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Ashlee Hodge

American University Washington College of Law

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by Ashlee Hodge

Editor's Note: The following column was posted on www.ipbrief.net on September 26, 2010. The Senate Judiciary Committee is scheduled to consider the Bill on November 18, 2010.

Congress's latest battle against piracy websites has begun with the aptly named “Combating Online Infringement and Counterfeits Act” (COICA or Bill). Led by Senator Patrick Leahy (D-Vt.) and Senator Orin Hatch (R-Utah), a group of U.S. Senators has sponsored legislation that would give the U.S. Department of Justice the ability to obtain federal court orders shutting down those websites deemed to be dedicated to the illegal online sharing of intellectual property, such as music, film, and software.

Specifically, the language in COICA targets websites “primarily designed” as pirating sites which are “dedicated to infringing activities” with “no demonstrable, commercially significant purpose or use” besides distributing pirated or counterfeited files. The Justice Department would file an in rem civil action against these types of sites, and if a federal court found the particular site satisfied the language within the bill, the U.S. Attorney General could then serve an injunction that would require the website's U.S.-based registrar to immediately cease resolving the infringing site's domain name.

Wired magazine has referred to this legislation as “the Holy Grail of intellectual-property enforcement” due to its far-reaching authority. For example, COICA would give the Justice Department the capability to also effectively shut down pirate sites overseas—the most famous being The Pirate Bay—by requiring Internet service providers (ISPs) in the U.S. to block resolution of the website's address.

Unsurprisingly, the Bill received immediate praise from representatives of the Motion Picture Association of America (MPAA) and the Recording Industry Association of America, both of which have former employees currently working for the Justice Department.

“These sites, whose content is hosted and whose operators are located throughout the world, take many forms. But they have in common the simple fact that they all materially contribute to, facilitate and/or induce the illegal distribution of copyrighted works,

such as movies and television programs,” said MPAA President and Interim CEO Bob Pisano.

On the blogosphere however, the Bill has already garnered immense dissent on a number of the Bill's aspects. Mike Masnick of techdirt.com points out that COICA's worldwide coverage seems to directly contradict the libel tourism Bill recently signed into law by Congress, which protects U.S. citizens from foreign libel judgments on laws going against the First Amendment.

Furthermore, as Masnick points out in his comments, when considering the validity of this Bill, it is extremely important to keep in mind exactly who this Bill is targeting. Both President Obama and Vice President Biden have promised to make intellectual property enforcement a priority—in June, Biden stated, “...piracy is theft. Clean and simple. It's smash and grab. It ain't no different than smashing a window at Tiffany's and grabbing [merchandise].”

But Masnick, as well as others displeased with COICA, argue that websites like The Pirate Bay that are targeted by the legislation are simply not performing any actions that can be considered within the realm of illegal activity. To tar these websites with the same brush as those users who are in fact engaging in copyright infringement would be a detrimental misunderstanding of the way this particular file-sharing system is set up.

The Pirate Bay, for example, stores no illegal material on its website. Rather, in layman's terms, The Pirate Bay directs torrent users to other torrent users in order to download potentially illegal files (such as copyrighted film or music) from one another. While these torrent websites do not themselves participate in illegal activity, some argue that they do indeed *foster* the illegal activity. On the flipside of that argument, one could perhaps draw a parallel to a library that hosts a copy machine used by students to make illegal copies of copyrighted books. The question there is, should the library be held liable for fostering the illegal activity?

Groups like the Electronic Frontier Foundation

(EFF) would definitely think not. EFF's response to COICA brings to light a number of alleged problems with the bill—namely, its censorship aspect. EFF states that not only is the language of the bill—targeting websites “dedicated to infringing activities”—incredibly broad and open to interpretation, but the proposed solution of placing a block on an entire domain, rather than limiting the block to the infringing part of the website, presents a serious possibility of widespread free speech violations.

EFF's response notes that currently the only governments that deny their citizens access to certain parts of the Internet are mostly totalitarian, anti-democratic regimes: “With this bill, the United States risks telling countries throughout the world, ‘Unilateral censorship of websites that the government doesn't like is okay—and this is how you do it.’”

Additionally, EFF points out that the existence of the Digital Millennium Copyright Act already provides to copyright owners the legal tools to remove specific infringing material in a much more narrowly-tailored manner, whereas COICA would allow the U.S. Attorney General to take down entire domains not only consisting of the purported “infringing activity,” but the non-infringing blog posts, images, and free-to-use software as well.

On Masnick's article, readers have left additional troubling observations. One reader notes the questionable language regarding the Attorney General's ability to maintain a list of domain names that the Department of Justice believes to be pirate sites, based simply “upon information and reasonable belief.” This is a somewhat surprisingly low burden of proof considering the censorship potential enumerated within this bill. Another reader noticed that any ISP or financial institution related to a domain name on that list would get instant immunity for a “vigilante-like cutting off of services” against the listed domain name.

The Inquirer is not alone in questioning the Senators' motives behind COICA, noting, “The bill is intended to appease big US media conglomerates” that have made hefty monetary contributions to political campaigns.

Cleaning up the plethora of copyright infringement on the Internet is an understandable governmental goal, but as many commentators have already pointed out, COICA seems to contain a number of questionable methods for clearly identifying what to clean up and exactly how to do it in an evenhanded way.