Senate Needs to Rein in Copyright Bill

by Andrew McDiarmid [1]
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CDT released a memo [2] today detailing major concerns with S. 3804 [3], the “Combating Online Infringement and Counterfeits Act.” Copyright infringement is a serious problem, and CDT harbors no sympathy for websites whose primary purpose is to enable widespread violation of copyright and other intellectual property rights. If enacted, though, this bill would stand out as a sea change in U.S. policy toward intermediaries, and would have significant implications for free speech, internet governance, and global internet freedom.

The bill would allow the Justice Department to bring actions against domain names (not the operators of the sites – literally the domain name itself) connected to sites that are “dedicated to infringing activities.” Orders coming out of these actions would place obligations on several types of intermediaries. Domestic domain registrars and registries would be required to suspend and lock the targeted domain, taking it down for the world. Alternatively, ISPs would be required to interfere with DNS requests for the domain, and payment networks and ad networks would be required to stop doing business with the site connected to the domain.

The bill also directs the Attorney General to maintain a blacklist of domain names that the DoJ suspects are dedicated to infringing activities, but which haven't had any action taken against them. And the intermediaries described above would actually be encouraged to take action--such as blocking or filtering--against blacklisted sites; and they would receive immunity for any action taken, even without a court order.

CDT’s analysis of the bill focuses on its constitutional and policy problems. Regarding free speech and the First Amendment, the bill would place unconstitutional prior restraints on speech with inadequate process, especially the AG's informal blacklist. From an international perspective, we are deeply troubled at establishing the precedent that a government can seize or block a domain name, even if the registrar and registry are located in another country. The seizing and blocking contemplated by the bill could also frustrate US foreign policy, as it would call into question the US’s credibility in criticizing other countries that adopt similar means to control Internet content. In addition, using the US’s unique position with respect to ICANN and the .net and .org registry (Verisign) in this way could inflame international debate over the location of ICANN in the US.

We’re especially nervous that a bill raising all these questions is being rushed through the Congress at the end of a legislative session. At the very least, the Senate needs to slow down, hear from all stakeholders, and consider all the implications before making such drastic changes to US Internet policy.

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