

Cooley

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On November 18, 2010, the Judiciary Committee of the United States Senate unanimously approved legislation known as the Combating Online Infringement and Counterfeits Act ("COICA"). The bipartisan legislation moves to the full Senate for consideration. The legislation is garnering significant attention in the press for giving the Attorney General the right to force the suspension of websites that are suspected of infringing copyrights or trademarks.

Overview of the Combating Online Infringement and Counterfeits Act

If approved by Congress and signed by the President, COICA would be groundbreaking legislation in the effort to protect intellectual property online. COICA gives the Attorney General power to take two distinct actions.

The first power, which is receiving the most media attention, allows the Attorney General to initiate a legal action against a domain name to obtain a temporary restraining order, preliminary injunction, or a permanent injunction if the website is "dedicated to infringing activities." A website "dedicated to infringing activities" is defined in the legislation essentially as a site that is "primarily designed, has no demonstrable, commercially significant purpose or use other than, or is marketed by its operator, or by a person acting in concert with the operator, to" infringe copyrights or trademarks and where such infringement is "central" to the activity of the website. The definition is met if the website includes "a link or aggregated links to other sites" with infringing products or services.

The Attorney General must send notice of the alleged violation and intent to obtain injunctive relief to the registrant of the domain. The Attorney General must also publish notice of the action after injunctive relief is obtained.

If the Attorney General is successful in obtaining injunctive relief, the domain registrar must suspend operation of the website. Alternatively, the Attorney General can force the domain name registry to suspend the site. The owner or operator of the website can petition the court for relief from the injunctive order.

Less noticed by the media is the power of the Attorney General to maintain a list of websites that meet the "dedicated to infringing activities" definition, but for which the Attorney General does not file an action to shut down the website. A website's placement on the Attorney General's list is subject to judicial review and can be removed after the website owner successfully brings an action against the Attorney General in federal district court.

Public concerns

Significant concerns have been raised about COICA. For example, Wired.com called the legislation, "among the most draconian laws ever considered to combat digital piracy." Of particular concern is the ability of the Attorney General to obtain a court order that requires the suspension of a website without any meaningful notice to the website's owner.

Senator Hatch (R-UT), a co-sponsor of the bill, in expressing his support for the legislation, noted that the legislation "includes substantial safeguards to prevent abuse by the DOJ." Senator Hatch, however, only identified the requirement that the Attorney General obtain a court order prior to shutting down a website and the ability of a website owner or operator "to petition the court to lift the order." For a less popular website that may not be well-known by the judge who decides whether to issue a suspension order, these protections may not prevent significant business disruption and loss.

The attorneys listed above are available to discuss the proposed legislation as well as other information pertaining to trademark and copyright on the internet.

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