Son of COICA: New Copyright Bill Introduced

by David Sohn [1]
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Senator Leahy introduced revised legislation today to target websites aimed at enabling copyright and trademark infringement. Last year, the bill's acronym was COICA, and CDT and others raised major concerns [2] about it. As of today, the bill is officially back in play – albeit with a catchier new acronym ("PROTECT IP") and a number of more substantive changes. Those changes narrow the bill's reach in some respects, reflecting a welcome effort to address concerns about the scope of the bill. At the same time, the new bill adds some new remedies and continues to feature domain-name-blocking provisions that CDT has warned against.

In terms of scope, this year's bill appears to do a much better job of tailoring its definitions to target true bad actors. As a result, there is less potential for the bill to inadvertently sweep in legitimate websites. This is an important improvement, since last year's definition could have applied quite easily to lots of multi-purpose and user-generated-content sites. In addition, major parts of the new bill no longer apply to sites registered through U.S.-based registrars and registries. That's a helpful limitation (though it is mostly a reflection of the fact that ICE is already asserting legal authority to seize domestically registered names – using a process that carries policy questions [3] of its own). The new bill also includes welcome language to ensure it won't have the practical effect of watering down the DMCA safe harbor. CDT appreciates Senator Leahy's willingness to listen to CDT and other critics and to make these important changes.

CDT still has serious concerns, however, about some of the bill's remedies. Specifically, requiring ISPs to block domain name lookup requests won't make a lasting impact on infringement and has the potential to undermine the domain name system. CDT recently testified [4] before a House Subcommittee and submitted a written statement [5] to the Senate Judiciary Committee (chaired by Leahy) opposing a domain-name-focused approach. Domain name blocking raises tricky cybersecurity questions and would set a dangerous international precedent for using the domain name system to try to impose domestic laws on foreign Internet activity.

Moreover, there is still a risk of mistakes [6] that would impact legitimate sites and legitimate speech, as illustrated earlier this year when ICE mistakenly seized mooo.com. The legislation seems to envision action against sites being taken quickly, in the form of temporary restraining orders or preliminary injunctions. It is highly likely that many of these actions would be taken without any adversarial process, because foreign website operators won't frequently have the inclination or the means to appear before U.S. courts. Finally, domain names can be widely shared, and it often will not be apparent when this is the case; there is no "phone book" for sub-domains. With one-sided presentations seeking quick preliminary relief, mistakes are all too possible.

In terms of process, the new bill relies less on "in rem" jurisdiction (i.e., cases that technically get filed against a site's domain name) than last year's version, requiring cases to proceed against the website operator when possible. But I'm not sure why this bill should apply at all when the website operator is subject to U.S. jurisdiction. When U.S. courts can sanction the wrongdoer directly, why rely on intermediaries (ISPs, credit card companies, etc.) for enforcement?

Another significant change is that the new bill adds "information location tools" to the list of intermediaries that can be ordered to block websites. This is an outgrowth of recent hearings, at which lawmakers focused extensively on the extent to which search engines (particularly Google) return results for infringement sites. "Information location tool," however, is a term that covers more than just traditional search engines. In fact, it appears to apply to just about anyone posting hypertext links. That means this new provision would bring just about every website operator and online service within the potential scope of the bill. Court orders under the bill could be served on operators of any site or service that includes a link to a site that has been found to be dedicated to infringement.

More broadly, the idea of targeting search engines seems an additional step down the fruitless path of trying to make it hard for people to find infringement websites. On the Internet, there are numerous easy ways to find websites, and numerous ways to build new navigation tools that are simple for anyone to use. For example, if search engines block infringement sites, then third parties will build index sites to help users navigate there – and those index sites will show up in search results where the infringement sites themselves used to be. In short, trying to keep the location of infringement sites obscure and hard to find is likely a losing strategy in practice. And CDT would urge caution before establishing a precedent for increased government-ordered interference with search results.

Finally, the new bill offers a private right of action aimed at getting payment processors and ad networks to cease business with offending websites. At a minimum, CDT thinks the right of action under this bill should be available only when bringing an ordinary infringement lawsuit is impossible (e.g., because the offender is outside the United States). Giving a rightsholder a second cause of action seems unnecessary and duplicative. Including a private right of action also greatly increases the bill's risk of overbroad application, since private rightsholders are more likely than the government to file questionable cases. On the other hand, we are certainly glad that the remedies for privately filed cases don't extend to domain name blocking and search. Allowing private parties to compel such remedies would raise a whole new set of red flags.

Overall, CDT welcomes the narrower definition of infringement websites, but we are disappointed that the bill doesn't follow the suggestion of CDT and others to just "follow the money" – that is, focus on making it unprofitable to run infringement hubs by blocking their access to payment systems and advertising networks. The new bill includes the money-focused remedies, to be sure, but as part of a multi-remedy, kitchen-sink approach. As I've said before [7], it's a nice slogan to say that "everybody in the ecosystem needs to pitch in," but lumping everyone together ignores important differences in their roles and capabilities. CDT believes legislation should focus on tactics that offer the greatest likelihood of effectiveness with the least collateral consequences. We will be trying to push the legislation in that direction as the process moves forward.

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