No. 11-704

IN THE

Supreme Court of the United States

PERFECT 10, INC., a California corporation,

Petitioner,

v.

GOOGLE, INC., a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement for the Petitioner was set forth at page iii of the Petition for a Writ of Certiorari and there are no changes to that statement.

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ARGUMENT

Respondent Google Inc.'s Brief in Opposition does not deny that the new requirement established by the Ninth Circuit's Opinion significantly alters a remedial scheme that has been operating for hundreds of years and makes it effectively impossible for copyright holders to stop the infringement of their intellectual property. The Ninth Circuit's decision to overrule the longstanding rule that a presumption of irreparable harm applies to preliminary injunctions involving copyright infringement claims, and instead require copyright holders to affirmatively demonstrate irreparable injury, will have the following negative consequences:

1) Massive infringers of copyright will be able to argue that their unlawful conduct should not be enjoined, because monetary damages are available. As a result, movie studios, recording companies, television studios, and other copyright holders will be unable to obtain a preliminary injunction. Instead, these copyright holders will be forced to go through years of litigation, without the ability to prevent ongoing infringement and with no guarantee that they will ever recover sufficient monetary damages. This country's creative industries will be substantially damaged by unimpeded infringement and jobs that are destroyed in the process will not return. In the end, no amount of monetary damages will be able to rectify the damage to this country's intellectual property caused by such infringement.

2) Courts will be able to deny claims for preliminary injunctive relief without addressing the merits of a copyright holder's claim, as occurred in the Ninth Circuit's

Opinion. Without prompt injunctive relief, copyright holders will be forced to expend significant time and attorneys' fees to litigate lawsuits against infringers through trial. As a result, copyright holders' businesses may fail before they ever obtain relief. Even if they prevail, copyright holders are unlikely to receive enough monetary damages to compensate for the harm to their businesses. It is for these very reasons that monetary damages historically have been deemed inadequate in copyright cases. *See* H. Tómas Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and The Inadequate-Remedy-At-Law Requirement,* 81 S.Cal.L.Rev. 1197, 1197 (2008) (**"The historical record shows that legal remedies were deemed categorically inadequate in copyright cases"**) (emphasis added). Nevertheless, the Ninth Circuit's Opinion chose to disrupt a remedial scheme that has been in place for hundreds of years. Finally, the federal courts will likely become even more backlogged because copyright infringement claims will be less likely to resolve at an early stage.[1]

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1. The facts surrounding this case demonstrate these very points. Petitioner Perfect 10, Inc. ("Perfect 10") filed its Complaint in this case on November 19, 2004. Perfect 10 alleged, among other things, that Respondent Google Inc. ("Google") was liable for copyright infringement because Google failed to expeditiously remove images that infringed upon Perfect 10's copyright works in response to notices sent by Perfect 10 to Google under the Digital Millennium Copyright Act, 17 U.S.C. §512 (the "DMCA"). Now, more than seven years later, and after expending millions of dollars in attorneys' fees, Perfect 10 has yet to receive an appellate ruling regarding whether it is likely to succeed on the merits of its copyright infringement claims or whether the notices it sent to Google complied with the DMCA, even though this case has twice been before the Ninth Circuit. Instead, in its 2011 Opinion, the Ninth Circuit declined to reach the merits of Perfect 10's

3) Because copyright holders will be unable to obtain preliminary injunctive relief, they will be forced to allow infringers to use their intellectual property through judicially imposed licenses, even if they ultimately

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copyright infringement claims because it held that "Perfect 10 has not demonstrated that it would likely suffer irreparable harm in the absence of a preliminary injunction." Petitioner's Appendix ("Appendix"), page 1a. The Ninth Circuit reached this holding even though Perfect 10 submitted vast evidence of ongoing harm to its business, demonstrating: (i) Google's ongoing display of 22,000 Perfect 10 thumbnails in Google's Image Search results; (ii) use of those thumbnails by Google users to view or download **tens of millions** of infringing full-size Perfect 10 Images; (iii) millions of downloads of full-size Perfect 10 Images using unauthorized passwords freely available from Google; (iv) Google's ongoing republication and display of tens of thousands of Perfect 10 Images from Perfect 10's DMCA notices; (v) the failure of Perfect 10's print magazine; (vi) Perfect 10's losses in excess of $60 million; and (vii) Perfect 10's impending bankruptcy. *See* Petition for Writ of Certiorari ("Petition") at 15-16 n.6. During oral argument, Judge Ikuta seemed to recognize the inevitability of injury to Perfect 10, stating that "if I can get it for free just by putting a model's name into the Google's search engine, why am I going to subscribe [to Perfect 10] and buy it. I mean, that has a lot of common sense appeal. ... They're [Perfect 10] losing more money more rapidly as the thumbnails increase." Transcript of April 11, 2011 Oral Argument Before the Ninth Circuit ("Transcript"), 21:20-23, 22:17-18, found at District Court Docket No. 1015-4, Exhibit 12 (filed October 24, 2011). Although trial is now scheduled for January 2013, it is unlikely that Perfect 10 will receive any monetary compensation, even if it prevails, until more than **ten years** after it filed this case. Copyright holders such as Perfect 10 should not be forced to suffer through massive ongoing infringement of their intellectual property, without the ability to prevent such infringement or obtain any relief until the conclusion of trial, because the defendants they are suing, such as Google, have substantial financial resources.

prevail. Such a remedy has neither been authorized nor contemplated by Congress and has never been recognized during more than 300 years of copyright law. *See* Petition at 17-18 and citations therein.

In addition to ignoring the significant harm that the Ninth Circuit's Opinion will inflict on copyright holders, Google fails to controvert the fact that the Ninth Circuit relied upon this Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) ("*eBay*"), to overrule the presumption of irreparable harm in copyright infringement cases only by misconstruing *eBay.* Google does not dispute that: (i) under *eBay,* courts must analyze each statute to determine whether Congress intended to make "a major departure from the long tradition of equity practice" [*eBay,* 547 U.S. at 391]; (ii) the Ninth Circuit failed to engage in this required historical analysis; and (iii) the analysis of "traditional equity practice" required by this Court in *eBay* establishes that the presumption of irreparable harm in copyright infringement cases was part of a long tradition of equity practice going back at least to the 17th Century. *See* Petition at 9-14. Instead, Google raises three different assertions, none of which provides a basis for this Court to deny certiorari. As explained below, this Court should grant Perfect 10's Petition even though there is no conflict among the circuits; resolution of the question in Perfect 10's favor will affect the outcome of the case; and the Ninth Circuit's Opinion is plainly incorrect.

Online piracy has been estimated to cost the American economy more than $100 billion each year.

There is no resolution of this problem in sight.[2] Under these circumstances, review by this Court is necessary to restore the long tradition of equity practice that applies to copyright infringement cases, protect the intellectual property of copyright holders, and combat the ever-increasing epidemic of Internet piracy.

I. GOOGLE'S MISTAKEN ASSERTIONS PROVIDE NO BASIS FOR THIS COURT TO DENY PERFECT 10'S PETITION FOR A WRIT OF CERTIORARI.

Google's Opposition advances three reasons in support of its contention that "[t]here is no plausible basis for certiorari." Opposition at 1. None of these reasons provides any basis for this Court to deny Perfect 10's Petition.

A. This Case Presents The Proper Vehicle For This Court To Address The Question Presented.

Google first asserts that this Court should deny Perfect 10's Petition because the Ninth Circuit's Opinion is consistent with those of other circuits that have addressed the question. Opposition at 6-8. On the contrary, this case is the proper vehicle to address the question presented because every circuit court of appeals that has addressed the issue has failed to engage in the historical analysis

2. The recent failure of Congress to pass either the Stop Online Piracy Act or the Protect IP Act, two bills which sought to address the problems of copyright infringement on the Internet, further demonstrates that any end to the ongoing erosion of protection for copyright will have to come from this Court. Google has led the opposition to both bills. *See* Statement of House Judiciary Committee Chairman Lamar Smith and January 19, 2012 article by Chairman Smith, attached hereto.

of traditional equity practice required by this Court in *eBay.* This is the only case, however, that has sought to raise this issue with this Court via a petition for writ of certiorari. If this Court does not accept Perfect 10's Petition, lower courts will continue to misconstrue this Court's *eBay* decision and continue to mistakenly deny requests for preliminary injunctions, and copyright holders will continue to suffer the harm described above.

Google's Opposition identifies three other appellate court decisions that it asserts have reached the same result as the Ninth Circuit's Opinion. *See* Opposition at 6-8, *citing Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010); *Bethesda Softworks, L.L.C. v. Interplay Entertainment Corp.*, 2011 WL 5084587 (4th Cir., Oct. 26, 2011) (per curiam); and *Robert Bosch LLC v. Pylon Manufacturing Corp.*, 659 F.3d 1142 (Fed. Cir. 2011). Certiorari has not been sought in any of these cases, however. Moreover, none of these cases engages in the historical analysis required by this Court in *eBay* and discussed in Perfect 10's Petition.[3] This case is the only vehicle currently

3. Google mistakenly contends that *Salinger* expressly stated that the historical argument advanced by Perfect 10 "has no merit." Opposition at 13, *citing Salinger,* 607 F.3d at 82. As a review of the Second Circuit's entire discussion makes clear, the *Salinger* court neither rejected Perfect 10's historical argument nor engaged in the analysis of traditional equity practice required by this Court in *eBay*:

> This is not to say that most copyright plaintiffs who have shown a likelihood of success on the merits would not be irreparably harmed absent preliminary injunctive relief. As an empirical matter, that may well be the case, and the historical tendency to issue preliminary injunctions readily in copyright cases may reflect just that. *See* H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and*

available for this Court to inform courts of appeal that they are misapplying the *eBay* decision and improperly overruling the longstanding application of the presumption of irreparable harm to preliminary injunctions involving copyright infringement claims.

B. A Decision By This Court Could Change The Outcome Of This Case.

Google next asserts that this case "does not merit review because no decision by this Court could change this case's outcome." Opposition at 9. Google is incorrect. In its appeal to the Ninth Circuit, Perfect 10 advanced numerous arguments supporting its contention that the District Court incorrectly ruled that Perfect 10 was not likely to succeed on the merits of its copyright infringement claims. During oral argument, the Ninth Circuit noted, and Google's counsel agreed, that the District Court had denied Perfect 10's motion for preliminary injunction, and ruled that Perfect 10 was not likely to succeed on the merits of its copyright infringement claims, **without even considering 95 DMCA notices sent by Perfect 10 to Google and at issue in the motion.**[4] The Ninth

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the Inadequate-Remedy-at-Law Requirement, 81 S. Cal. L. Rev. 1197, 1201 (2008) (concluding, after a thorough historical analysis, that "the historical record suggests that in copyright cases, legal remedies were deemed categorically inadequate").

Salinger, 607 F.3d at 82.

4. During oral argument, Judge Ikuta asked Google's attorney: "How about the 95 notices that [Perfect 10] claim[s] the district court overlooked in the preliminary injunction motion?" In response, Google's attorney conceded that "they've not yet been considered by the district court." Transcript, 25:11-16.

Circuit also raised significant questions about the District Court's rulings with respect to direct infringement,[5] contributory infringement,[6] and vicarious infringement.[7]

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5. Chief Judge Kozinski suggested that Google's display of full-size copyrighted Perfect 10 images hosted on Google's Blogger servers constituted direct infringement under the Ninth Circuit's "server test." Chief Judge Kozinski noted that "those images are on Google's own servers," and added: "So then you get to the other Perfect 10 case, right? Which talked about carrying things on, you know, a server." Transcript, 31:15-16, 31:20-22.

6. Judge Ikuta suggested that Google's ability to use image recognition technology to remove from its system images that infringed upon Perfect 10's copyrighted works appeared to satisfy the test for contributory copyright infringement:

> They [Google] now really assisted all of these infringing sites to multiply themselves immensely. I don't think there can be a big dispute about that. And, then, Perfect 10 says, well, look, you have this similar images search. You could go through and get all of the images that they've indicated are infringing, that only they have the right to display, and you could block all those URLs.
>
> That argument has some appeal given Google's current existing technology that it's using. . . .Does [Google] know of the infringement? Yes. And could it take steps to block these sites. And they argue, yes, they have the technology already.
>
> Why doesn't that meet the contributory infringement standard or test?

Transcript, 26:15-27:4. Judge Ikuta also recognized that the District Court had overlooked significant evidence of Google's ability to use image recognition technology to remove the infringing material. Transcript, 29:3-11.

7. Several judges questioned whether Perfect 10 had established that it was likely to succeed on the merits of its claim

Nevertheless, because the Ninth Circuit's Opinion overruled its longstanding rule applying the presumption of irreparable harm to copyright infringement claims, it did not address the District Court's failure to rule on whether the 95 DMCA notices at issue were compliant or the merits of Perfect 10's claims. Instead, the Ninth Circuit held that "[b]ecause Perfect 10 has failed to show irreparable harm, we need not address its likelihood of success on the merits." Appendix, page 12a n.3. If this Court grants Perfect 10's Petition and reinstates the presumption of irreparable harm, the Ninth Circuit would be required to address the merits of Perfect 10's copyright infringement claims. Perfect 10 would then be

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that Google was vicariously liable for hosting infringing images on its servers while placing ads around those images. For example, Judge Ikuta asked Google's attorney:

> Could you address the district court's discussion on the vicarious liability on the financial benefit and whether the use of [Google's] AdSense and the clicks is enough to give a direct financial or a direct enough financial benefit?

Transcript, 32:13-17. After Google's attorney responded, Judge Ikuta continued:

> So, the images of the women attract people to the site, and, then, when they're there, they click on the ads. Isn't that the whole idea behind AdSense?

Transcript, 32:23-33:1. Furthermore, Chief Judge Kozinski noted that to "use Blogger you have to click on an agreement or agree to the terms of use. And I am guessing the terms of use involves promises not to display illegal material. . . . Well, how is that different than kicking somebody off a flea market? . . .[Y]ou're not going to rely on the difference between physical space and cyber space . . ." Transcript, 34:3-6; 34:23-24; 35:12-13.

able to establish that a preliminary injunction should issue because massive infringement of Perfect 10's copyrighted images is continuing. Accordingly, a decision by this Court to reaffirm the rule applying the presumption of irreparable harm to copyright infringement cases could certainly change the outcome of this case.

C. The Ninth Circuit's Opinion Is Plainly Incorrect.

The Ninth Circuit's holding that this Court's decision in *eBay* effectively overruled the application of the presumption of irreparable harm to copyright infringement cases is plainly incorrect, for all of the reasons set forth in Perfect 10's Petition. *See* Petition at 6-22. Nothing in Google's Opposition demonstrates otherwise.

For example, Perfect 10 demonstrated in the Petition that the Ninth Circuit's Opinion conflicts with Congressional intent regarding the presumption of irreparable harm. As Perfect 10 showed, although the presumption of irreparable harm clearly existed in case law decided before Congress passed the 1976 Copyright Act, nowhere in that Act did Congress express its disapproval of this presumption. *See* Petition at 14-15 and citations therein. Google's Opposition fails even to address this argument. Instead, Google asserts, without more, that there is nothing in the 1976 Copyright Act to "suggest that Congress intended 'a major departure from the long tradition of equity practice.'" Opposition at 12, *quoting eBay*, 547 U.S. at 391.

Google's assertion proves Perfect 10's point. Because Congress was aware that courts had applied the presumption of irreparable harm to copyright infringement claims before it enacted the 1976 Act, and because there is no indication in the 1976 Act that Congress intended to change the meaning courts previously had given to the copyright statute, this Court must presume that Congress did not intend a change. *See, e.g., Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542-44 (1994); *Ankenbrandt v. Richards,* 504 U.S. 689, 700-01 (1992).

CONCLUSION

The Ninth Circuit's Opinion will result in substantial additional damage to this country's creative industries, which will no longer be able to stop the infringement of their intellectual property. The Ninth Circuit's elimination of the presumption of irreparable harm will compel copyright holders to litigate their infringement claims through trial, in the hope of recovering sufficient monetary damages, thereby increasing the caseload faced by already overburdened federal district courts. Delayed monetary awards, however, will not reverse the damage done to movie studios, recording companies, software manufacturers, and other copyright holders by rampant, uncontrolled infringement. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Press Releases

Statement of Judiciary Committee Chairman Lamar Smith Hearing on H.R. 3261, the "Stop Online Piracy Act"

For Immediate Release
November 16, 2011

Contact: Kim Smith Hicks, 202-225-3951

Statement of Judiciary Committee Chairman Lamar Smith
Hearing on H.R. 3261, the "Stop Online Piracy Act"

Chairman Smith: Today's hearing is on legislation that will help protect one of the most productive sectors of the American economy.

While the *Digital Millennium Copyright Act* does provide some relief to copyright owners whose works are infringed, it only helps in limited circumstances:

> It provides no effective relief when a rogue website is foreign-based and foreign-operated like the PirateBay - the 89th most visited site in the U.S.;
>
> It doesn't protect trademark owners and consumers from counterfeit and unsafe products like fake prescription medicines and misbranded drugs that are often presented to the public by unlicensed "online pharmacies";
>
> Nor does the law assist copyright owners when rogue web-sites contribute to the theft of intellectual property on a massive scale;
>
> And, finally, it does nothing to address the use of certain intermediaries such as payment processors and Internet advertising services that are used by criminals to fund illegal activities.

That's where the *Stop Online Piracy Act* comes in.

This bill focuses not on technology but on preventing those who engage in criminal behavior from reaching directly into the U.S. market to harm American consumers.
We cannot continue a system that allows criminals to disregard our laws and import counterfeit and pirated goods across our physical borders.

Nor can we fail to take effective and meaningful action when criminals misuse the Internet. The problem of rogue websites is real, immediate and wide-spread. It harms all sectors of the economy.

And its scope is staggering. One recent survey found that nearly one quarter of global Internet traffic infringes on copyrights.

A second study found that 43 sites classified as 'digital piracy' generated 53 billion visits per year and that 26 sites selling just counterfeit prescription drugs generated 51 million hits annually.

Since the United States produces the most intellectual property, our country has the most to lose if we fail to address the problem of these rogue websites.

Responsible companies and public officials have taken note of the corrosive and damaging effects of rogue sites.

One of our witnesses today represents MasterCard Worldwide, a company that takes seriously its obligation to reduce the amount of stolen intellectual property on the Internet. MasterCard deserves thanks for its commitment to support legislation that addresses the problems of online piracy.

In contrast, another one of the companies represented here today has sought to obstruct the Committee's consideration of bipartisan legislation.

Perhaps this should come as no surprise given that Google just settled a federal criminal investigation into the company's active promotion of rogue websites that pushed illegal prescription and counterfeit drugs on American consumers.

In announcing a half billion dollar forfeiture of illegal profits, the U.S. Attorney, Peter Neronha, who led the investigation stated, "Suffice it to say that this is not two or three rogue employees at the customer service level doing this… This was a corporate decision to engage in this conduct."

Over several years, Google ignored repeated warnings from the National Association of Boards of Pharmacy and the National Center on Addiction and Substance Abuse at Columbia University that the company was violating federal law.

The company also disregarded requests to block advertisements from rogue pharmacies, screen such sites from searches and provide warnings about buying drugs over the Internet.

The Wall Street Journal reports Mr. Neronha characterized Google's efforts to appear to control unlawful advertisements as "window-dressing" since "it allowed Google to continue earning revenues from the allegedly illicit ad sales even as it professed to be taking action against them."

Given Google's record, their objection to authorizing a court to order a search engine to not steer consumers to foreign rogue sites is more easily understood.

Unfortunately, the theft of America's intellectual property costs the U.S. economy more than $100 billion annually and results in the loss of thousands of American jobs.

Under current law, rogue sites that profit from selling pirated goods are often out of the reach of U.S. law enforcement agencies and operate without consequences. The Stop Online Piracy Act helps stop the flow of revenue to rogue websites and ensures that the profits from American innovations go to American innovators.

Protecting America's intellectual property will help our economy, create jobs, and discourage illegal websites.

US House of Representatives Committee on the Judiciary
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OPINION

The Truth about SOPA

By Rep. Lamar Smith
Published January 19, 2012 | FoxNews.com

Like many members of Congress, I have spoken to constituents and organizations across the country with questions about the Stop Online Piracy Act, a bill that makes it harder for foreign thieves to steal and sell U.S. technology and products. What I have found from those conversations is that once people learn the facts about what the Stop Online Piracy Act really does, they drop their opposition. So let's set the record straight on SOPA.

When most Americans think about counterfeit or pirated goods, they think about street vendors that sell fake brand-name purses or pirated DVDs for a fraction of the price. But the theft of America's products goes far beyond street vendors. There is a vast virtual market online run by foreign criminals who steal and sell America's technology and intellectual property.

These online thieves not only steal our products, they steal the jobs and profits that rightly belong to American innovators. The theft of America's intellectual property costs the U.S. economy more than $100 billion annually and results in the loss of thousands of American jobs. From technology to movies to counterfeit medicine, automotive parts and even baby food, the online counterfeiting market poses a real economic threat and even potential health risk to American consumers. That's why this bill is needed.

The Stop Online Piracy Act makes it harder for illegal foreign websites to make a profit off the sale and distribution of stolen technology and innovations. It specifically targets foreign websites that are actively engaged in illegal and infringing activity. Domestic websites like Facebook and YouTube have nothing to worry about under this bill.

The activity these foreign websites are engaged in is already illegal in the U.S. But because they are operated overseas, the sites are out of reach of current U.S. laws that protect intellectual property. The Stop Online Piracy Act simply applies to foreign illegal websites similar standards that are already in place for domestic sites.

This is a constitutional bill that protects free speech and America's intellectual property. It's not censorship to enforce the law and stop criminal activity.

Just like online piracy, child pornography can be found on the Internet. It is also illegal. Just as there is no First Amendment right to offer or access obscenity online, there is no protected interest to offer illegal counterfeit and pirated products and services. Laws exist to protect our property rights in the real world – those same protections apply to the Internet.

This bill authorizes only the Justice Department to seek an injunction against a foreign site that is dedicated to illegal and infringing activity. The Justice Department must go to a federal judge and lay out the case against a foreign site.

If the judge finds that the site is primarily engaged in illegal activity, then a court order can be issued directing companies to sever ties with the illegal website. Search engines will simply be required to remove only the direct link to an illegal site. Third-party intermediaries, like credit card companies and online ad providers, will only be required to stop working with the site. They cannot be held liable for the illegal or infringing actions taken by the rogue website.

So if SOPA only applies to foreign illegal websites, then why are Google and Wikipedia opposed? Unfortunately, one of the reasons why you can't believe everything you read about the Stop Online Piracy Act is because some critics of this bill have generated enormous profits from illegal websites that sell stolen intellectual property.

For instance, Google has directed consumers to these illegal sites by featuring them prominently on their search function. This includes sites with counterfeit drugs that could endanger the lives of Americans.

In August, Google paid $500 million to settle a criminal investigation into the search engine's active promotion of illegal foreign pharmacies that sold counterfeit and illegal drugs to American patients.

Google's conduct demonstrates there is a need for the government to step up enforcement of intellectual property rights online and provide increased protections to American consumers.

The ability to pass along rumors on blogs and social networks comes at the risk of getting the facts all wrong.

The truth is you can't believe everything you read about the Stop Online Piracy Act, and we can't let misinformation distract us from making the online marketplace safe for American consumers.

Last week, the White House called for Congress to produce legislation to combat online piracy that protects free speech, the Internet and America's intellectual property. And that's precisely what the Stop Online Piracy Act does.

This bill does not threaten the Internet. But it does threaten the profits generated by foreign criminals who target the U.S. market and willfully steal intellectual property by trafficking in counterfeit or pirated goods.

Republican Rep. Lamar Smith of Texas chairs the House Judiciary Committee and is the sponsor of the Stop Online Piracy Act (HR 3261) which is also known as "SOPA."

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