

September 27, 2010

Chairman Patrick J. Leahy  
United States Senate  
433 Russell Senate Office Building  
Washington, DC 20510

Ranking Member Jeff Sessions  
United States Senate  
335 Russell Senate Office Building  
Washington, DC 20510

*Re: S. 3804, Combating Online Infringement and Counterfeits Act (COICA)*

Dear Chairman Leahy and Ranking Member Sessions:

Although the undersigned entities support the objectives of S. 3804, the “Combating Online Infringement and Counterfeits Act” (COICA), the bill raises numerous legal, political, and technical issues. If left unresolved, these issues could harm consumers, educational institutions, innovative technologies, economic growth and global Internet freedom. These complicated issues require careful deliberation that we fear cannot be accomplished in the waning days of this session.

The bill enables the Justice Department to bring *in rem* actions against domestic and foreign domain names of websites dedicated to infringing activities, and, with respect to foreign sites, to obtain judicial orders mandating that Internet services, operators of domain name servers, financial transaction providers, and ad networks discontinue service to the designated sites. In addition, subsection (j) authorizes the Justice Department to maintain a public blacklist of websites that the Department determines “upon information and reasonable belief” to be dedicated to infringing activities. Internet-related services will be encouraged to discontinue service to these websites.

Given the fundamental due process values of our nation and the potential for other countries to enact similar mechanisms to retaliate against U.S. companies abroad, Congress must carefully consider whether it wishes to authorize Justice Department officials to blacklist websites in a manner subject to little process and limited judicial review. Without judicial oversight, these blacklists could reach the websites of political candidates and advocacy groups. Numerous political campaigns have received copyright cease-and-desist letters or infringement notices, including candidates very recently in this cycle from both parties.<sup>1</sup>

The potential for blacklisting for “facilitating” infringement, as so broadly defined in this bill, can undermine U.S. secondary liability law as established in *Sony v. Universal*, and ignores the culpable intent requirement of *MGM v. Grokster*. For example, would the listing of a website on the blacklist constitute constructive knowledge for contributory infringement purposes, if a service provider did not discontinue providing service to a website after it was listed? More generally, the new definitions and requirements also raise serious questions about the effect of this bill on existing copyright exceptions, limitations and defenses upon which a significant sector of the U.S. economy relies.

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<sup>1</sup> *Nevada GOP Candidate Faces Copyright Lawsuit*, Wash. Post, Sept. 4, 2010; *Mo. Democratic nominee for US Senate keeps TV ad despite copyright lawsuit by Fox News Network*, Wash. Examiner, Sept. 16, 2010.

The proposed *in rem* proceeding also raises a host of issues that necessitate thorough review. It is unclear whom may be compelled by such orders, and what obligations can be imposed. The definition regarding which services must comply with *in rem* orders is both broad and vague. Will COICA apply to (a) all ISPs? (b) The root zone server operated by the Internet Corporation for Assigned Names and Numbers (ICANN)? (c) The “authoritative” root zone server operated by Verisign under contract with NTIA? Would a webhost or search engine have to remove all links to designated sites? Such mandates may be unmanageable, and could have a deleterious effect upon the fight to keep Internet governance out of the bureaucracy of international organizations.

It is further unclear what consequences will result from the functionally extraterritorial application of U.S. intellectual property laws. Congress must consider the precedent this bill would set for countries less protective of citizens’ rights of free expression. COICA’s blacklist may be used to justify foreign blacklists of websites that criticize governments or royalty, or that contain other “unlawful” or “subversive” speech. Just this year, the Secretary of State declared that Internet freedom is nothing less than freedom of assembly online.<sup>2</sup> At this time in our campaign to ensure Internet freedom abroad, it is imprudent to endow U.S. law enforcement officials with an unsupervised right to determine who may assemble and who may not.

In sum, COICA – which was introduced only last week – raises a host of global entanglements and serious questions that need to be evaluated thoroughly and carefully. To do so, we believe a hearing on S. 3804, with testimony from impacted industries and user constituencies, should be held before any major legislative action is taken. We look forward to working with you to address these questions, and to ensure that intellectual property laws can be enforced while preserving free speech, due process, and the stability, freedom, and economic potential of the Internet.

Respectfully submitted,

American Association of Law Libraries (AALL)  
American Library Association (ALA)  
Association of College and Research Libraries (ACRL)  
Association of Research Libraries (ARL)  
Center for Democracy and Technology (CDT)  
Computer and Communications Industry Association (CCIA)  
Consumer Electronics Association (CEA)  
Electronic Frontier Foundation (EFF)  
Home Recording Rights Coalition (HRRC)  
NetCoalition  
Public Knowledge

Cc: Senate Judiciary Committee  
Chairman and Ranking Member, House Judiciary Committee

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<sup>2</sup> Hillary Clinton, *Remarks on Internet Freedom*, Newseum, Jan. 21, 2010, available at <http://www.state.gov/secretary/rm/2010/01/135519.htm>