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May 23, 2011

Chairman Patrick Leahy  
Ranking Member Chuck Grassley  
Senator Orrin Hatch  
Senate Judiciary Committee  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

Re: The Protect IP Act

Dear Chairman Leahy, Ranking Member Grassley and Senator Hatch,

I write with regard to the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (“the Protect IP Act”), which is currently under consideration by this Committee.<sup>1</sup> I represent the Directors Guild of America, the American Federation of Television and Radio Artists, the Screen Actors Guild, the International Alliance of Theatrical and Stage Employees, and the Motion Picture Association. I write to you at their request to offer my view that the Protect IP Act is consistent with the First Amendment and to set forth the basis for that conclusion.

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<sup>1</sup> This letter supersedes my February 11, 2011 letter regarding The Protect IP Act’s predecessor, the Combating Online Infringement and Counterfeits Act (COICA), which was reported out of the Judiciary Committee during the 111th Congress (S. 3804 (Reported in Senate)).

In this letter, I will summarize the provisions of the statute briefly and then turn to its constitutionality under the First Amendment. I think it useful, however, to begin with some observations about copyright law and the First Amendment in the age of the Internet.

I start with what should not be controversial. The Internet is one of the greatest tools of freedom in the history of the world. That is why, as Secretary of State Clinton recently observed, there is an “urgent need” to protect freedom of expression on the Internet throughout the world. At the same time, however, she pointed out that “all societies recognize that freedom of expression has its limits,” observing specifically that those who use the Internet to “distribute stolen intellectual property cannot divorce their online actions from their real world identities” and that our ability to “safeguard billions of dollars in intellectual property [is] at stake if we cannot rely on the security of our information networks.”

It is no answer to this challenge to treat loose metaphors—the Internet as “the Wild West,” for example—as substitutes for serious legal analysis. It is one thing to say that the Internet must be free; it is something else to say that it must be lawless. Even the Wild West had sheriffs, and even those who use the Internet must obey duly adopted laws.

It is thus no surprise that libel law applies to material that appears on the Internet. *Milum v. Banks*, 642 S.E.2d 892 (Ga. Ct. App. 2007) (holding that defendant published libelous statements by posting them on his website) *cert. denied* (June 4, 2007). Or that libel precedents regarding printing information on paper are given comparable meaning as to information posted online. *Nationwide Bi-Weekly Administration, Inc. v. Belo Corp.*, 512 F.3d 137 (5th Cir. 2007) (holding that the “single publication rule” for the statute of limitations in libel suits applies to Internet publication). Or that principles of privacy law are applied to personal information posted online with the same animating principles that apply in more traditional media. *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34 (Minn. Ct. Ap. 2009) (holding that posting information from a patient’s medical file on a social networking website constitutes the “publicity” element of invasion of privacy); *Benz v. Washington Newspaper Publishing Co.*, 2006 WL 2844896 (D.D.C. Sept. 29, 2006) (holding that false information posted on independent websites provided reasonable claim for defamation, invasion of privacy and false light against private party defendant, in addition to claims regarding publication of related information by a newspaper).

Copyright law is no different. It is not disputable that “[a]ll existing copyright protections are applicable to the Internet.” Edward H. Rosenthal, *J.D. Salinger and Other Reflections on Fair Use*, 1003 PLI/Pat 35, 42 (2010). See *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 342 F.3d 191 (3d Cir. 2003) (upholding preliminary injunction against website compiling video clips of copyrighted movies for commercial use); *UMG Recordings, Inc. v. Stewart*, 461 F. Supp. 2d 837 (S.D. Ill. 2006) (finding *prima facie* case of liability in support of default judgment against Internet user who downloaded, reproduced and distributed copyrighted audio recordings online). The seizure provisions of copyright laws are applied to seize and stop the use of online property to facilitate infringement, such as domain names, just as offline property can be seized to stop its use to facilitate infringement. *United States v. The Following Domain Names: TVShack.net et al.*, 2010 WL

2666284 (S.D.N.Y. June 29, 2010) (treating domain names hosting infringing videos as forfeitable property under 18 U.S.C. §§ 2323(a) and ordering their seizure, locking domain names at registry level, replacing registrar information to identify the government as the domain names' owner, and compelling the registry to route traffic to the domain names to a government IP address notifying the public that the domain name was seized). While Congress has created safe harbors to accommodate the invention of online service providers, it has clearly declined to "simply rewrite copyright law for the on-line world." Copyright claims online are thus "generally evaluated just as they would be in the non-online world." *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004) (internal quotations omitted).

Copyright law has existed throughout our Nation's history. The Constitution itself authorizes Congress to adopt copyright legislation (Art. I, Sec. 8, Clause 8) and the first such legislation was enacted in 1790, a year before the First Amendment was approved by Congress. Ch. 15, 1 Stat. 124 (1790) (repealed). From the start, injunctions were one form of relief accorded to victims of copyright infringement. (Courts applied the 1790 Act, and its later amendments, to grant injunctions "according to principles of equity." Act of Feb. 3, 1831, ch. 16, 4 Stat. at 438 (1831) (repealed 1870) (cited in Kristina Rosette, "*Back to the Future: How Federal Courts Create a Federal Common Law Copyright Through Permanent Injunctions Protecting Future Works*," 2 J. Intell. Prop. L. 325, 340 (1994)). However, since injunctions in non-copyright cases have frequently been held to be unconstitutional prior restraints on speech, *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971), and for other reasons, the subject has arisen as to the application, if any, of the First Amendment to copyright principles. See generally, Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 19 (2010).

The issue of whether and, if so, how certain elements of the Copyright Act should be read to accommodate various First Amendment interests remains open. The law could hardly be clearer, however, that injunctions are a longstanding, constitutionally sanctioned way to remedy and prevent copyright violations. Indeed, that premise was explicit in the critical concurring opinion in the Supreme Court's most famous prior restraint case, assessing publication of the Pentagon Papers, which noted that "no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another." *New York Times Co.*, 403 U.S. at 731 n.1 (White, J. and Stewart, J., concurring). Current treatises reflect this judicial consensus. "[C]ourts have found no constitutional obstacle to enjoining, pursuant to federal legislative mandate, the unlawful use of a registered trademark or copyright." Floyd Abrams & Gail Johnston, *Communications Law in the Digital Age 2010: Prior Restraints*, 1026 PLI/Pat 247, 261 (2010); James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 38 J. Copyright Soc'y 63, 71 (1990) ("A pirated or copied edition, record, movie, song or other work . . . cries out for an injunction").

The Supreme Court's most detailed treatment of the interrelationship between the First Amendment and copyright, the seminal case of *Harper & Row Publishers, Inc. v. Nation Entpr.*, 471 U.S. 539, 560 (1985), stressed that far from conflicting with the First Amendment, the Copyright Act actually furthers the very interests which the First Amendment protects. "First Amendment protections," the Court noted, are "already embodied in the Copyright Act's distinctions

between copyrightable expression and uncopyrightable facts and ideas.” The Constitution supports the explicit protection of such expression and creativity, the Court stated, within a framework that defends *both* the right to speak *and* the ability to profit from speech. “[T]he Framers intended copyright itself to be the engine of free expression,” explained the Court, and “[b]y establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.” *Id.* at 558. Copyright law thus fortifies protections for speakers and creators, in a First Amendment context, while stimulating future creativity.

The evident constitutionality of injunctive relief for copyright violations does not mean, to be sure, that injunctions must automatically or always be issued in response to a copyright violation. The Supreme Court has recently held to the contrary, warning against the error of a “categorical grant” of injunctive relief for patent infringement in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006), and the Second Circuit has applied that conclusion in a recent, celebrated copyright case, *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010). What *no* court has ever denied is that injunctions are a valuable and constitutional response to copyright violations.

## Legislative Summary

I turn to a discussion of the bill itself. The Protect IP Act is designed to enforce federal copyright and trademark law in the age of the Internet. The “theft of American intellectual property” costs “American creators and producers billions of dollars per year,” as this Committee has documented, and results in “hundreds of thousands of lost jobs annually.” S. Rep. No. 111-373, at 2 (2010). The Protect IP Act aims to combat the theft and infringement of American intellectual property, copyrights and trademarks, whether such activity originates within or beyond the United States.

The Protect IP Act does so by strengthening the measures that the Attorney General and private parties may pursue, with court approval, to address infringing content. The bill buttresses injunctive relief previously available against infringing websites by providing a mechanism to compel operators of domain name lookup services, financial transaction providers, Internet advertising services, and Information Location Tools to cease supporting or cooperating with websites that have been determined to have broken the law.

The bill does not address all types of infringement online. It focuses only on websites that are *dedicated* to infringing activities. The Protect IP Act would establish a statutory category of websites that are “dedicated to infringing activities.” There are two ways that a website can meet this statutory category: Either a website has “no significant use other than engaging in, enabling or facilitating” infringement; or a website is “designed, operated, or marketed [] primarily as a means for engaging in, enabling, or facilitating infringement,” and “facts or circumstances suggest” the website is used “primarily as a means for engaging in, enabling, or facilitating infringement.” Under both definitions, infringement is defined by current copyright and trademark law. Thus the statute requires the offering of goods or services in violation of title 17 U.S.C., such as reproduction, distri-

bution or public performance of copyrighted works (section 501), or circumvention of technological measures that control access to copyrighted works (section 1201), or the sale, distribution, or promotion of goods, services, or materials bearing a counterfeit mark (section 34(d) of the Lanham Act (15 U.S.C. 1116(d)).

For websites allegedly dedicated to infringement, the bill authorizes the Attorney General to commence two types of actions. The Attorney General may commence an in personam action against the registrant, owner or operator of a website dedicated to infringing activities through a nondomestic domain name. If such an individual cannot be located “through due diligence” by the Attorney General, then an in rem action may be commenced against the nondomestic domain name used by the website in question. For both types of actions, the domain name must be used within the U.S. to access the website; the website must conduct business directed to U.S. residents; and the harm must be against holders of U.S. intellectual property rights. Notice of alleged violations and intent to proceed must be sent to domain name registrants, via email and postal mail, and in any other form that a court “finds necessary,” including as may be required by Rule 4(f) of the Federal Rules of Civil Procedure.

The Protect IP Act stipulates that a federal district court “may” issue a temporary restraining order, a preliminary injunction or an injunction “in accordance with rule 65 of the Federal Rules of Civil Procedure.” By incorporating Rule 65, the Protect IP Act applies the procedural protections that federal law currently affords all litigants in civil actions in the United States.

Under Rule 65, courts “may issue a preliminary injunction only on notice to the adverse party.” For temporary restraining orders to be issued without notice, Rule 65 requires that two conditions must be met. “[S]pecific facts in an affidavit or verified complaint [must] clearly show that immediate and irreparable injury, loss, or damage will result . . . before the adverse party can be heard in opposition.” And “the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.” Hearings for orders without notice are to be held “at the earliest possible time, taking precedence over all other matters,” under Rule 65, and the adverse party may move to dissolve or modify an order on two days’ notice to the moving party. All these protections are incorporated into the Protect IP Act.

Once court orders are issued against domain names, a federal law enforcement officer, with “prior approval of the court,” may serve a copy of a court order on four types of entities that may be cooperating with the website in question. First, operators of domain name lookup services shall stop the domain from resolving to the website’s Internet protocol address, and shall instead display a notice informing visitors that the operator is taking an action pursuant to a court order.<sup>2</sup> Second, financial transaction providers shall prevent, prohibit or suspend payment transactions

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<sup>2</sup> The text of this notice is to be drafted by the Attorney General.

between U.S. customers and the website named in the order. Third, Internet advertising services shall prevent their networks from providing advertisements to the website named in the order. Fourth, the order may be served on Information Location Tools, a term defined by the Digital Millennium Copyright Act (DMCA) (section 512 of title 17 U.S.C.), which generally refers to search engines. Such an order requires Information Location Tools to “remove or disable access” to the website or avoid serving a hypertext link to the website.

For each of these four entities, the bill’s general framework states that the entities must take “reasonable measures” in order to comply with orders. For the three entities that potentially face more technical computing demands – operators of domain name lookup services, Internet advertising services and Information Location Tools -- the bill provides that they are only required to take “technically feasible” measures. In the special case of operators of domain name lookup services, the Protect IP Act enumerates three additional protections. Such operators “shall not be required” to modify their network or facilities to comply with such orders; nor to take steps involving “domain name lookups” that are performed by entities other than their “own domain name system server”; nor to continue taking preventive actions under the order once access to the domain name has been “effectively disabled by other means.” The bill also notes that these enumerated protections do not “affect” or weaken the limitation on liability of such operators under section 512 of title 17 U.S.C.

The Protect IP Act neither compels nor prohibits speech or communication by the four entities regarding any measures they take.<sup>3</sup> The entities may decide, at their discretion, “whether and how to communicate” their actions to users or customers.

In the event of a willful and knowing failure to comply with orders under the bill, the Attorney General may seek injunctive relief directly against the entity in question. In such actions, the Protect IP Act provides that technological inability to comply with the order “without incurring an unreasonable economic burden” shall serve as an affirmative defense. A showing that the order in question is inconsistent with the Protect IP Act shall also serve as an affirmative defense. More broadly, in no way does the Protect IP Act limit current defenses to copyright infringement that may be offered, including but not limited to that of fair use.

Entities taking actions reasonably designed to comply with court orders issued under The Protect IP Act are granted immunity from causes of action based on such compliance. They are also exempted from liability for voluntarily taking the actions stipulated against websites dedicated

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<sup>3</sup> The single possible exception to this description is the bill’s affirmative requirement for operators of domain name lookup services, discussed above, to display a notice drafted by the Attorney General informing visitors that the operator is taking an action suspending website access pursuant to a court order.

to infringing activity in the Protect IP Act, provided that such actions are taken based on the reasonable belief that the websites are dedicated to infringing activity.

Apart from the Attorney General's powers under the Protect IP Act, the bill also provides for a private right of action. It is structured as a companion to the process enumerated for actions by the Attorney General. The private right of action includes the same protections of Rule 65, the prioritization of in personam actions against U.S. individuals over in rem actions against domains, and the same requirements regarding notice, service of process and domain activity within the U.S. The private right of action is limited, however, regarding which third party entities may be served with court orders. Private plaintiffs may only serve orders on financial transaction providers and advertising networks, not on operators of domain name lookup services or Information Location Tools.

### **First Amendment Considerations**

Having discussed the broad constitutional and copyright framework for the Protect IP Act, and described what the bill does in basic terms, I now turn to two potential First Amendment issues in analyzing this legislation: the breadth of the regulatory framework's impact on speech, and its procedural protections in a First Amendment context.

#### *Potential Overbreadth*

It is a fundamental principle of First Amendment jurisprudence that government restrictions on speech should be narrowly tailored to avoid unnecessarily burdening protected speech. Courts apply strict scrutiny to statutes that potentially interfere with protected speech, with special attention for rules that may sweep too broadly. Like any statute impacting speech, Congress must consider the potential overbreadth of the Protect IP Act's statutory structure and remedies in light of these First Amendment considerations.

The Protect IP Act is not constitutionally overbroad. The bill sets a high bar in defining when a website or domain is eligible for potential actions by the Attorney General or private plaintiffs,<sup>4</sup> the application of Federal Rule 65 serves as a check on overbreadth, and the bill's treatment of linking is consistent with current precedent.

The Protect IP Act is not designed to regulate the entire Internet. Nor is it designed to counter the vast array and forms of online infringement, which are subject to various laws already on

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<sup>4</sup> In my view, the definition in COICA, the bill's predecessor, was also not constitutionally overbroad, as I concluded in my February 11, 2011 letter.

the books. The Protect IP Act focuses, instead, on a narrow category of entities which are not simply trafficking in some infringing content, or occasionally breaking federal laws, but which are primarily devoted to providing or selling infringing content in the United States. Since the Protect IP Act applies only to websites that are “dedicated to infringing activities,” based on the precedent for online infringement liability, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936 (2005), actions under the Protect IP Act require a showing that a target website is *both* violating current federal law and engaging in wholesale infringement. Therefore, any website basically engaged in legal activities, such as commentary, socializing or commerce, cannot be pursued under the Protect IP Act. Indeed, the definitions of “dedicated to infringing activities” specifically exclude websites that have any other “significant use,” or websites that are not “primarily” used for infringement.<sup>5</sup>

For websites and domains that meet the Protect IP Act’s statutory category, a range of injunctive relief is available, with a court making the final determination as to whether and how to craft relief against a website operator or owner, or the operators of domain name lookup services, or third party entities, or some combination of these options. When injunctive relief results in the blockage of a domain name, the blockage of some non-infringing or protected content may result. However, such content must be hosted in conjunction with an entity that meets the Protect IP Act’s definition of entities devoted to infringing activities. Furthermore, even without that high bar, the very presence of non-infringing speech generally does not provide a copyright violator with immunity from enforcement actions under current caselaw. The First Amendment allows government regulations to prevent piracy that clearly have an incidental impact on non-infringing speech. *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1129 (N.D. Cal. 2002) (noting that the First Amendment allows the government to pursue online infringement with an “incidental restriction” on First Amendment freedoms, so long as the traditional test is met that the “means chosen do not burden substantially more speech than is necessary to further the government’s legitimate interests.”) (internal citations omitted). Furthermore, and independent of a potential statutory framework such as that set forth in the Protect IP Act, courts already approve, on a case-by-case basis, copyright seizures of domain names that can result in the blockage of some non-infringing content. Indeed, some such seizures apply current forfeiture laws to permanently seize domain names as property. *United States v. TVShack.net et al.*, 2010 WL 2666284 (S.D.N.Y. June 29, 2010) (treating domain names hosting infringing videos as forfeitable property under 18 U.S.C. §§ 2323(a) and ordering their seizure).

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<sup>5</sup> This protection for websites that engage in significant activities besides infringement has been clarified, or arguably strengthened, in revisions to the bill’s predecessor, COICA. That legislation defined websites dedicated to infringing activities as websites with “no demonstrable *commercially* significant purpose or use” besides infringement (emphasis added). That definition, criticized by some on the ground that it could be read to require an explicitly commercial non-infringing activity -- rather than other legal, non-infringing activities -- is not contained in the Protect IP Act.



If an order under the Protect IP Act does result in blocking some non-infringing content, the bill is sufficiently narrow to accommodate the immediate publication of that content elsewhere and the future publication of the content on the same domain. First, by definition, any non-infringing content is not specifically enjoined by the order, so it may still be legally posted anywhere else online. Second, such content may be unblocked or reposted *on the same* website or domain name in the future, once the infringing content at issue is removed. Indeed, the content can be unblocked or reposted precisely because the domain name itself, as property, is not forfeited by an order pursuant to the Protect IP Act. Thus after the infringement issue is resolved and the site operator is in compliance with federal law, the domain name can post its archived non-infringing content.

Finally, it is worth noting that the Protect IP Act's regulatory structure implicates linking, a key part of the Internet's architecture, in two ways. First, the bill's definition of websites "dedicated to infringing activities" could potentially be met exclusively through links, even if a linking website does not technically host infringing content on its own site or servers. Second, the bill's remedies include potential injunctions against linking by Information Location Tools, such as search engines, pursuant to a court order. These measures' impact on linking are not overbroad, nor a break from precedent. The bill's definitions of websites dedicated to infringing activities applies to entities that have no significant use other than engaging in, enabling, or facilitating the reproduction, distribution, performance or sale of copyright or trademark infringement, or entities that are designed, operated or marketed and primarily used for copyright or trademark infringement. Thus, neither a few inadvertent links to infringing material on an otherwise lawful website, nor some links to infringing websites for the purposes of public information or education, could be held to meet this threshold. A website which has no significant use other than providing links to such illegal activities, albeit on other, separate websites, may meet this definition. In recent enforcement actions against domain names, for example, the U.S. Department of Homeland Security specifically seized "'linking' websites" which provided "links to files on third party websites that contain illegal copies of copyrighted contact." (Aff. ¶ 13) *United States v. The Following Domain Names: HQ-Streams.com et al.*, 2011 WL 320195 (S.D.N.Y. Jan 31, 2011). Targeting such linking is also consistent with caselaw regarding online copyright infringement, since "[l]inking to infringing material" can create secondary liability, 1003 PLI/Pat 35 at 43. Under current law, when a website links to infringing content, or links to technology to facilitate infringement, courts look to whether the website operator knowingly linked to facilitate violations of the law. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) (holding defendant violated DMCA by linking to program to unlock DVDs for unauthorized copying, and requiring knowing linking for the purpose of disseminating the program, and holding that prohibiting technology designed to circumvent protections for copyrighted works did not violate the First Amendment); *Bernstein v. JC Penney, Inc.*, 50 U.S.P.Q.2d 1063 (C.D. Cal. 1998) (plaintiff did not have a claim for mere linking to website without knowledge of infringing material on the site). In situations without the presence of the knowledge element, where no secondary liability attaches, courts retain the authority to issue injunctive relief specifically against linking, as a means to remedy copyright infringement. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (holding that injunctions issued against linking to thwart copyright infringement was consistent with the First Amendment). Even in cases that have *narrowed* injunctions against linking based on First Amendment violations regarding overbreadth, protected criticism and non-

commercial speech, courts have still upheld injunctions tailored to protect intellectual property rights by banning commercial links. *Nissan Motor Co. v. Nissan Computer Corporation*, 378 F.3d 1002 (9th Cir. 2004) (holding injunction violated First Amendment “to the extent that it enjoins the placing of links [] to sites with disparaging comments” about plaintiff’s business, but upholding injunction compelling defendant to “refrain from displaying” links about the plaintiffs’ business on website with similar name, and holding trademark was infringed by certain links).

Given these precedents, actions against websites dedicated to infringing content based on extensive linking to facilitate infringement appear to rest on a solid constitutional foundation. Likewise, potential injunctions against linking to websites dedicated to infringing activities, pursuant to a court order and tailored to combat infringement, are consistent with courts’ current remedies for intellectual property violations online.

### *Procedural Protections*

The procedural protections under the Protect IP Act are so strong, uniform and constitutionally rooted that it is no exaggeration to observe that any complaints in this area are not really with the bill, but with the Federal Rules of Civil Procedure itself, which govern all litigants in U.S. federal courts.

The Protect IP Act incorporates Rule 65 to provide the process governing how a judge “may” issue a temporary restraining order, preliminary injunction, or injunction. Thus website operators subject to the Protect IP Act would benefit from the same procedural safeguards afforded litigants in all other U.S. civil actions. For preliminary injunctions, those safeguards require notice in advance. For temporary restraining orders, the safeguards include first, the requirement that temporary restraining orders issued without notice must be based on specific facts showing the prospect of immediate and irreparable damage “*before* the adverse party can be heard in opposition” (emphasis added); and second, a written certification by the attorney (for the government or the plaintiff, depending on the action), explaining efforts made to give notice and the reasons it should not be required in this instance. Subsequent hearings for orders without notice are a first priority under Rule 65, which also grants the adverse party the option of moving to dissolve an order with two days’ notice.

In addition to those well-established procedures, the Protect IP Act requires several measures to ensure due process. First, the Attorney General or qualifying plaintiff must commence an in personam action against the registrant, owner or operator of a website dedicated to infringing activities, if it is possible to locate such an individual through due diligence. This approach, which provides more protection than the original COICA bill, provides more warning and the prospect of adversarial hearings before injunctive relief -- at least in situations where such an individual resides in the U.S. and has provided accurate contact information. For in rem actions, the Protect IP Act explicitly requires service of process by sending notice of the alleged violation and intent to proceed to the registrant, by email and postal mail listed in a public database, by email and postal mail of the

registrar or authority that registered the domain name, as well as in any form a court finds necessary under Rule 4(f) of the FRCP. Consistent with the objectives of Rule 65, this requirement provides an opportunity to operators of allegedly infringing websites to defend themselves before an order is issued. In the event that operators prefer to respond later, or only learn of injunctive action later because they did not provide accurate contact information to their registry, they still retain their rights to seek later relief from the order by disputing the allegations or appealing to the interests of justice.<sup>6</sup> It is worth noting, in addition, that federal copyright law disfavors the submission of false contact information to a domain name registrar, treating the knowing provision of “materially false contact information to a domain name registrar” as a rebuttable presumption of willful infringement. 17 U.S.C.A § 504(c); *Chanel, Inc. v. Cui*, 2010 WL 2835749 (S.D.N.Y. July 7, 2010) (entering default judgment for permanent injunction against product trademark infringement and finding willful conduct based, in part, on defendant’s repeated submissions of “false information in registering domain names” used for infringement). Finally, since the Protect IP Act states that courts “may” issue preliminary injunctions or injunctions, the range of available remedies includes the prospect of a final—not preliminary—resolution of the dispute.

Even when the Protect IP Act’s required procedural protections are satisfied, some operators of allegedly infringing websites may knowingly decline to participate in U.S. court proceedings. Such a choice, after legitimate notice and procedural safeguards are provided, may lead to *ex parte* proceedings and default judgments. Courts routinely enter default judgments in civil lawsuits, including comparable online copyright cases. After initial notice has been served, courts grant permanent injunctive relief for copyright violations in default judgments without additional attempts at notice. *Disney Enterprises, Inc. v. Farmer*, 427 F.Supp. 2d 807 (E.D. Tenn. 2006) (issuing permanent injunction barring infringement of copyright by website distributing copyrighted movies over peer-to-peer network, with default judgment entitled without additional service of notice on defendant); *Priority Records, LLC v. Bradley*, 2007 WL 465754 (E.D. Mich. Feb. 8, 2007) (issuing permanent injunction in default judgment against defendant using online distribution system to download and distribute copyrighted recordings).

## Conclusion

I would like to directly acknowledge that potential action by Congress in this area has drawn objections from groups and individuals with deeply held beliefs about civil liberties, human rights and a free Internet.


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<sup>6</sup> Each of these protections applies regardless of whether the Attorney General or a qualifying plaintiff is bringing an action. The prospect of potential actions by private plaintiffs, which was not provided in the COICA legislation, does not fundamentally alter the First Amendment and due process analysis in this area.

Among a range of objections, two core critiques stand out. First, there is a recurring argument that the United States would be less credible in its criticism of nations that egregiously violate the civil liberties of their citizens if Congress cracks down on rogue websites. Second, there is the vaguer notion that stealing is somehow less offensive when carried out online.

I disagree. Copyright violations are not protected by the First Amendment. Entities “dedicated to infringing activities” are not engaging in speech that any civilized, let alone freedom-oriented, nation protects. That these infringing activities occur on the Internet makes them not less, but more harmful. The notion that by combating such acts through legislation, the United States would compromise its role as the world leader in advancing a free and universal Internet seems to me insupportable. As a matter of both constitutional law and public policy, the United States must remain committed to defending both the right to speak and the ability to protect one’s intellectual creations. This legislation does not impair or overcome the constitutional right to engage in speech; it protects creators of speech, as Congress has since this Nation was founded, by combating its theft.

Respectfully submitted,

  
Floyd Abrams\*

cc: Directors Guild of America  
American Federation of Television and Radio Artists  
Screen Actors Guild  
International Alliance of Theatrical and Stage Employees  
Motion Picture Association

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