Law Professors' Letter in Opposition to S. 3804

(Combating Online Infringements and Counterfeits Act)

The Senate Judiciary Committee is poised to consider a bill that, if enacted, will have dangerous consequences for free expression online and the integrity of the Internet's domain name system, and will undermine United States foreign policy and strong support of Internet freedom abroad.

Summary of the Bill

The current version of the Combating Online Infringements and Counterfeits Act ("COICA," or "the Act"), S. 3804, would authorize the Attorney General to obtain, upon application to a federal court, injunctions *in rem* "against the domain name" of any Internet site "dedicated to infringing activities." An Internet site will be deemed "dedicated to infringing activities" if (a) it is "primarily designed," has "no demonstrable commercially significant purpose or use other than," or is "marketed by its operator," to offer goods and services in violation of the Copyright Act and/or the Lanham Act, and (b) the site "engages in" such infringing activities, and those activities, "taken together," are "central to the activity" of the site.

These injunctions can issue against entities which are not in any way responsible for the unlawful content, but which participate in the global Domain Name System (DNS):

(a) the domain name *registrar* where the target site's domain name was registered;

(b) the domain name *registry* responsible for maintaining the authoritative database of names for the target site's top-level domain; and

(c) *any* of the thousands of "service providers" (*i.e.*, entities "offering the transmission, routing, or providing of connections for digital online communications") *or* "operator of a nonauthoritative domain name server" (a category that includes virtually all service providers, and any operator of network linked to the Internet).

Registrars and registries subject to the injunction will be required to "suspend operation of," or "lock," the specified domain name. Service providers or domain name server operators

will be required to "take technically feasible and reasonable steps designed to prevent [the] domain name from resolving to that domain name's Internet protocol address."

Objections to the Bill

The Act, if enacted into law, would fundamentally alter U.S. policy towards Internet speech, and would set a dangerous precedent with potentially serious consequences for free expression and global Internet freedom.

To begin with, the Act is an unconstitutional abridgment of the freedom of speech protected by the First Amendment. It directs courts to impose "prior restraints" on speech – the "most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), which are constitutionally permissible only in the narrowest range of circumstances. *See Near v. Minnesota*, 283 U.S. 697 (1931).; *see also Center For Democracy & Technology v. Pappert*, 337 F. Supp. 2d 606, 651 (E.D. Pa. 2004) (statute blocking access to particular domain names and IP addresses an unconstitutional prior restraint). The Supreme Court has made it abundantly clear that the category of "prior restraints," while traditionally applied to "orders forbidding certain communications when issued *in advance of the time* that such communications are to occur," *Alexander v. United States,* 509 U.S. 544, 550 (1993) (emphasis added), also encompasses any governmental action suppressing speech taken prior to "a prompt final judicial decision . . . in an adversary proceeding" that the speech is unlawful. *Freedman v. Maryland,* 380 U.S. 51, 58-60 (U.S. 1965) (statute requiring theater owner to receive a license before exhibiting allegedly obscene film was unconstitutional because the statute did not "assure a prompt final judicial decision" that the film was obscene); *see also Bantam Books v. Sullivan*, 372 U.S. 58 (1962) (State Commission's letters suggesting removal of books already in circulation is a "prior administrative restraint" and unconstitutional because there was no procedure for "an almost immediate judicial determination of the validity of the restraint"); *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46, 51-63 (1989) (procedure allowing courts to order pre-trial seizure of allegedly obscene films based upon a finding of probable cause was an unconstitutional prior restraint; publications "may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing.").

These cases "require a court, *before* the material is completely removed from circulation, . . . to make *a final determination* that material is [unlawful] *after an adversary*

hearing." CDT v. Pappert, 337 F.Supp.2d, at 657 (emphasis added). The procedural seps prescribed by the Act do not come close to comporting with this Constitutional requirement. In place of a final determination after an adversary proceeding that the website in question contain infringing material, the Act permits the issuance of speech-suppressing injunctions *without any meaningful opportunity for any party to contest the Attorney General's allegations of unlawful content*. The domain name registrars, registries, service providers, and domain name server operators against whom injunctions can be issued pursuant to the Act will have, in virtually all cases, *no information whatsoever* concerning the allegations regarding the presence of infringing content at the target websites because they have no relationship to the operators of those websites; they are therefore in no position, and they have no conceivable incentive, to contest those allegations. The Act contains no provisions designed to ensure that the persons actually responsible for the allegedly infringing content – the operators of the target websites – are even aware of the proceedings against them, let alone have been afforded any meaningful opportunity to contest the allegations in a true, adversarial proceeding. These target websites, by virtue of the Act's assertion of *in rem* jurisdiction over domain names, may (and presumably often will) be located in, and/or controlled by citizens of, other countries; the Act specifically permits courts in these actions to exercise jurisdiction provided only that either:

(a) the domain name *registrar*, or the domain name *registry*, is located within the United States, *or*

(b) the domain has been accessed by users within the United States, and the website "conducts business directed to the United States" and "harms holders of United States intellectual property rights."

Rather than give these foreign website operators a meaningful opportunity to be heard and to contest the allegations of illegality in an adversarial hearing, the Act requires only that the Attorney General notify the domain name *registrant* – who may, but in many cases will not, be the operator of the website in question – of an intent to proceed against the site. Injunctions may be entered entirely *ex parte*, without the participation of any other party, and the Act does not provide for any review of a judge's *ex parte* determination that the website in

question contains unlawful material. This falls far short of what the Constitution requires before speech can be eliminated from public circulation.[1]

The Act would also suppress vast amounts of protected speech containing no infringing content whatsoever, and is unconstitutional on that ground as well. The current architecture of the Internet permits hundreds or even thousands of independent individual websites to operate under a single domain name by the use of unique sub-domains; indeed, many web hosting services operate hundreds of thousands of websites under a single domain name (*e.g.,* www.aol.com, www. terra.es, www.blogspot.com). By requiring suppression of all sub-domains associated with a single offending domain name, the Act "burns down the house to roast the pig," *ACLU v. Reno,* 521 U.S. 844, 882 (1997), failing the fundamental requirement imposed by the First Amendment that it implement the "*least restrictive means* of advancing a compelling state interest." *ACLU v. Ashcroft,* 322 F.3d 240, 251 (3d Cir. 2003) (quoting *Sable Commun. v. FCC*, 492 U.S. at 126 (emphasis added)); *cf. O'Brien*, 391 U.S. at 377 (even the lower "intermediate scrutiny" standard requires that any "incidental restriction on First Amendment freedoms . . . be *no greater than is essential* to the furtherance of that interest"); *see also CDT v Pappert*, 337 F.Supp.2d, at 649 (domain name blocking ["DNS filtering"] resulted in unconstitutional "overblocking" of protected speech whenever "the method is used to block a web site on an online community or a Web Hosting Service, or a web host that hosts web sites as sub-pages under a single domain name," and noting that one service provider "blocked hundreds of thousands of web sites unrelated to" the targeted unlawful conduct); *see also id*.,

[1] In addition, like the statute struck down in *CDT v. Pappert,* the Act is an unconstitutional prior restraint also because it prevents *future* content from being displayed at a targeted domain name, based solely on the fact that the domain name hosted illegal content in the past. This closely resembles the unconstitutional permanent ban on the publication of a newspaper with a certain title, *Near v. Minnesota*, 283 U.S. 697 (1931), or the permanent injunction against showing films at a movie theater, *Vance v. Universal Amusement Co.,* 445 U.S. 308 (1980). In *Near*, the Court examined a statute that provided for a permanent injunction against a "malicious, scandalous, and defamatory newspaper, magazine or other periodical." *Near*, 283 U.S. at 701-702. *Near* involved a county attorney who obtained an injunction against the publishers of a newspaper called "The Saturday Press" under a statute preventing them from "publishing, circulating, or having in their possession any future editions of said The Saturday Press." Id. at 705. The statute at issue in *Near* was held to be unconstitutional because it permitted censorship of future publications based on material published in the past. *See Universal Amusement Co. v. Vance,* 404 F. Supp. 33, 44 (S.D. Tex. 1975) ("In both [*Near* and *Vance*] the state made the mistake of prohibiting future conduct after a finding of undesirable present conduct.").

at 640 (statue resulted in blocking fewer than 400 websites containing unlawful child pornography but in excess of *one million websites without any unlawful material*).

Precisely because of these egregious Constitutional infirmities, the Act, if enacted into law, will not survive judicial scrutiny, and will, therefore, never be used to address the problem (online copyright and trademark infringement) that it is designed to address. Its significance, therefore, is entirely symbolic – and the symbolism it presents is ugly and insidious. For the first time, the United States would be requiring Internet Service Providers to block speech because of its content – a dramatic retreat from the US's long-standing policy, implemented in §230 of the Communications Decency Act, §512 of the Copyright Act, and elsewhere, of allowing ISPs to focus on empowering communications by and among users free from the need to monitor, supervise, or play any other gatekeeping or policing role with respect to those communications. It is a policy that has not only helped make the United States the world leader in a wide range of Internet-related industries, but it has also enabled the Internet's uniquely decentralized structure to serve as a global platform for innovation, speech, collaboration, civic engagement, and economic growth.

Even more significant and more troubling, the Act represents a retreat from the United States' historical position as a bulwark and beacon against censorship and other threats to freedom of expression, freedom of thought, and the free exchange of information and ideas around the globe. At a time when dozens of foreign governments have dramatically stepped up their efforts to censor Internet communications in order to suppress legitimate dissent, to marginalize religious minorities, and to prevent citizens from obtaining information about the world outside their borders,[2] the United States has always been a voice – often the only voice –

[2] Secretary of State Clinton, in her "Remarks on Internet Freedom" delivered earlier this year, put it this way:

> In the last year, we've seen a spike in threats to the free flow of information. China, Tunisia, and Uzbekistan have stepped up their censorship of the internet. In Vietnam, access to popular social networking sites has suddenly disappeared. And last Friday in Egypt, 30 bloggers and activists were detained. . . . As I speak to you today, government censors somewhere are working furiously to erase my words from the records of history. But history itself has already condemned these tactics.
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> [T]he new iconic infrastructure of our age is the Internet. Instead of division, it stands for connection. But even as networks spread to nations around the globe, virtual walls are cropping up in place of visible walls. . . . Some countries have erected electronic barriers that prevent their people from accessing portions of the world's networks. They've expunged words, names, and phrases from search engine

opposing these efforts. Our ability to defend the principle of the single global Internet – the Internet where all of humanity has equal access to knowledge and ideas, the Internet that looks the same to, and allows free and unfettered communication between, users located in Shanghai and Seattle and Santiago, free of locally-imposed censorship regimes – will be deeply compromised by enactment of S. 3804, which would enshrine in U.S. law for the first time the contrary principle: that all countries have a right to insist on the removal of content, wherever located, from the global Internet in service of the exigencies of local law. Nothing limits the application of this principle to copyright or trademark infringement, and nothing limits the application of this principle to actions by the United States; when all countries exercise this prerogative in support of their local legal regimes, as they surely will, we will have lost – or, more properly speaking, we will have destroyed – the single global inter-connected communications platform that we have built over the past several decades and that holds out so much promise for the improvement of human society across the globe.

> results. They have violated the privacy of citizens who engage in non-violent political speech. . . . With the spread of these restrictive practices, a new information curtain is descending across much of the world.

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