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Please direct all inquires to:

Illinois Business Law Journal
University of Illinois College of Law
504 E. Pennsylvania Avenue
Champaign, IL 61820
law-iblj@illinois.edu

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2011 BANKRUPTCY REVIEW: WHAT COMES DOWN MUST GO UP

Approximately five years after the United States economy took a nosedive, analysts have started to note possible signs of an economic turnaround. Unemployment claims are at their lowest level since 2008. U.S. GDP is in its tenth consecutive growth quarter. American retail spending is increasing. Additionally, President Obama stated his confidence in continuing economic growth. However, where does the fact that 2011 business and consumer bankruptcy filings were down (as compared to 2010) fall? Whether it is another encouraging signal that the bad economy is on its way out or simply has no correlation, bankruptcy filings this past year have fallen across the board.

Consumer Bankruptcy

Personal bankruptcy filings fell 12% in 2011, with only one out of every 175 Americans filing, compared to one out of 150 people in 2010. Coming off the heels of a steady rise in personal bankruptcy filings from 2005-2010, the American Bankruptcy Institute (ABI) had expected that trend to continue into 2011. The rise in filings during this period came despite the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act, which placed more restrictions on filing debtors. The ABI stated that the steady increase in filings was a result of high debt burdens along with stagnant income growth.
After the first six-months of 2011, the ABI credited the drop in bankruptcies to "continued efforts of consumers to reduce their household debt and [the] overall pull back in consumer credit." However, the months preceding June 2011 showed growth before consumer spending declined, even then only 0.2%. The

analyst associated with the growth study reasoned the decreased spending was the result of unemployment, stagnant wages, and fuel costs. As a result, the reasons given by the ABI for the increase in filings from 2005 to 2010 do not match up with the realities of a decrease in filings during 2011.

Though the economics of consumer debt and bankruptcy filings is complex (with experts voicing their dueling opinions over the matter) possible explanations exist for the 2011 bankruptcy filing decline. First, in the wake of lending disasters of the recent past, perhaps banks and lending institutions have been more stringent about consumer debt borrowing.[1] With less debt available to them, there are presumably fewer chances for consumers to default on loans, resulting in fewer bankruptcies. Second, the real estate market has been in a severe decline since 2006. The beginning of this decline was right before the real estate bubble popped and home mortgage lending was at its peak. Therefore, it is possible that banks holding onto non-performing or under performing mortgages do not have an interest in foreclosing on homes whose value far under secures their loan. Rather, these banks may be holding onto these mortgages to give the real estate market time to rebound, thus securing a higher return upon foreclosure at a later date.

Business Bankruptcy

The 12% decline in consumer bankruptcy filings this past year parallels the 14% decline in business bankruptcy filings (by a corporation, partnership, or an individual with debts predominately related to operation of business) for the same period. Even more impressive, publicly traded companies filed 86 times in 2011, compared to 106 filings in 2010, and 211 filings in 2009. Though down in number, the 2011 business bankruptcies eclipsed 2010 bankruptcies in pre-petition assets: $1.2 billion, compared to $840 million in 2010. While there were fewer bankruptcy filings, the increase in pre-petition assets involved means that the size of the bankruptcies, the value of them, actually grew approximately 70% in 2011.[2] Notably, there were several high-profile bankruptcies filed in 2011 including AMR Corporation (American Airlines), MF Global Holdings Ltd., Borders and Dynegy Holdings.

In 2011, a total of four financial-institution bankruptcies occurred (compared to ten in 2010). Furthermore, bank failings (receiverships handled by the Federal Deposit Insurance Corporation, a separate process than bankruptcy) in 2011 rested at 92, a significant reduction from 2010's 161. However, the relative health of financial institutions as a whole could have been caused by tighter consumer lending (mentioned above).

The decline in business bankruptcies might be related to the rise in out-of-court restructuring. Similar to consumer mortgages and loans, banks might be holding onto non-performing or under-performing business loans and favoring leniency and extended timeframes for defaults. This strategy allows banks to avoid dealing with the automatic stay of a debtor's assets, the attorneys' fees, and the multi-creditor concessions that accompany chapter 11 reorganizations. Another explanation for this decrease is that the balloon loans issued pre-2008 have not yet become due. This means that 2012 could have a significant increase in bankruptcy filings.

However, businesses that file for reorganization under chapter 11 do not always file due to insolvency, or even high levels of financial distress. Donald Trump, whose companies have filed for chapter 11 on four separate occasions, stated "I've used the laws of this country to pare debt. We'll have the company. We'll throw it into a chapter. We'll negotiate with the banks. We'll make a fantastic deal. You know, it's like on 'The Apprentice.' It's not personal. It's just business." This type of attitude may stem from the reality that companies who owe banks a lot of money are more likely to strike a deal with that bank. This allows these companies to reorganize. They receive post-petition lending and usually only need to acquiesce to a bankruptcy plan that pays well under what banks are owed. A bank is incentivized to agree to this type of out-of-court restructuring plan because it might want to preserve a business relationship with a promising businessman (like Trump). Another reason a bank may agree to such a plan is that keeping the debtor afloat may be the best way to get repayment. Either way, the attitude suggested by banks might indicate that the possible uptick in out-of-court reorganizations kept 2011 bankruptcies at bay.

What to Expect in 2012

Predicting a bankruptcy wave is a tough task. Several different factors come into play: the amount of money banks and other financial institutions are willing to lend financially distressed companies, the possibility of the economy landing in a double-dip recession, and the possible implications of the European debt crisis. While all these indicators are imprecise, the surge in filings during the last quarter of 2011 might serve as an excellent forecast for what is ahead in 2012. The United States' weak economy, feeble consumer spending, shaky junk-bond market, and increasingly tight lending practices may continue to threaten struggling companies into 2012. Lawyers are preparing for a big increase in bankruptcy work.[3] Jay Goffman, co-head of the Global Restructuring Group at Skadden, Arps, Slate, Meagher & Flom said "it's getting busier for everyone I know. I think 2012 will be a busy year and 2013 and 2014 will be extraordinarily busy years in restructuring."

For a successful restructuring, it is key that consumers have confidence in the economy and companies have easy access to lending. If consumers continue to stay frugal–keeping debt down and spending modestly—and financial institutions lend (appropriate) funds to restructuring companies, the 2011 trend of decreasing bankruptcies might just continue. If continued, the trend would allow consumers to fly on American Airlines to LAX (Twinkie in hand) to catch a Dodger's game, memorializing the event with their new Kodak camera.[4]

Update – 2012 So Far

After the first few months of 2012, the projections that bankruptcy filings would increase proved to be too generous. In fact, the "distressed state of the Chapter 11 industry" was discussed during the ABI's 30th Annual Spring Meeting in late April.[5] During a session titled "Is the Chapter 11 Industry Distressed?" Keith J. Shapiro, from the Chicago office of Greenberg Traurig LLP, said the people who represent distressed businesses in the future are "screwed."[6] Shapiro rationalized his statement by stating the downward trend in the duration of bankruptcy cases has affected the amount of work in the industry.[7] "This industry is driven by subtle changes in credit. The worst case for us is stability, and we're in year three of stability right now," explained Daniel F. Dooley of MorrisAnderson in Chicago.[8] Explained differently, the extended low interest rate environment, which allows over-leveraged companies to refinance and delay a bankruptcy filing (at least in the short-term), keeps corporate bankruptcy filings declining. Despite industry professionals' grim outlook on the future of chapter 11 work, out of court alternatives to bankruptcy, like receiverships, assignments for the benefit of creditors, foreclosures and out of court workouts, were noted during the session as increasing in popularity.

Data compiled by University of Illinois College of Law Professor Robert Lawless supports the concerns of bankruptcy attorneys that filings will continue to fall. After the first quarter in 2012, bankruptcy filings declined 12.8% overall as compare with this time last year. However, other sources report that the number of commercial filings for public companies in 2012 have rose, compared with 2011. Despite the doom and gloom of bankruptcy attorneys, it may be too early in the year to accurately gauge the future trends for bankruptcy filings.

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1 Of course, this argument might steer the other way; if banks allow more credit to consumers, perhaps consumers could pay down prior debts with the borrowed funds (though the healthy financial sector described below supports the former suggestion).

2 A few of 2011's "big-ticket bankruptcies" include AMR Corporation (American Airlines), MF Global Holdings Ltd., Borders Group, Inc. and Dynegy Holdings, LLC. *See* http://www.bankruptcydata.com/product_files/PR_010612.pdf.

3 Planning accordingly, 31% of lawyers said they plan to add legal jobs in the first three months of 2012, with bankruptcy among one of the strongest areas of growth. http://www.washingtonpost.com/business/capitalbusiness/lawyers-cautiously-optimistic-about-hiring-in-q1-arent-fox-adds-health-policy-adviser/2011/12/28/gIQAqwEeUP_story.html.

4 Parents companies for American Airlines, Twinkie, Kodak and the Los Angeles Dodgers filed for chapter 11 protections this past year. http://www.bankruptcydata.com/product_files/PR_010612.pdf.

5 Stephanie M. Acree, et al., *ABI Spring Meeting Focuses on Industry Trends, Asset Sales, Mortgage Crisis, BNA's Bankruptcy Law Reporter* (April 26, 2012).

6 Id.

7 Id.

8 Id.

REGULATING THE PIPE MARKET: THE UNINTENDED RIPPLE EFFECTS

This week, the authors of *SEC Enforcement in the PIPE Market: Actions and Consequences*are presenting their paper at the CFA-FAJ-Schulich Conference on Fraud, Ethics and Regulation. Their work discusses the SEC's early 2000s reforms affecting the PIPE (private investment in public equity) market. The SEC intended these reforms to "reduce the opportunities for investor stock price manipulation." This article contends (and the paper hints) that the SEC's efforts to crack down on this price manipulation not only had unintended deleterious effects on the PIPEs market but also had little impact on the intended target of the reforms—investor exploitation of companies seeking PIPE capital.

A PIPE transaction is a unique way for distressed companies to publicly solicit capital and external financing from privately-held investors, such as hedge funds and private equity funds. A PIPE is generally a good way for these companies to get "faster access to the cash they [] need." Plus, a PIPE can be "finely tailored to match the particular needs of a given investment." PIPEs are the sale of "unregistered securities by a public company to a selective group of individuals or institutions." These types of transactions are legal under Section 4(2) or Regulation D under the Securities Act. Structurally, "[t]he pricing of a PIPE is measured as the 'net discount' between the common equity share price and the PIPE-issued equity price." This discount results from two unique features of PIPEs transactions. First, since distressed companies use PIPEs as a way to get capital quickly, these transactions come at a premium as compared to traditional routes of financing. The second reason for the discount is that there is a time lag between the transaction and the investor's ability to resell or short the PIPEs securities purchased. This time lag is due to the need for SEC approval of the deal. Given this "temporary illiquidity," investors get a substantial discount on these securities.

A big criticism of the PIPE market, however, is that it results in the exploitation of the distressed companies issuing these securities. For example, "PIPE contracts often include too many investor-friendly cash flow and control rights . . . .[S]uch onerous contract design could allow investors, in particular hedge funds, to exploit issuers by pushing the stock price down (by shorting) and then receiving additional shares as contractual compensation for this price decrease." The SEC targeted its reforms at this potential price manipulation, particularly by hedge funds. "Importantly, the SEC did not launch its actions because the agency wanted to shut down the PIPE market as a whole, but rather because it wanted to reduce the usage of investor-friendly reprising rights and lack of trading restrictions in PIPE transactions."

With the goal of eliminating price manipulation, and thus returning some rights in these transactions to the issuers, the SEC focused on "removing aggressive repricing rights and regulating trading activities." Since price manipulation would be hard to claim and litigate in court, the SEC instead focused on "the act of shorting securities obtained in a PIPE offering, which is much easier to prove." To do this, the SEC filed lawsuits against different hedge funds alleging that these funds either illegally sold an unregistered security or engaged in insider trading. This method of reform resulted in expensive, protracted litigation, a successful deterrence measure for the rest of the hedge funds engaging in the PIPE market. Since the market responded positively, PIPEs done in the post-action period "were less likely to have the aggressive repricing rights . . . and more likely to include contract terms that restrict investors from trading the issuer's stock. " So these reforms resulted in what the SEC intended, right?

While at first glance it may seem that the SEC's targeted reforms and enforcement measures may have done a great, tailored job, a deeper examination finds that not only are there now "more investor protections and less issuer rights" in PIPEs contracts, but there were other unintended side effects of the enforcement that has impaired the PIPEs market.

The first possible issue with the SEC's tactics is that its reform measure of choice, suits against hedge funds for either insider trading or selling an unregistered security, largely failed to gain any traction in the courtroom. Using these proxies to try to prevent price manipulation was generally found to be too flimsy. In fact, there was really only one case, *SEC v. Berlacher*, where the court ruled in favor of the SEC. Further, this victory is nuanced from the vast majority of the similar suits filed against hedge funds since "[t]he court found that Berlacher and co-defendants had committed fraud, but only with respect to instances in which they represented themselves as having held no short position in the PIPE issuers' securities while they did in fact hold such a position." For most of the suits filed, this type of fraud was not alleged. Overall, this means that the SEC's failed courtroom campaigns changed the way PIPEs transactions were conducted. Despite its inability to win these cases in court, the SEC still achieved its end goal of standardizing "less aggressive repricing rights and more restrictions on trading."

While the impotent court campaign seemingly worked to stop the factors causing price manipulation, the results of these enforcement measures do actually beg the question of what the SEC's true goal was, and whether this goal was actually achieved. Was the SEC trying to just fix the price manipulation problem, or was it trying to aim bigger and give more power and rights to the troubled, issuer companies? Sure, the factors that could lead to price manipulation were basically stamped out by the SEC's reforms; however, the post-action period did not result in a power dynamic shift towards the issuer companies in these transactions. Hedge funds remained in power through increased investor protections and decreased issuer rights. So if the SEC was aiming big, it definitely failed to shift the power balance. Instead, power and control remains firmly in the hands of the investors, especially the big-player hedge funds. Through contractual arrangements in the post-reform period, the paper found that there were actually *more* investor protections and rights, and that the pricing of the PIPEs was even more favorable to the investor than before the SEC crackdown.

> [A]ll types of PIPE investors responded to the SEC's actions by substituting away from contractual rights that were under scrutiny towards other contractual rights that were not. Although such substitution may have left the aggregate level of investor-friendliness in PIPE structures unchanged, it was associated with marked modifications to the precise allocation of contractual rights. [I]nvestors could more often mitigate investment risks by exercising various investor-friendly contingent cash flow rights, without giving away similar rights to issuers.

It seems that basically, the parties just used contractual maneuvering to shift where the investors got these protections. The SEC reforms did not give any of the power back to issuers.

Additional unintended consequences resulting from the SEC's actions were seen in an increase in capital costs and the elimination of small players from this market. Since the reforms, issuers have relied more heavily on placement agents to get the deal done right. These agents cost money. Additionally, the PIPEs capital comes at a greater discount to the investors now than it did in the pre-action period. This means that to raise capital through PIPEs is now more expensive than it was in the pre-reform/enforcement period. In conjunction with the capital cost increases, the smaller players being driven out of the market leaves the big hedge funds as the solitary sources of capital for distressed companies. These big hedge funds have better bargaining power and get the most favorable treatment possible for themselves in these deals, leaving many of the most distressed companies unable to even enter such transactions. This narrowed the scope of which companies can actually seek PIPEs financing—a troubling by-product for a transaction that is meant to serve as a way to get easy capital for troubled companies.

In sum, it seems like the SEC did not fully think through their plan of attack before engaging in its reforms. While price manipulation is definitely less likely to occur, the byproducts of the SEC's actions have had a much more substantial impact to the PIPE market than the SEC anticipated. The ripple effect has left the PIPE market still dominated by the hedge fund players. It seems that in trying to reform the PIPE market, the SEC failed to fully take stock of the purpose of the PIPE market and, as a result, created a lot of unintended damage.

Related article: Ola Bengtsson, Na Dai & Clifford Chad Henson, *SEC Enforcement in the PIPE Market: Actions and Consequences* (April 3, 2012). Illinois Program in Law, Behavior, and Social Science Paper. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033950

GERMANY AND PATENTS: ALL THAT GLITTERS ISN'T GOLD

On April 2nd, Microsoft decided to move its European distribution center from Germany to the Netherlands. The decision was not the product of distribution logistics. Rather, Microsoft sought to avoid German patent law in advance of a pending April 17th opinion by the German patent courts. German patent law has made the country something of a patent shelter in Europe. Germany provides expedient decisions and easy-to-obtain injunctions that are hard to challenge for defendants. All that sounds fantastic until a corporation or small business is the target of those laws rather than the one benefitting. Furthermore, in these tough economic times, Germany's patent regime has broad consequences for economic and technological development.

Currently, two-thirds of all patent claims in Europe are filed in Germany. This fact is not surprising given all the seemingly positive aspects of German patent law and procedure. German patent judges are all also engineers who have specifically studied patent law. Cases are turned around in six to eight months with cases taking fifteen months in Dusseldorf. Appeals are completed within 1 to 1.5 years. However the most desirable aspect of the German patent system is the ease with which injunctions are granted. When a litigant succeeds in an action for infringement, an injunction is immediately available. This stands in contrast to America where an injunction will only be granted if a patent is deemed exploited and monetary damages remain the primary remedy. What makes these easily obtained German injunctions especially appealing is that the injunctions run while a case is up on appeal.

The German patent regime is also a fairly harsh place to mount a defense. Claims challenging the validity of a patent are brought in a separate court from those deciding infringement claims. These courts can take up to twenty months to reach a decision. An appeal can add another couple of years to that process. According to German lawyer Sabine Age, "[i]t is only in the cases where the patent is grossly invalid that German courts dismiss claims for preliminary injunctions . . . ." The German "Orange-Book" case provides an extra defense on patents that are essential to an industry standard and thus defined in terms of that standard. Under "Orange-Book," the attack against the injunction doesn't rely upon equity standards familiar in America like fairness and reasonableness but rather that frivolous patents related to industry standard essential patents constitute antitrust violations. Accordingly, one seeking to get an injunction dismissed must prove both that their license was made under fair, reasonable and non-discriminatory terms and that reasonable royalties were paid to the licensor. However, neither German civil law nor German courts have defined what "reasonable rates" are. Therefore, the Orange-Book defense is largely useless. Licensors can claim that royalties paid to them were not reasonable or they can simply set the price of their "reasonable" royalties to a rather high amount. With the threat of easily obtained injunctions looming, this creates an easy market for licensors to demand high royalties or pounce with injunctions.

While the German patent regime might seem desirable for patent-holders, the sting of the system is certainly harsh. After all, just ask Microsoft. However, German-nationals are expressing concern too. Johannes Sommer, Managing Director of Bundesverband Informations- und Kommunikationstechnologie, an association of small and mid-sized business based in Hamburg, said of Germany, "[w]e are a very patent-holder friendly nation in Germany, to a fault." Sommer's comments reflect a concern that an overzealous patent regime will stifle technological innovation, particularly for small and mid-size businesses. There is certainly weight to that argument. The German system allows for expediently and easily obtained injunctions. Judges will only dismiss injunctions related to grossly invalid patents. The Orange-Book defense is largely unworkable; essential patent licensees accused of infringements have to prove fairly cryptic elements and are attacking their licensors as anti-trust violators rather than attacking the substance of the injunction itself. This is all fairly troubling considering the current global economic climate. Germany might be the economic titan of the European Union, but is a patent regime that hurts small and mid-size business wise? Could this be limiting growth across their economy? Further, it is concerning to see extremely large corporations like Microsoft smoked out of the nation by a harsh patent regime. If the patent regime both stifles domestic development and foreign investment, then it truly may be overly friendly to patent-holders to a fault.

PRETEXTUAL WIRETAPPING: RAJ RAJARATNAM AND PERFECT HEDGE

What do Raj Rajaratnam and a mafioso have in common? While that might be a loaded question, to direct the discussion, both have received similar treatment from the Federal Bureau of Investigation (FBI). Rajaratnam's recent conviction for securities fraud by way of insider trading came about through the use of evidence obtained by wiretapping. Wiretapping is a common technique used by the FBI to help build cases against members of organized crime under the Racketeer Influenced and Organized Crime Act (RICO). Referred to by the FBI as operation "Perfect Hedge," the United States has begun to use wiretapping to prosecute insider trading. Just last year, a federal judge upheld the use of wiretapping against Rajaratnam. Even though insider trading is not a crime that can support a wiretapping application, Rajaratnam's motion to suppress the evidence obtained from his wiretap was denied. The case of Raj Rajaratnam, which is currently on appeal in the Second Circuit, presents a tough dilemma. In today's "Occupy Wall Street" world, society has greater demands for fair dealing and justice in the financial services industry. At the same time, those working in business and finance are entitled to the same United States Constitutional protections as any other American. Perfect Hedge might have noble intentions, but how far should we go in investigating and prosecuting alleged white collar criminals?

"Perfect Hedge" was the brainchild of the New York branch of the FBI. Agents David Chaves and Patrick Carroll, heads of the securities and commodities fraud units, had received intelligence that surging profits in hedge funds were likely the result of endemic insider trading. The agents had learned that the hedge fund industry was becoming “similar to organized crime: insular and distrusting of the outside.” Therefore “Perfect Hedge” was designed to treat insider trading like organized crime and deploy techniques like wiretapping to uncover the evidence needed to prosecute.

Wiretapping refers to the “interception and capture” of wire, oral or electronic communication. Title III of the Omnibus Crime Control and Safe Streets Act (the Federal Wiretap Act) authorizes and governs wiretaps. Unquestionably, wiretapping is a great invasion of privacy. The wiretapped suspect has no way of knowing his or her communication is being monitored. Consequently, wiretapping is held to rigorous standards. Only the highest-ranked, specially authorized prosecutors can pursue an application for a wiretap. Wiretapping can only be used when other forms of investigation have proven to be ineffective or unsafe.

Further, wiretapping is limited only to crimes enumerated in Title III. Securities fraud and insider trading are not listed in Title III. Consequently, Rajaratnam moved to suppress the evidence of insider trading obtained from his wiretap. His motion was denied however because evidence of wire fraud and money laundering were the grounds under which the United States applied to wiretap. The United States District Court for the Southern District of New York held that incidental evidence obtained in a wiretap is admissible. Therefore, even though the FBI wiretapped Rajaratnam knowing they would obtain evidence of a crime not covered in Title III, the evidence was admissible.

“Perfect Hedge” is a troubling program. The American financial sector is under heavy scrutiny in today’s world. With frustrations rising during the

Recession, more and more Americans are calling for accountability from Wall Street. However, at what cost must accountability come? The decision on Rajaratnam's wiretap is concerning. Wiretapping is held to a higher standard than the typical investigatory search because of the extra requirements levied by Title III. The FBI tried to side-step Title III by applying for the wiretap under eligible crimes. This practice creates a case of what can best be described as pretextual wiretapping. The idea of a pretextual wiretap is disheartening. While insider trading is a detrimental and corrupt act, its status does not lessen the burden that pretextual wiretapping impinges upon American privacy.

Rajaratnam's initial wiretap decision currently awaits appeal in the Second Circuit Court of Appeals. Therefore, the pretextual wiretapping employed in "Project Hedge" may be overturned. However, regardless of whether the District Court is or is not overturned, transparency in business is an important societal interest. Regardless of the fate of "Perfect Hedge", Congress should strongly consider adding securities fraud and insider trading to Title III. Doing so would allow for insider trading to be legitimately wiretapped under the requirements of Title III. Accountability in business is commendable but highly invasive obstructions of American privacy under pretext are not.

WHAT'S MINE IS YOURS: TAKINGS AFTER KELO

"The sacred rights of property are to be guarded at every point. I call them sacred, because, if they are unprotected, all other rights become worthless or visionary." Supreme Court Justice Joseph Story, 1852.

Security in ones' property has been a fundamental tenant of our society since its inception. The Fifth Amendment enumerates this vital right and has served as a refuge against the government unjustly interfering with individual property rights for centuries. But, as judicial interpretation develops over time, a startling trend has emerged that could profoundly shape the future of the taking of private lands by the government. The landmark case of *Kelo v. City of New London* marked a radical shift in what could be construed as a legitimate taking based on a state's police power. (1) This ruling has resulted in many states drafting new legislation in an attempt to temper the controversial ruling. (2) Regardless of how the legislature approaches the issue, it is clear that the takings landscape has fundamentally changed in ways that were unintended and unforeseen. Have we entered an age of disintegrating property rights?

Turning Point

Takings are a vital component of many public improvement projects such as schools, bridges, and roads. However, courts have slowly expanded the justifications for takings to include more than pure public use situations. *Berman v. Parker* allowed the taking of a non-blighted department store in a blighted area because the government had adopted a legitimate end, in this case, slum eradication, and could use any means to fulfill it. (3) In*Hawaii Housing Authority v. Midkiff*, the government upheld the transfer of lands from the hands of the original owners to the leaseholders to prevent over concentrated land ownership in the area. (4) Both these cases exhibit takings of non-blighted lands that were then turned over for less than purely public interests. It is within this slow shift away from requiring purely public use that *Kelo* was decided.
Kelo established that the condemnation of non-blighted homes for retransfer to private urban redevelopment did not violate the "Public Use Clause" in the fifth

amendment of the constitution. (5) This ruling greatly expanded the uses the government could apply to justify a taking. As a result of this ruling, most states have introduced or passed legislation that limits or forbids condemnation for retransfer to private revitalization groups. (6) However, an analysis of the after affects show that "anti-*Kelo* legislation has been mostly utilized in States where revitalization condemnation has not been utilized and least successful where it has been most utilized." (7) Thus, the battle over takings remains in full force.

The Aftermath

Since the ruling in *Kelo*, significant expansion in what constitutes a valid taking has occurred in some states. In dealing with government-selected redevelopers, a New York court held potentially extortionist tactics to be acceptable. (8) The developer demanded substantial payments from certain parcel owners in exchange for not condemning their property. (9) When the parcel owners refused, the village condemned their property. (10) The court held no equal protection violation, nor any unconstitutional exaction. Thus, the condemnation of their parcels was valid.

(11) In conjunction with a massive Brooklyn renovation project, an entire neighborhood was condemned to make room for residential towers, a basketball stadium, and other amenities that would lead to primarily private, not public, gain. (12) Although the area could hardly be considered blighted, the court allowed the taking because they considered the issue to be one for the legislature, not the courts. (13) In a similar case that dealt with the same development, the court held sufficient public use even though the development primarily benefited Bruce Ratner, the developer behind the project. (14) In explaining the public use, the court held that the new sports arena was a well-established public use. (15)

Finally, a massive project to relocate the campus of Columbia University, a private university, was found to be valid even though a large part of the project required the government to exercise its eminent domain powers. (16) The court held that, "assistance to private as well as public universities constituted public uses." (17)

While these cases highlight situations found primarily in New York, a state notorious for its approval of nearly all takings, it still goes to show how little recourse property owners can have against takings if the state is pitted against them. Analysis of these cases seems to highlight the fact that once a trivial amount of public use is established, courts no longer look to the balance between public and private benefit.

Public Housing: An Easier Injustice

While not an actual taking in the traditional sense, government condemnation of public housing has expanded in startling ways. The Chicago Housing Authority ("CHA") has condemned all 53 of Chicago's public housing high-rises to make room for new developments. Residents have been forced to find other housing, many times to no avail due to the negative stigma that accompanies public housing residents. Although the condemnation was done in the name of better future housing for low-income residents, these benefits have been slow to develop, if at all.

Nearly two years after the projects were torn down, reports estimate that 2,202 families are still unaccounted for from an initial 16,500 originally displaced. Some of these families probably left due to dissatisfaction with the CHA, while others merely remain as question marks. Of those originally displaced families, only 11% currently live in the brand new mixed-income developments that replaced the torn down project housing. This has left a significant number of families to find housing using CHA waivers, or to merely abandon the program altogether and rely on family and friends for suitable housing.

These startling facts highlight just how far government can go to achieve what they consider to be a reasonable result. It is no surprise to find that a large portion of the condemned public housing high-rises were in Cabrini Green, a notoriously crime ridden area that borders some of Chicago's finest enclaves such as the Gold Coast. While the sole justification for condemning these properties surely was not some form of slum eradication, it begs the question of what did the CHA have to gain from their actions as opposed to what they had to lose by not acting.

The Time Is Now

As time passes after *Kelo* and legislatures and courts decide how to shape the future of their states property rights respecting takings, it is clear that a crucial juncture approaches. The ability to be secure in one's property could become a relic of the past if rulings like those in New York proliferate.

The justifications for the expansion of takings are not without merit. With municipalitiesstruggling to generate tax revenues and meet budget, it is understandable that they would welcome a potential savior under the guise of a large corporation's new business park or a high-rise development. But at what cost? Public use takings, and obviously condemnation of public housing, disproportionately affect poor and underrepresented groups. The potential scenario is a bulldozing of blighted housing for the benefit of private interests supported by a proclamation for greater public value. The issue presents a slippery slope, as greater deference is given to merely having a plan with little actual analysis of what the plan espouses or promotes, courts may begin to accept things at face value. Once this occurs there is little turning back due to settled expectations and judicial deference to the matter.

Firmness must come from the legislature. Those in power have the ability to shape future legislation to create fairness and justice within the takings doctrine. The legislature can establish bright line rules that guide courts to establish reasonable bounds that will ensure property owners feel safe in their rights. *Kelo* greatly shook every property owner's security in this fundamental right; it is now time for state legislatures to respond accordingly to re-instill confidence for every citizen.

Footnotes:

1. Steven J. Eagle, Steven J. Eagle on Eminent Domain for Urban Revitalization Five Years After Kelo, Matthew Bender & Company, Inc., 2010, at 2, available at LexisNexis 2010 Emerging Issues 5280.
2. Id.
3. Berman v. Parker, 348 U.S. 26, 35 (D.C. 1954)
4. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (Haw. 1984)
5. Kelo v. City of New London, 545 U.S. 469, 486 (Conn. 2005)
6. Steven J. Eagle on Eminent Domain for Urban Revitalization Five Years After Kelo, at 2.
7. Id.
8. Didden v. Village of Port Chester, 322 F. Supp. 2d 385, 389 (S.D.N.Y. 2004)
9. Id. at 388.
10. Id.

11. Id. at 390.
12. Goldstein v. New York State Urban Development Corp., 921 N.E. 2d 164, 167 (N.Y. 2009)
13. Id. at 190.
14. Goldstein v. Pataki, 516 F.3d 50, 64 (N.Y.S.D. 2008)
15. Id.
16. Kaur v. New York State Urban Development Corp., 892 N.Y.S.2d 8, 28 (N.Y. App. Div. 2009)
17. Id. at 29.

UNITED STATES' LAST CHANCE TO SAVE COTTON SUBSIDIES?

According to the Congressional Research Service (CRS), over the past ten years the United States has given about 24 billion dollars worth of cotton subsidies despite the fact that the World Trade Organization (WTO) ruled that United States cotton subsidies are illegal.1

The WTO's dispute over United States cotton subsidies started in 2002 when Brazil brought a lawsuit against the United States. Brazil claimed that the United States failed to comply with its commitments made in both the Uruguay Round Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures, which sought for WTO member nations to reduce agricultural subsidies. In 2004 the WTO found that United States cotton subsidies were inconsistent with WTO commitments and recommended the subsidies be removed in a reasonable amount of time. Specifically, the WTO found payments to cotton producers under the GSM-102 program, a United States Department of Agriculture (USDA) program used to provide guarantees for credit extended by U.S. banks or exporters to approved foreign banks for purchases of U.S. agricultural exports, were illegal.2

The WTO only prohibits subsidies it finds to be distorting trade and hurting farmers in other countries. The WTO found American cotton subsides were having a distorting effect on the international market by encouraging American farmers to grow more than the equilibrium supply of cotton, thus lowering the world price of cotton. The WTO also found the United States has been export dumping its surplus cotton into the world market, making it difficult for farmers of other countries to compete against the cheap American cotton on the international market.

In 2005 the United States made several changes to its cotton subsidy program; however, Brazil argued these changes were not adequate and brought another suit against the United States. In 2007 and 2008, the WTO found United States cotton subsidies were still inconsistent with WTO commitments.3 Once again the United States did not comply with the WTO ruling in 2008. In 2009, the Obama administration eliminated some cotton subsidies but they were found not to be trade-distorting subsidies that were ruled illegal by the WTO.4

The United States needs to take this current ruling seriously because Brazil now has the authority from the WTO to retaliate. In August 2009, a WTO arbitration panel was assigned to determine the appropriate level of retaliation. The WTO arbitration panel gave Brazil the ability to collect 147.3 million dollars in damages from the United States. The WTO arbitration panel also ruled Brazil would be entitled to the right to impose counter measures including punitive tariffs (upwards of 100%) and lift patent protections on 829 million dollars worth of U.S. goods, many of which are non-farm goods.5

Brazil gave the United States the option to comply with the WTO by April 2010 or face retaliation. In the last hours of negotiations between the United States and Brazil, the two countries reached a framework agreement where the United States agreed to pay Brazil 147.3 million dollars annually to provide technical assistance and capacity building for Brazil's cotton sector until the "cotton issue" is resolved. In return Brazil agreed to postpone the implementation of the 829 million dollars worth of counter measures. The framework is intended to delay any retaliation by Brazil until after the 2012 Farm Bill is evaluated.6

Even though the framework agreement between the United States and Brazil established that the United States would revisit the elimination of cotton subsidies in the 2012 Farm Bill, the United States missed a valuable opportunity to eliminate its cotton subsidies in an easier fashion when the United States Congress Joint Select Committee on Deficit Reduction, also known as the Super Committee, failed to act on the Senate and House Agriculture Committees proposal as well as any sort of proposal. The Senate and House Agriculture Committees proposal to the Super Committee would have included 23 billion dollars worth of cuts.7 This could have been the best and easiest way to eliminate cotton subsidies. If cotton subsidy cuts were included within the Super Committee recommendation it could have been couched as part of as a deficit reduction measure. Eliminating cotton subsidies via the Super Committee would have been undertaken in a 10-year period giving American cotton farmer the ability to slowly wean themselves off of cotton subsidies. The 10-year period would have given American farmers the ability to start growing other crop like organic cotton, since there is a demand in the cotton market.9 More importantly, the Senate and House Agriculture Committees proposal included a shallow-loss revenue insurance program, known as STAX, which was developed by the cotton industry to maximize use of limited budget resources and serves as a basis for the resolution of the United States-Brazil WTO cotton dispute.10

While it is possible that the United States could eliminate its cotton subsidies through a piece of legislation, it is more likely that the United States would have to eliminate cotton subsidies through the 2012 Farm Bill. Unfortunately, eliminating cotton subsidies through the 2012 Farm Bill is going to be a challenge. The 2012 Farm Bill unlike the recommendation of the Super Committee will be conducted as regular order. This means that the 2012 Farm Bill will have full hearings, full mark-ups, floor debates with amendments, passage, conference committee, more debate, amendments and votes.11 Unfortunately, 2012 is going to be short legislative year because of the congressional and presidential elections which is going to make it that much harder to eliminate cotton subsidies in the 2012 Farm Bill.

History also proves that trying to eliminate subsidies via the Farm Bill has been ineffective. In March 1996, Congress passed the Federal Agriculture Improvement and Reform Act of 1996, also known as the 1996 U.S. Farm Bill, which threatened to end dairy subsidies by 2003. Instead of enacting a market transition period that would end subsidies, the final bill actually increased dairy subsides. The same thing occurred when Republican presidents proposed cutbacks in the 1970s and 1980s. In each case a bipartisan coalition of agriculturalists in Congress rejected the administration’s plan immediately and then wrote their own Farm Bills to keep existing support levels intact.12

Even though the elimination of cotton subsidies is going to be challenge, the United States needs to wake up and realize the negative ramifications if the cotton subsidy issue is not taken seriously when the 2012 Farm Bill is debated and passed. If the United States fails to act and does not eliminate its cotton subsidies during a time where its economy is trying to gain momentum and increase growth, paying Brazil 147.3 million dollars a year can only hurt the United States’ chances of growth. If retaliation were to occur it would hurt the chances of growth even further by paralyzing the ability of the United States to effectively trade with Brazil, one of the United States’ biggest trading partners.

1 Randy Schnepf, Cong. Research Serv., RL32571, Brazil's WTO Case Against the U.S. Cotton Program (2010).

2 Id.

3 Id.

4 Roberta Rampton, *Obama farm subsidy cut won't revive Doha: experts*, Reuters, Feb. 25, 2009, http://www.reuters.com/article/2009/02/25/us-usa-agriculture-trade-idUSTRE51O6ES20090225

5 Randy Schnepf, Cong. Research Serv., RL32571, Brazil's WTO Case Against the U.S. Cotton Program (2010).

6 Id.

7 Alan Bjerga, *Farm Subsidies Divide Lobbyists in Debate over U.S. Budget Cuts*, Bloomberg, Nov. 1, 2011, http://www.businessweek.com/news/2011-11-01/farm-subsidies-divide-lobbyists-in-debate-over-u-s-budget-cuts.html.

9 *Organic Cotton Facts*, http://www.ota.com/organic/mt/organic_cotton.html

10 Forrest Laws*, Farm bill faces difficult road ahead*, http://insurancenewsnet.com/article.aspx?i d=323746

11 Id.

12 David Orden, Robert L. Paarlberg &Terry L. Roe, Policy Reform in American Agriculture: Analysis and Prognosis 10 (1999).

CUSHIONING THE IMPACT OF FIRST TO FILE FOR SMALL BUSINESSES: THE PROVISIONAL PATENT APPLICATION

On September 16, 2011, President Obama signed into law the Leahy-Smith America Invents Act ("AIA"), the most substantial change to patent law in the United States since the Patent Act of 1952.[1] Over the eighteen months following enactment, a number of alterations to the process that the U.S. Patent and Trademark Office ("PTO") uses to evaluate patent applications will take place. The single most significant effect of the AIA is the transition from a First to Invent ("FTI") patent system to a First to File ("FTF") patent system. Many commentators have noted the challenges that the FTF system poses to small businesses and entrepreneurs.[2] Indeed, small applicants, often operating on a limited budget and lacking the funds to fully pursue novel ideas, are at a significant disadvantage under FTF when compared with larger entities. However, the AIA is now the law of the land, and it behooves small applicants to implement the best possible methods to mitigate the disadvantages that FTF presents. To that end, it is likely that small applicants will come to rely increasingly on provisional applications to protect their intellectual property.[3]

A FTF system is, practically speaking, a race to the patent office. Under a FTF system, large, well funded entities like corporations and universities enjoy a marked advantage over small businesses, start-ups, and the archetypical lone inventor, compared to a FTI system. Consider the following hypothetical: A is a lone inventor, working out of her garage. B is an inventor employed by a major corporation. On January 3, A creates a patentable invention. On January 13, B independently creates that same invention. A needs four weeks to write her application and secure financing to pay the patent application fees. B's employer enlists the aid of an expert patent law firm to help with the application, and can immediately pay the application fees, allowing B's application to be submitted two weeks after B's discovery. B's company submits the application on January 27, while A's application is not submitted until January 31. Under a FTI patent system, A would receive a patent for the invention. Under a FTF system, B's company would be awarded the patent.[4]

Apart from any considerations of justice and fairness, a major problem with the FTF system is that it may dis-incentivize innovation. A primary purpose of granting patents, and the purpose described in the U.S. Constitution[5], is to encourage the free exchange of ideas by granting temporary exclusive rights to profit from those ideas. When a patent is published, others can engage in further development of the core ideas into new patentable technologies. By temporarily protecting the profit expectations of inventors, patent laws discourage keeping innovations and technologies secret. An FTI system supports this public policy goal by allowing inventors to discuss and publish their inventions prior to applying for a patent without sacrificing their intellectual property rights. A FTF system may reduce the level of protection available to inventors, discouraging them from freely discussing ideas in progress.

Some provisions in the AIA indicate an awareness of the challenges faced by small businesses under the new legislation. To supplement the pre-existing "small entity" class, who receive a 50% reduction on patent application fees, the AIA creates a "micro-entity" designation who pay only 25% of the standard application fees. Micro-entity status is limited to solo inventors who have filed fewer than four previous patent applications and have an annual gross income of less than three times the median household income as determined by the Bureau of the Census.[6] Institutions of Higher Education are also considered micro-entities. Further provision is made in the AIA for a report on the impact on small businesses of the changes to patent law. The report will be due to Congress on September 16, 2012.[7] These provisions constitute at least a token acknowledgement of the need for providing additional support and consideration for small businesses affected by the AIA.

What is a small business or an individual inventor to do under the AIA? One option to mitigate the negative impact of FTF is increased use of provisional patent applications.[8] Provisional applications allow a filer to establish a claim of priority for an invention without filing a full and exhaustive patent application. A provisional application is good for one year from the filing date, and any complete application for the same invention filed by the same inventor during that one year period will be treated, for the purposes of priority, as if it was filed at the time of the provisional application. In essence, a provisional application allows an inventor to hold his place in the priority line. Since a provisional application can be completed with less precision and has fewer components than a full application, it can be submitted more quickly and with greater ease. Provisional applications are not reviewed by the PTO, and do not require a claim, an inventor oath, or an inventor declaration.[9] Provisional applications can also be used to establish an extra year of patent protection in addition to the standard twenty year term.[10]

In addition to the time benefits of provisional applications, the financial impact of filing a provisional patent is lighter than that of a full application. As of September 26, 2011, the basic filing fee for a provisional patent is $250 plus a $50 processing fee, compared to a basic filing fee of $380 for a utility patent.[11] Also, while a full application for a patent requires payment of search, examination, and other incidental fees, a provisional application can be filed with no additional fees. Finally, since a provisional application requires a lessened standard of precision and may be subject to less scrutiny compared to a full application, it can be completed with lower or no attorney's fees.

For a lone inventor or small business, this lessened financial burden is key. While it might be difficult for a micro-entity (aside from Institutes of Higher Learning) to scrape together the fees for a full application, the fees for a provisional application might well be within their means. With rights to his or her intellectual property protected under the provisional application, an inventor will feel more free to seek outside investment to further develop the invention and the patent application without risking his patent. Investors, for their part, will be more likely to risk providing funding a full application if they know that rights to the invention are protected by a provisional application.

There are, of course, downsides to the provisional application process. First, when a full application can be filed immediately, there is no reason to pay the extra fee for a provisional application. More importantly for a small entity, the provisional application must enable the invention to be patented. The final form of the product or service to be marketed may be different from the first invention, and protecting the patent right would require a series of intermediary filings to protect the priority.[12] Each additional filing imposes additional costs on the inventor. Finally, the provisional application does not remove the barriers to free exchange of ideas that the FTF system erects. Allowing a provisional application may shorten the period in which an inventor feels unable to discuss or publish his invention, but it does not eliminate it, and an inventor may be inclined to secrecy in the important development phase for fear of losing his patent right to a competing early filer.

Provisional patent applications are already fairly common. In 2009, 486,499 total patent applications were filed, of which 134,438 were provisional.[13] As a result of the switch to a FTF system, that number will likely rise. It is conceivable that filing one or more provisional patent applications to secure priority will become de rigueur in the patent application process. While this may impose additional burdens on the PTO, any increase in applications will hopefully be offset by a decrease in challenges under the FTF system. While the FTF system unquestionably changes the patent game in significant ways, provisional applications help to level the playing field between large and small entities, and hopefully will be able to play some role in protecting the rights of inventors over corporations and in stimulating innovation through the free exchange of ideas.

As a new piece of legislation, AIA will likely evolve in the coming years as administrative regulations and court challenges arise. The report on small businesses due to be submitted next year hopefully will provide a better window into the effect of AIA on small businesses, and suggestions on how to mitigate the deleterious effects of the AIA on innovation. Until then, small entities must take whatever steps are advisable to protect their interests, and err on the side of caution with regards to submitting provisional applications early and often.

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[1] "Immediate and Delayed Effects of the America Invents Act," Steven J. Lee, *2011 Emerging Issues* 5897.

[2] For a selection, see "Patent Reform: America Invents Act for Small Applicants," Irene Keselman, *Patent Trademark and Copyright Law Daily* (Oct.

21 2011) and http://www.generalpatent.com/first-file-vs-first-invent-who-really-benefits-changing-u-s-patent-system.

[3] Of course, small entities remain subject to the challenges that they faced prior to the AIA, among which is the ability of a patent applicant with deep pockets to hire more and better patent lawyers, and the resources to market the end product more swiftly and effectively.

[4] This hypothetical, of course, assumes good faith by both parties. In a situation where one party claims that another patent is derived from their work, they may institute a derivation proceeding. This replaces the prior challenge system of interferences. While the process of a derivation proceeding s not entirely clear at this point, the fundamentally litigious nature of the action will likely favor parties with pockets deep enough to employ skilled advocates. See Leahy-Smith America Invents Act, Pub. L. No. 112-29 §3 125 Stat. 284 (2011).

[5] 1 U.S. Constitution §8

[6] 35 U.S.C. 11 §123(g) The median household income in 2010, according to the Bureau of the Census, was $49,445, meaning the gross income cut-off for micro-entity status in 2011 would be
$148,445. http://www.census.gov/hhes/www/income/data/statistics/index.html

[7] Leahy-Smith America Invents Act, Pub. L. No. 112-29 §31 125 Stat. 284 (2011)

[8]35 U.S.C. §111

[9] Chisum on Patents §11.02(i)

[10] 35 U.S.C. §154(a) 2-3

[11] http://www.uspto.gov/web/offices/ac/qs/ope/fee092611.htm

[12] "Conferences: Patent Reform Will Force Sequential, Broader Patent Application Filings by New Ventures," Tony Dutara, *Patent, Trademake, and Copyright Law Daily*, (September 6, 2011).

[13] 2009 Performance and Accountability Report available at http://www.uspto.gov/about/stratplan/ar/index.jsp

THE GREAT FIREWALL OF AMERICA: IS THE UNITED STATES ON THE ROAD TO BECOMING THE NEXT INTERNET VILLAIN?

In the past couple of months, two Congressional bills have been the subject of a heated debate between media industry giants and some of the world's largest technology companies: the Stop Online Piracy Act (SOPA) in the House and its Senate counterpart the PROTECT IP Act (PIPA). This legislation is meant to provide the Department of Justice and copyright holders with the ability to curb access to "rogue" foreign websites dedicated to infringing or counterfeit goods. Since the U.S. government does not have the power to take down foreign websites, this bill would grant it the ability to forbid Internet providers from allowing users to connect to those sites. While many entertainment and pharmaceutical companies are in support of these bipartisan bills, digitally oriented companies such as Google, Facebook, and Mozilla have publicly voiced their opposition. Although the problems the bill attempts to address – online piracy, copyright, and trademark infringement – are serious and present a number of enforcement challenges, this vaguely written, catch-all legislation is alarming in its reach.

Most would agree that copyright protection is important, without it, creativity would be stifled and innovation discouraged. For this reason, in 1998, the Digital Millennium Copyright Act (DMCA) was passed as a fairly new mode of communication (i.e. the Internet) threatened existing copyright protections. With copyright infringement laws already on the books, many are skeptical of SOPA (and PIPA) as a tool for preventing copyright infringement, and instead see it as an attempt by the government and corporations to censor the Internet. Under the existing "safe harbor" provisions of the DMCA, an Internet service provider (ISP) who acts in good faith to take down infringing content upon notice is not held liable for infringement. This provision immunizes sites that may unknowingly host infringing material uploaded by a user and has served as a cornerstone of the Internet's growth and success.

As originally written, SOPA departed from DCMA in several significant and problematic ways. If passed, ISPs would no longer have immunity and would be responsible for reviewing all registered domain names to ensure none are infringing on copyrighted material. The streaming of such material would become a felony, exposing sites such as YouTube to penalties if any of its users stream copyrighted material. Search engines would be required to block sites and links to infringing websites. In addition, payment processors and advertisers would be required to cease business with web sites the government has chosen to sue as well as any site that a private copyright or trademark owner claims is predominantly infringing. The impact this legislation would have on Internet intermediaries is quite significant. According to YouTube, 48 hours of video are uploaded to its site every minute, resulting in nearly eight years of content uploaded everyday. Under the original version of the bill, YouTube would have had the burden of checking every video uploaded to ensure that copyrighted materials were not being shared; failure to do so could have resulted in penalties or legal action. If passed, Google would not have been permitted to display "rogue" websites in their search results and PayPal would not be allowed to conduct monetary transactions for such sites.

The effects of SOPA are potentially far reaching. Requiring ISPs, search engines, payment processors, and internet advertisers to block access to a number of "blacklisted" websites would constitute a significant departure from the United States' long-standing policy of allowing these intermediaries to focus on empowering and facilitating communications rather than monitoring, supervising, and policing them. This policy has played a major role in advancing the Internet's uniquely decentralized structure which has served as a "global platform for innovation, speech, collaboration, civic engagement, and economic growth."

Critics of the bill worry about the potentially huge overhead costs necessary to monitor users as well as the daunting financial burdens and legal risks it would create for start-up companies. The bill would most likely discourage investors from financing a start-up site that could be shut down at any minute. In addition, SOPA also gives rise to serious First Amendment and due process concerns. PIPA would empower theAttorney General to create a list of blacklisted sites without a court hearing or a trial. SOPA went further and allowed private companies to sue ISPs for unknowingly hosting content that infringes copyright. The owner of a site could have his or her "property" taken without a fair hearing and a reasonable opportunity to present evidence on their behalf. Not only does this violate due process, it is also an unconstitutional restriction on freedom of speech. According to the Supreme Court, "governmental action suppressing speech, if taken prior to an*adversary proceeding* and subsequent judicial determination that the speech in question is unlawful, is a presumptively unconstitutional prior restraint." The Constitution provides that a court make a final determination that the material is unlawful "after an adversary hearing before the material is completely removed from circulation." Under these bills, websites could be taken down immediately upon the filing of an infringement claim; this clearly violates the Constitutional requirements that must be met before speech can be eliminated from circulation.

In response to the concerns voiced by critics, SOPA's primary sponsor, Representative Lamar Smith, issued a manager's amendment on December 12th which removed some of the original bill's egregious language in an effort to narrow it. In the amendment, Smith clarifies that SOPA's provisions will only apply to foreign rogue websites and will not cover any domestic sites such as YouTube, Facebook, and eBay. It states that the bill is not meant to create an obligation for websites to monitor all user content. It also proposes that all DMCA safe harbors remain in place for intermediaries, requiring ISPs to only take measures they determine to be the "least burdensome, technically feasible, and reasonable" to satisfy their obligations under the bill. Though the manager's amendment clarifies and makes changes to some of the more controversial provisions of the original bill, SOPA's problem is not in the details but in the core idea of creating an Internet blacklist.

While leading technology companies continue to assert that the modified version of SOPA does not go far enough in narrowing its definitions and curtailing its obligations, many of them have voiced their support for a more limited proposal. The Online Protection & Enforcement of Digital Trade Act (OPEN) is an alternative bill that would combat piracy in a more targeted manner. It would retain the "safe harbor" provisions of the DMCA, require "willful infringement" and a conclusive International Trade Commission (ITC) investigation before a foreign website can be labeled as "rogue." However, the enthusiasm over this bill is not shared by the entertainment industry which sees the proposal as "ineffective and believes that the ITC is slow and often biased in favor of tech companies over content originators."

Though online piracy and copyright infringement is a serious problem that needs to be addressed, SOPA and PROTECT IP appear to simply be a product of Hollywood's lobbying efforts rather than a carefully thought out plan to protect copyrights and trademarks. This is supported by the fact that the 32 sponsors of SOPA received four times as much in contributions from the entertainment industry than Internet companies. As stated in a joint letter by a number of Internet organizations to the House of Representatives' Committee on the Judiciary, congress should "consider more targeted ways to combat foreign 'rogue' websites dedicated to copyright infringement and trademark counterfeiting, while preserving the innovation and dynamism that has made the Internet such an important driver of economic growth and job creation." American intellectual property should be protected in a manner that does not suppress innovation and is compatible with freedom of speech and due process of law. SOPA, PIPA, and OPEN have become a hot topic in the past month and many hope that, once Congress reconvenes on January 23, legislators will take the time to fully consider the impacts of each proposal before casting their vote.