and an eighty to ninety-five percent drop across user groups in other waves.[115] Additionally, analysis in Australia, Portugal, and South Korea found average drops in visits to blocked sites of between sixty and ninety percent.[116] Site blocking also increases traffic to legitimate content sources among former users of the blocked sites, as shown by research in the United Kingdom and Australia.[117] In the United Kingdom, along with a decrease in usage of pirate sites, blocks caused a seven to twelve percent increase in usage of paid legal subscription streaming sites like Netflix.[118] It also caused an increase in new paid subscriptions.[119] In

115. *See* Brett Danaher et al., *The Effect of Piracy Website Blocking on Consumer Behavior*, 44 MIS QUARTERLY 631, 637 (2020), https://www.cmu.edu/entertainment-analytics/documents/effectiveness-of-anti-piracy-efforts/uk-blocking-misq.pdf ("We see that the November 2014 blocks [of fifty-three sites] were effective at reducing visits to blocked sites. Visits to blocked sites dropped by 88% from the 3 months before the blocks to the 3 months after."). *Id.* at 639 ("Visits to blocked sites drop by 80% to 95% across the various groups, indicating an effective block.") (citing data from 2012 and 2013 site-blocking waves); *see also* Rivkin, *supra* note 113 (citing peer-reviewed studies).

116. *See, e.g.*, MOTION PICTURE ASS'N, MEASURING THE EFFECT OF PIRACY WEBSITE BLOCKING IN AUSTRALIA ON CONSUMER BEHAVIOR: DECEMBER 2018, at 4 (2020) [hereinafter AUSTRALIA BLOCKING SUMMARY], https://www.mpa-apac.org/wp-content/uploads/2020/02/Australia-Site-Blocking-Summary-January-2020.pdf ("Average visitation to blocked sites declined sharply for the treatment group, with visitation to this group of sites was [sic] down 61% overall from the pre-period to the post-period."); INCOPRO, SITE BLOCKING EFFICACY—KEY FINDINGS: AUSTRALIA 2 (2018), https://creativecontentaustralia.org.au/wp-content/uploads/2021/03/INCOPROAustralianSiteBlockingEfficacyReport-KeyFindingsJuly2018FINAL.pdf (report prepared for Australian Screen Ass'n) ("Site blocking in Australia has resulted in an overall usage reduction of 68.7% to blocked sites when comparing usage recorded in April 2018 to before blocking took effect. Usage has decreased for each blocking wave implemented in the country."); INCOPRO, SITE BLOCKING EFFICACY IN PORTUGAL: SEPTEMBER 2015 TO OCTOBER 2016, at 2 (2017), https://www.incoproip.com/wp-content/uploads/2020/02/Site-Blocking-and-Piracy-Landscape-in-Portugal-May-2017.pdf (industry research report) ("The findings in this report show that overall the blocks have had a positive impact, reducing the usage in Portugal of the websites targeted by the blocking orders in Portugal by 69.7%."); MOTION PICTURE ASS'N, MPA STUDY ON SITE BLOCKING IMPACT IN KOREA: 2016, at 1 (2017), https://www.mpa-apac.org/wp-content/uploads/2018/05/MPAA_Impact_of_Site_Blocking_in_South_Korea_2016.pdf ("The Level 1 impact was clear: visits to blocked sites had declined on average 90% as of three months after a block (97% after Wave 1, 93% after Wave 2 and 79% after Wave 3) . . . . Total visits to piracy sites declined following each wave of site blocking.").

117. *See* Danaher et al., *supra* note 115, at 646 ("We observe that [the 2014 blocking of fifty-three major piracy sites in the United Kingdom] causally increased usage of paid legal streaming sites."); s*ee* AUSTRALIA BLOCKING SUMMARY, *supra* note 116, at 1 ("For users of sites targeted for blocking, traffic to legal content viewing sites increased by 5% in the post-period following the blocking.").

118. Danaher et al., *supra* note 115, at 633, 649.

119. *Id.* at 631.

Australia, in December 2018, 233 piracy domains were subject to blocking, the largest single wave of site blocking in the country at that point.[120] For users of targeted sites, site blocking caused traffic to legal content viewing sites to increase by five percent in the post-period following the December 2018 wave.[121]

Study after study has shown that site blocking is effective when strategically utilized (such as with simultaneous blocks) and has the added benefit of steering consumers to legitimate content.[122] Most recently, a February 2024 report in the *Harvard Business Review* summarized blocking studies that had been published in peer-reviewed journals and subsequent follow-ups, confirming that the increase in legal consumption is replicated globally from India, Brazil, and the United Kingdom with statistically significant results.[123]

VII. FACT 5: SITE BLOCKING WON'T BREAK THE INTERNET

It seems obvious now that judicial site blocking won't break the internet or stunt its growth. It is still alive and kicking.

Since 2012, 90,000 domains used by over 27,000 pirate websites have been blocked globally[124] while the internet has thrived with over twice the number of internet users, hundreds of legitimate streaming services worldwide, and lightning-fast internet speeds that are far faster than they were in 2010.[125]

So, with those facts as a backdrop, what we have learned over the past thirteen years is that the fifty-plus countries that have adopted site blocking provide a very effective model for discussions in the United

120. AUSTRALIA BLOCKING SUMMARY, *supra* note 116, at 2. *See generally id.* at 11–12 (listing sites blocked in December 2018).

121. *Id.* at 1, 7.

122. *See, e.g.*, FROSIO & BULAYENKO, s*upra* note 28, at 58–59; Brett Danaher et al., The Impact of Piracy Website Blocking on Legal Media Consumption 3–4, 22 (Feb. 12, 2024), http://dx.doi.org/10.2139/ssrn.4723522; LIVE EVENT PIRACY, *supra* note 77.

123. Danaher et al., *supra* note 59 ("What we found is that the results from website blocking in India and Brazil are consistent with what happened in the UK: The blocking caused a decrease in piracy and an increase in legal sales.").

124. *Consumers Hearing*, *supra* note 92, at 35 (prepared Testimony of Karyn A. Temple, Senior Exec. Vice President & Glob. Gen. Couns., Motion Picture Association; Former Reg. of Copyrights and Dir., U.S. Copyright Office).

125. *See generally UK Internet Speeds from Past to Present*, AIRBAND (Mar. 2, 2022), https://www.airband.co.uk/uk-internet-speeds-from-past-to-present/ (describing a marked increase in average United Kingdom internet speeds between 2017 and 2022).

States and globally when considering legislation to authorize judicial site blocking.[126]

VIII. KEY PROVISIONS

A. Must Be Directed Only at the Worst Illegal Actors

There was some confusion during early decisions around site blocking in the United States whether *legitimate* sites that might include some small amount of infringing material would be targeted.[127] The answer, based on over a dozen years and multiple countries, is an unequivocal no.[128] These provisions should only target true pirate websites that are wholly dedicated to infringement of creative content. It is not an appropriate remedy for sites, such as those that host user-generated content, which have large volumes of non-infringing material but also include some infringing material.

Countries around the world have addressed this issue by defining sites subject to blocking as those that are structurally infringing or those that have a primary purpose or primary effect to infringe or facilitate infringement of copyright.[129]

B. Must Include Due Process Procedures

Commentary during the initial site-blocking discussions in the United States expressed serious concerns that earlier versions of the bills permitted certain enforcement actions without the need for a court order/hearing.[130] While those provisions were quickly modified, the initial suggestions were considered an example of overreach and failure to properly consider the importance of the internet to consumers in everyday life.[131] Site-blocking regimes that have been successful across

126. *Consumers Hearing*, *supra* note 92, at 35; *see* CORY, *supra* note 28, at 4 ("[W]ith dozens of democratic, human-rights-respecting countries using website blocking against thousands of piracy websites, it's clear that . . . these claims remain untrue . . . ."); *see also* CORY, *supra* note 79, at 18 ("[T]he growing use of website blocking since then shows that these claims were not based in reality and that website blocking did not 'break the [i]nternet,' nor lead to a multitude of other predicted dire outcomes, such as the widespread circumvention of blocking orders, the fragmentation of the global DNS namespace for the [i]nternet, an alternative DNS system for the [i]nternet, nor contribute to a breakdown in user trust and an exodus of users from the [i]nternet.").

127. *See* CORY, *supra* note 28, at 17.

128. *See id.*

129. *See, e.g.*, *Copyright Act 1968* (Cth) s 115A(1)(b) (Austl.) (as amended Oct. 14, 2024), https://www.legislation.gov.au/C1968A00063/latest/text.

130. *See, e.g.*, Professors' Opposition Letter, *supra* note 104.

131. *See id.*

the globe take these concerns seriously and ensure that appropriate due process provisions are included at the outset. As noted, major democracies have concluded these provisions are consistent with human and fundamental rights.[132]

Due process means that all parties would get advance notice of proceedings,[133] the right to participate and present evidence,[134] a decision by an independent federal judge, and the right to appeal any adverse decision. The website operator, the relevant intermediaries, and internet users all have the right to be heard.[135]

Before granting a site blocking order, a U.S. court would review the evidence against the illegal site to confirm that it is dedicated to piracy, that the plaintiff has a valid infringement claim against the site operator, and that site blocking is an appropriate remedy and can proceed.

These safeguards, which are also present in most site-blocking regimes, are an integral part of any successful legislation.[136]

C. Must Allow for Flexibility in Terms of Technology

Lawyers and judges are not technologists, and it is extremely important that enforcement tools that affect traffic on the internet are made by those with a deep understanding of its infrastructure. That is

132. In its notable *Kino.to* decision, the highest European court confirmed that site blocking is compatible with EU law and fundamental rights. *See supra* note 106; *see also* UTV Software Commc'n Ltd. v. 1337x.to, 2019 SCC Online Del 8002, UTV Software Commc'n Ltd. v. 1337x.To, CS (COMM) 724/2017 (consolidated), at 67 (Apr. 10, 2019) (Del. H.C.), https://www.cmu.edu/entertainment-analytics/documents/research-pdfs/indian-high-court.pdf (Justice Manmohan Singh of the Delhi High Court stating: "[J]ust as supporting bans on the import of ivory or cross-border human trafficking does not make one a protectionist, supporting website blocking for sites dedicated to piracy does not make one an opponent of a free and open [i]Internet. Consequently, this Court is of the opinion that advocating limits on accessing illegal content online does not violate open [i]nternet principles.").

133. *See, e.g.*, *Copyright Act 1968* (Cth) s 115A(4) (Austl.).

134. *See, e.g.*, *id.* at ss 115A(3), (9).

135. *See, e.g.*, *id.* at s 115A(4) (establishing notification requirements for website operators and other relevant intermediaries).

136. For instance, in Italy, before implementing a block, the Italian Communication Authority (L'Autorità per le Garanzie nelle Comunicazioni or AGCOM) sends a kick-off communication to the website operator, the uploader (if traceable), and the relevant ISP. *See* Allegato B alla Delibera 189/23/CONS: Regolamento in materia di tutela del diritto d'autore sulle reti di comunicazione elettronica e procedure attuative ai sensi del decreto legislativo 9 aprile 2003, n. 70 [Annex B to Resolution 189/23/CONS: Regulation on the protection of copyright on electronic communication networks and implementation procedures pursuant to Legislative Decree No. 70 of 9 April 2003], art. 7 (2023), (unofficial translation), https://www.agcom.it/sites/default/files/migration/attachment/Allegato%2031-7-2023%201690809543887.pdf. The regulation also provides for the possibility of appeal within five days. *Id.* Similar provisions exist in other administrative regulations.

why most site-blocking regimes do not mandate specific technologies intermediaries must employ to disable access to infringing sites.[137] Those decisions are best left to the ISPs and other intermediaries who know their infrastructure the best. This provides solutions that work for the ISPs/intermediaries and prevents over blocking.

In most cases, ISPs have typically employed DNS blocking to restrict access to piracy websites, but that decision is wholly within the hands of the ISPs.[138] Other techniques include IP address blocking and URL blocking.[139]

D. Must Share Cost Burdens Among the Participants

Several jurisdictions have addressed the potential costs of site blocking and have included that those costs should be appropriately shared. Internal infrastructure costs, to the extent there are any, are typically borne by the ISPs who have decided their own technological needs, while the operational costs are sometimes borne by the rights holders.[140] This strikes me as a reasonable solution that does not place the burden on one party.

137. In Australia, for example, the orders typically provide that "reasonable steps to disable access to the Target Online Locations" include "any one or more of the following . . . DNS Blocking . . .; IP Address blocking . . .; URL blocking . . .; [or] any alternative technical means for disabling access to the Target Online Locations as agreed." *See Roadshow Films Pty Ltd. v Telstra Ltd*. [2023] FCA 777 (7 July 2023), at ii, https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2023/2023fca0777. This flexibility is replicated in orders in Singapore, while in India, no method of block is specified, leaving it up to the ISPs to determine the appropriate method to comply with the orders. *See* C*opyright Act 2021* § 315 (Rev. Ed.) (Sing.), https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/sg/sg175en.pdf; Kushagra Singh et al., *How India Censors the Web*, 12TH ACM CONFERENCE ON WEB SCIENCE, July 2020, at 21, https://doi.org/10.1145/3394231.3397891.

138. In Germany, the CUII codex expressly limits voluntary site blocking to the technical means of DNS blocking. *See* CUII, *supra* note 82, at Art. 1(b).

139. *See, e.g.*, LIVE EVENT PIRACY, *supra* note 77, at 48–55 (discussing types of blocking technology); FROSIO & BULAYENKO, *supra* note 28, at 16 ("Internet site-blocking injunctions can be implemented through DNS blocking, IP address blocking, or through uniform resource locator (URL) filtering.").

140. *See* Cartier Int'l AG v. British Sky Broad. Ltd. [2014] EWHC (Ch) 3354, [2015] 1 All ER 949, *affirmed* [2016] EWCA (Civ) 658, ¶ 240, https://knyvet.bailii.org/ew/cases/EWHC/Ch/2014/3354.pdf ("I also adhere to the view that, for the reasons I gave in *20C Fox v BT* (*No 2*) at [32], the ISPs should generally bear the costs of implementation as part of the costs of carrying on business in this sector. Indeed, it seems to me that my reasoning is supported by the subsequent judgment of the CJEU in *UPC v Constantin* at [50].").

E. Must Allow for Efficient Updating [Dynamic Site Blocking]

As discussed, the internet and technology advance rapidly. Often, laws proposed to apply to the internet are outdated before the ink on the President's signature is dry. That is why it is important to future-proof these laws as much as possible at the outset. Many countries have recognized that pirates seek to evade site-blocking orders by switching domain names and IP addresses regularly. If the procedure restarts every time a pirate site switches its website domain name, the burdens could unintentionally outweigh the benefits. That's why many countries have now adopted what is known as dynamic site blocking, where a streamlined procedure is in place to update site blocks as pirates seek to evade them.[141] Other countries such as Ireland, Portugal, the

141. For example, dynamic blocking regimes are operating in the following countries: **Denmark:** A dynamic judicial procedure was agreed to between rightsholders and Danish ISPs at the request of the Ministry of Culture in the "Code of Conduct for handling decisions on blocking access to services, infringing intellectual property rights." *See* FROSIO & BULAYENKO, *supra* note 28, at 2. A revised version of the Code of Conduct is publicly available online. *See supra* note 110.

Ireland:

> [It is ordered] that, pursuant to Section 40(5A) of the Copyright and Related Rights Act, 2000, within thirty working days, the Defendants block or otherwise disable access by their subscribers to the Infringing Websites, presently accessed by the domain names, IP addresses and/or URLs listed in Schedule 1 hereto, together with such other domain names, IP addresses and/or URLs used to access those Infringing Websites as may be reasonably notified by the Plaintiffs to the Defendants from time to time.

Jan. 15, 2018 Order issued in Twentieth Century Fox Film Corp. v. Eircom Ltd [2018] IEHC 54, at 3–4.

Italy:

> [T]he Court of Milan issued a dynamic blocking injunction ordering the blocking of current and future domain names and IP addresses of several IPTV services for illegal distribution of audiovisual content. The Court ruled that all the defendants, with their activity of 'intermediaries', are in any case subject to the dynamic injunction according to Article 156 et seq. Italian Copyright Act and Article 669bis et seq. c.p.c.

FROSIO & BULAYENKO, *supra* note 28, at 118 (explaining ruling in Tribunale di Milano – Ordinanza, 5 ottobre 2020, n. 42163/2019, R.G. Sky Italia, Lega Serie A v. Cloudflare).

Netherlands:

> In case [The Pirate Bay] operates via other/additional IP addresses and/or (sub)domains other than those mentioned under 4.2, *Ziggo and XS4All should block these other/additional IP addresses and/or (sub)domains within 10 days* after Brein as notified these by fax, registered letter or email to Ziggo and XS4All, counting from the day this message arrives with Ziggo/XS4 all of the correct IP addresses and/or (sub)domains.

HoF, Amsterdam, 2 Juni 6, ECLI:NL:GHAMS:2020:1421 (Ziggo/Brein), ¶¶ 4.2, 4.3, (unofficial translation), http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2020:1421.

Portugal: A civil site blocking process is available in a parallel administrative process: In its decision dated 27 March 2015 (PT IPR Court Lisbon, 27 March 2015, SportTV v ISPs and SEs, EN), the Portuguese Intellectual Property Court ordered—based on Sport TV's exclusive broadcast rights—the infringing site operators to cease making the programs of the Sport TV Channels available to the public, search providers to take appropriate delisting measures, and ISPs to adopt appropriate measures to block access to the infringing websites and any redirection from the infringing websites to others with identical content. Tribunal da Propriedade Intelectual [Intellectual Property Court] of 27-3-2015 in Proceedings No. 49/15.9YHLSB.

Spain:

> That, as a result of the above, the defendants are ordered . . . to block or prevent, by immediately putting in place the best technical measures and procedures available as the defendants may deem adequate, so as *to terminate or significantly reduce, in a real and effective manner, access by their respective clients, from the Spanish territory, to said websites with current main domain names . . . also including other domains, sub-domains and IP addresses which exclusive or main purpose would be facilitating access to said websites—such as websites used for circumventing or prevent blocking measures and allowing access to users from the Spanish territory.*

S.J.M. B. [Decision of Com. Ct. of Barcelona No. 6], Jan. 12, 2017 (No. 15/2018, ¶ C) (emphasis added) (Columbia Pictures Indus. Inc. v. Telefónica España), https://www.poderjudicial.es/search/AN/openDocument/9530a6114d481fa6/20180220, *amended by*, S.J.M. B., Feb. 20, 2018 (Appeal No. 666/2016, ¶ 4) (order clarifying Decision No. 15/2018) (unofficial translations), https://www.poderjudicial.es/search/AN/openCDocument/a0aa3efb1c75533353f9e1f51d00f019179e3f439af7b2cc; *see also* FROSIO & BULAYENKO, *supra* at note 28, at 95–96, 127–28 (summarizing previous case).

Sweden:

> Furthermore, it is clear that the different domain names and URLs used to give access to the services are continuously changing for the purposes of circumventing blocking measures. This signifies that an injunction encompassing solely the domain names and URLs specified in appendix 2 to the judgement of the Patent and Market Court would risk being ineffectual. The rightsholders have a legitimate claim to have an effective protection against continued copyright infringement (regarding the requirement of a high level of protection and effective protection see e.g. recitals 9–13, 58 and 59 of the Infosoc Directive). In a balancing of interests between the interests of the rightsholders and the contradicting interests that exist, the Patent and Market Court of Appeal, similar to the Patent and Market Court, finds that the injunction ought to encompass even the new domain names and URLs that are created and that give access to any of the services. An order regarding such domain names and URLs is accommodated within the general injunction from continuing to "medverka" to infringement in the copyright of the rightsholders' film works through a transfer to the general public via the following services: The Pirate Bay, Nyafilmer, Fmovies and Dreamfilm. It is also accommodated in the assessment of proportionality that the Patent and Market Court of Appeal has performed.

Netherlands and the European Union Intellectual Property Office have, in addition, implemented or explored specific procedures to address piracy of live content by developing live-blocking procedures that identify piracy occurring through set-top boxes and create the ability to respond in real time.[142]

F. Must Provide a Liability Bar That Is Reasonable

In the fifty-plus countries that have employed site-blocking regimes, there is not a single case of an ISP being sued for implementing a block. But it is worthwhile to ensure that ISPs who are not at fault for the pirate conduct receive limited immunity for implementing those court orders.

A narrow limitation on liability focused on the ISP's role in implementing site blocks may be needed—though the fact that there hasn't been extensive litigation anywhere in the world, even when those provisions do not exist, shows that the need is modest, and any immunity

Patent-ochmarknadsöverdomstolen [PMÖD] [The Patent Market and Appeal Court] 2020-06-09 PMT 13399-19, at 23–24 (Telia Sverige AB v. AB Svensk Filmindustri) (unofficial translation), https://www.domstol.se/globalassets/filer/domstol/patentochmarknadsoverdomstolen/avgoranden/2020/pmt-13399-19.pdf (Patent and Market Court of Appeals setting precedent by granting dynamic site blocking injunction); *see also* FROSIO & BULAYENKO, *supra* note 28, at 98, 128.

U.K.:

> It is ordered . . . [t]hat, within 10 working days of the date of notification, the Respondents shall block or attempt to block access to the Target Websites, their domains and sub-domains *and any other IP address or URL notified to them by the Applicants or their agents whose sole or predominant purpose is to enable or facilitate access to a Target Website.*

Nov. 17, 2017 Order, ¶ 1, Twentieth Century Fox Film Corp. v. British Telecomms. PLC (EWHC) (Ch) (Claim No. IL-2017-000002) (emphasis added);

> It is ordered . . . [t]hat the Respondents shall block or attempt to block access to the Target Website at the domains, sub-domains, URLs and/or IP addresses notified to them by the Applicants or their agents *whose sole or predominant purpose is to enable or facilitate access to the Target Website*, within 10 working days of the date of notification.

Feb. 25 2021 Order, ¶ 1, Capitol Records v. British Telecomms. PLC (EWHC) (Ch) (Claim No. IL-2018-000221) (emphasis added).

142. *See* FROSIO & BULAYENKO, *supra* note 28, at 39–41 (identifying Ireland, Spain, and the United Kingdom); LIVE EVENT PIRACY, *supra* note 77, at 9 (identifying Ireland, Malta, the Netherlands, and Portugal); *see also* Joel Smith & Laura Deacon, *Live Blocking Orders: The Next Step for the Protection of Copyright in the Online World*, 39 E.I.P.R. 438, 438–40 (2017); Nedim Malovic, *The Evolution of Copyright Website Blocking in the UK: Live Blocking Orders*, 40 E.I.P.R. 810 (2018), https://ssrn.com/abstract=3348426.

provision should be extremely narrow so as not to affect existing copyright law.[143]

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We now have the fact-based data we need to prove to Chicken Little that the sky isn't falling—and never was. As stated at the outset, facts matter. And they matter even more in this age of online misinformation and political division.

143. In the landmark Newzbin2 decision, Justice Arnold provided a detailed ruling on the issue of indemnity. *Newzbin2* [2011] EWHC (Ch) 2714, [2012] 1 All ER 869. British Telecom (BT) requested an indemnity against losses. Justice Arnold concluded that there was no reason for the studios to provide an indemnity as BT was unlikely to suffer any losses as a result of complying with the court order. BT argued that it might suffer losses due to being attacked by hackers, to which Justice Arnold held:

> I see no reason why the Studios should indemnify BT against unlawful acts of third parties, particularly where BT is complying with a court order. As counsel for the Studios submitted, to grant such an indemnity in the circumstances of this case would be to encourage the very mischief sought to be remedied.

Id. ¶44. The second argument by BT was for possible claims by either subscribers or third parties. As to claims from subscribers, Justice Arnold held:

> For these reasons I do not consider that a BT subscriber could bring a claim against BT for breach of contract as a result of BT's compliance with the order. It appears unlikely that any subscriber would have a claim against BT for breach of contract anyway, for two reasons. First, BT's broadband service terms incorporate its Acceptable Use Policy. This states that "You must not infringe the rights of others, including … copyright". Thus[,] a subscriber could not claim against BT for being prevented from accessing Newzbin2 for the purpose of obtaining infringing content. Secondly, BT's terms contain a series of limitations and exclusions: paragraphs 7 and 8 in clause 1.1.1.24 provide that "we do not guarantee either the quality of the service or that the service will be available at all times" and "The quality of the . . . service is dependent on . . . other conditions or circumstances beyond our control", and paragraph 21 in clause 1.1.1.27 provides that "Unless we are negligent, our only responsibility is to pay you the rental credit as described in paragraph 19", which appears to apply only where there is a continuous total loss of service that persists for more than three days.

Id. ¶51 (alterations in original).