



May 25, 2011

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the Computer and Communications Industry Association (CCIA), the Consumer Electronics Association (CEA) and NetCoalition, we write to express our concerns regarding certain aspects of S. 968, the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (“PIPA”). If left unaddressed, portions of the legislation will undoubtedly inhibit innovation and economic growth.

Our organizations represent the most innovative companies in America. Our industries drives the US economy, and create the high-skill, high wage jobs that will pull America out of its economic doldrums.

We support strong intellectual property enforcement. Indeed, our members’ businesses rely on robust and balanced intellectual property law that protects the rights of authors and inventors while preserving and encouraging innovation, free expression and competition.

We appreciate the responsiveness of Committee staff to our comments on the draft “COICA” legislation considered in the 111th Congress. However, given the complexity of this issue, revisions to the previous text carry their own potential for unintended consequence and require intense scrutiny and study.

In particular, we raise the following issues with S.968:

Definition of “dedicated to infringing activities”. Since COICA was introduced at the end of last Congress there has been a consensus among stakeholders that the legislation is meant to be addressed *only* to “bad actors” – those who act without reasonable justification, and who, if efficiently subject to our criminal processes, would be have been convicted under 17 U.S.C. Section 506. The PIPA definition is narrower in several respects, but still does not match the intent of addressing only those who would be clearly liable for criminal copyright infringement. For example:

- Those “enabling, or facilitating” conduct face liability equal to those “engaging” in it. Coupled with other elements of the definition, this language is broad enough to implicate retailer websites advertising legal devices that are capable of infringement (such as computers or copying machines).

- Like COICA, this new definition includes any violation of Section 1201 of Title 17 (the “DMCA”). Section 1201 includes “trafficking” language, has broad “circumvention” provisions, and has a substantive broad scope so much that the U.S. Circuit Courts of Appeal are split over its application.¹ A site is qualified as “dedicated to infringing activities” if the conduct that allegedly violates the DMCA is merely “enabled or facilitated.” The combination of “enabling or facilitating” with DMCA liability could even undermine the “safe harbor” provisions of Section 512.
- If the standard for copyright violation is to be equivalent to criminal intent, the reference should be to 17 U.S.C. 506 (“Criminal offenses”), not 501 (“Infringement of copyright”).

Application to search engines. A provision in PIPA but not in COICA would make “information location tools” – commonly understood as “search engines” – subject to the injunctive provisions of the Act. This change has serious and potentially harmful consequences. It arguably constrains the First Amendment rights of users and is subject to legal challenge on that basis. Moreover, search engines cannot readily distinguish between lawful fair uses and infringing uses of copyrighted works. This proposed provision in PIPA would give search engine companies perverse incentives to deny the public access to lawful uses, so as to avoid potential litigation for injunctive relief and the possibility of subsequent liability for contempt. Most pointedly, it provides a convenient precedent for overseas interests who would wish to limit the Internet search capability of their own citizens (which in many cases provides their only window on a free press), or who for domestic commercial reasons would want to hamstring U.S.-based Internet companies. This concern is intensified by the fact that the broad definition of “information location tool” could go well beyond search engines and cover any website which includes a hyperlink.

Private right of action. Also not in COICA, but included in PIPA, is a private right of action against some of the law-abiding companies that provide generic services to sites that are “dedicated to infringing activities.” Because PIPA still includes provisions aimed at blocking DNS server resolution, and because the ability of bad actors to move to new addresses can be anticipated, this provision holds the potential for a flood of lawsuits – irrespective of any safe harbor against damages as enacted in 17 U.S.C. 512 – that seek to impose affirmative monitoring duties on providers of generic services. This provision has the potential to impose an immense burden on companies and commerce and is especially worrisome given the content industry’s long history of aggressive lawsuits against new and innovative technologies. As in the case of the search engine provisions, the potential of this provision to burden commerce has not been examined in a Committee hearing.

DNS Blocking. We continue to have concerns with the government-mandated site blocking proposed by this bill. The potential collateral damage it could cause to the Internet ecosystem, here and abroad, outweighs the limited effectiveness it may have on the trafficking of infringing goods. As an alternative, we continue to support and advocate remedies that put an end to profits gained through the sale and marketing of infringing goods by blocking access to payment processors and advertising networks.

¹ Compare *Storage Tech. Corp. v. Custom Hardware Eng’g Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005) and *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004) with *MDY Industries, LLC v. Blizzard Ent. Inc.*, 629 F.3d 928, 948-52 (9th Cir. 2010).

Our associations have been pleased to work with your staffs in pursuing legislation that is accurately targeted on piracy and on bad actors. We urge the Committee to continue to pursue a process that can result in legislation that all can support.

Respectfully submitted,

A handwritten signature in black ink that reads "Ed Black". The signature is fluid and cursive, with the first name "Ed" and last name "Black" clearly distinguishable.

Ed Black
President and CEO
Computer and Communications Industry Association (CCIA)

A handwritten signature in black ink that reads "Gary Shapiro". The signature is cursive and stylized, with the first name "Gary" and last name "Shapiro" clearly distinguishable.

Gary Shapiro
President and CEO
Consumer Electronics Association (CEA)

A handwritten signature in blue ink that reads "Markham Erickson". The signature is cursive and stylized, with the first name "Markham" and last name "Erickson" clearly distinguishable.

Markham Erickson
Executive Director & General Counsel
NetCoalition