New year may bring relief against rogue websites

Copyright owners found this holiday season a hollow one as anticipated relief against foreign pirate websites crashed in an acrimonious legislative session that foiled predictions that the Stop Online Piracy Act (SOPA) would be enacted before year’s end.

Although SOPA’s future remains uncertain, potential relief from other sources could make 2012 a banner year for combating those rogue websites. SOPA has begun an international dialogue that may result in future legislation that provides copyright owners with new tools for fighting foreign piracy. In particular, SOPA attacks the money trail supporting rogue websites by requiring Internet service providers, search engine operators, operators of payment systems and Internet advertisers to take “technically feasible and reasonable measures” to prevent access, hyperlinks and compensation, respectively, to foreign websites “dedicated to the theft of U.S. property.”

Under recently offered manager’s amendments to the original bill, such “dedication” would be established if the site were “primarily designed or operated for … or is marketed by the operator … primarily for use in offering goods or services” in violation of copyright. To qualify for the extended remedies of SOPA, an infringement must be “for purposes of commercial advantage or private financial gain.” It must also be an infringement of “complete or substantially complete” works.

The revised bill also has a catchall provision that includes sites operated “with the object of promoting … (copyright infringing) acts” among those for which SOPA remedies are available. In addition, the original bill tied relief to receipt of a notice of infringement by a copyright holder, whereas under the amended SOPA, relief must be initiated by a court order.

Any hope for rapid passage of this revised SOPA was crushed when the scheduled December markup session ended in acrimonious exchanges usually saved for fiscal legislation. Renewed hearings are scheduled for mid-January.

Given the plethora of issues raised in the markup, including requests for testimony from technology experts on the effects of SOPA’s suspension provisions on Internet security, it is unlikely that SOPA will be enacted soon.

In the interim, U.S. copyright owners will have to look to other countries to provide relief from the growing scourage of rogue websites offering pirated films, software and music to U.S. “customers.” Fortunately, recent developments in Western Europe hold out hope that such relief may be more forthcoming than previously expected.

Britain may currently provide the closest approximation to SOPA remedies against the money trail. In November, the E-Crime Unit of London’s metropolitan police closed down several rogue websites engaged in selling counterfeit goods by having Nominet, the .uk domain name registry, suspend their registrations. Such suspension was in accordance with a Nominet’s take-down policy that allows suspension within two hours of a police demand.

This rapid suspension, however, is limited to websites involved in criminal activity that harms consumers. Such consumer harm includes the sale of counterfeit goods. It is not clear if the rapid suspension process can also be applied to websites that provide pirated works. Nominet is currently revising its process. Future policy drafts should be posted on its website nic.uk.

France is also creating new remedies to attack the money trail for rogue websites. This November, the Hadopi ministry, in charge of enforcing the three strikes rule against Internet users who violate copyright, announced consultations to develop new techniques for combating pirate sites.

These techniques would include actions against cyber-lockers, direct download sites, Internet service providers, banking and payment providers and advertising networks. Marie-Francoise Marais, the president of Hadopi, has scheduled a report on proposed legislative and process changes by the end of the first quarter of next year. It should be posted on hadopi.fr sometime in March.

These efforts are not without hazard. European equivalents of the same groups who have challenged SOPA can be expected to mount a vigorous attack. They will no doubt be joined by members of the Pirate Party, whose members have even been elected to the European Parliament. Among the party’s platforms is the elimination of copyright protection for file sharing and other Internet-based activities. But even if domestic legislation develops slowly next year, other forms of relief against rogue sites may help fill the gap.

As the British experience demonstrates, and threats of proposed legislation and other regulatory controls mount, domain name registries and other Internet companies are...
developing stronger suspension policies and are showing a greater willingness to work with copyright owners to deal with pirate websites.

Google has been more aggressive in recent months in blocking “bittorrent” and related terms used to locate pirate sites from appearing in its “Autocomplete” mode. Such blocking does not eliminate rogue sites from appearing in search results, but it does require end users to type precise entries to locate such sites. Similarly, payment providers such as MasterCard have created anti-piracy policies to block payments for pirated goods.

None of these processes is without problems but with the increased money trail scrutiny by SOPA and its European equivalents, Internet companies can be expected to be more proactive in assisting copyright owners in 2012.

These processes would be significantly enhanced if the WHOIS database was an accurate source of information for the identity of at least commercial website operators. The suspensions of access that lie at the heart of money trail remedies under SOPA, and its European companions, can only be effective if accurate operator information is available.

The Internet Corporation for Assigned Names and Numbers (ICANN), charged with administering the database, has been woefully ineffective in assuring such accuracy. Continuing pressure by copyright owners during 2012, along with the increasing need for an accurate database to support SOPA style remedies, may finally convince ICANN to act. If it does, suspension remedies against rogue websites and their moneyed supporters have a chance of becoming the breakthrough remedy of the year.