

THE UNITED STATES TAKES CENTER STAGE IN THE INTERNATIONAL FIGHT AGAINST ONLINE PIRACY & COUNTERFEITING

On September 20, 2010, U.S. Senators Patrick Leahy (D–Vermont) and Orrin Hatch (R– Utah) introduced the most far-reaching and comprehensive U.S. legislation to date aimed at modernizing intellectual property rights regulations and combating online piracy and counterfeiting: The Combating Online Infringement and Counterfeits Act (“COICA” or “the Act”).¹ With the recent U.K. adoption of the Digital Economy Act² and the French adoption of The Creation and Internet Law,³ the world has hotly anticipated a U.S. response to online copyright infringement. COICA, the latest effort by Senators Leahy and Hatch to advance intellectual property legislation in the United States, could be a vital part of the eventual U.S. response.⁴

1. Press Release, Senators Introduce Bipartisan Bill to Combat Online Infringement, http://leahy.senate.gov/press/press_releases/release/?id=e26c01c9-e291-4bd3-9912-80dca46a75f6 (last visited October 3, 2010) [hereinafter Senators Introduce COICA].

2. See The Digital Economy Act, 2010, c. 24 (Eng.) available at <http://www.statutelaw.gov.uk/Home.aspx> (search “Title:” for “Digital Economy Act”; then follow “Digital Economy Act 2010” hyperlink; then follow “Digital Economy Act 2010 (c. 24)” hyperlink).

3. See Jane Winn & Nicolas Jondet, A New Deal for End Users? Lessons from a French Innovation in the Regulation of Interoperability, 51 Wm. & Mary L. Rev. 547, 560 (2009); see also Loi 2009-669 du 12 juin 2009 de favorisant la diffusion et la protection de la création sur Internet [Law 2009-669 of June 12, 2009 on the Dissemination and Protection of Creation on the Internet], Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 13, 2009 p. 135.

4. See Senators Introduce COICA, *supra* note 1. Senators Leahy and Hatch have a longtime commitment to protecting U.S. intellectual property rights; in addition to COICA, they co-sponsored the Inducing Infringement of Copyrights Act of 2004 and the 2009 Patent Reform Act. Press Release, Senators Hatch, Leahy Introduce Patent Reform Act of 2009, http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=ce28c6f0-1b78-be3e-e028-418ea18126e5; see Todd C. Chapman, Note,

COICA would provide the Justice Department with the tools necessary to monitor and terminate websites that promote or provide access to the unauthorized downloading, streaming, or selling of copyrighted material and counterfeit goods.⁵ Such goods include movies, music, software, and pharmaceuticals.⁶ Currently, the policing of such “rogue websites,” many of which are foreign-owned and operated, is difficult: The websites are often maintained by vast global piracy networks, and those piracy networks have been tolerated—and sometimes protected—in China, India, Russia, and even Canada.⁷

Intellectual property theft costs the U.S. economy more than \$100 billion each year.⁸ More than \$20 billion of the annual loss is attributable to the piracy of copyrighted movies, music, and other entertainment.⁹ Digital media piracy is so prevalent that as few as one in three music CDs and one in twenty music downloads are sold legitimately worldwide.¹⁰ In 2002, between 400,000 and 600,000 movies were illegally downloaded every day.¹¹

Sharing in the Groove: Ninth Circuit Allows Peer-to-Peer Networks to Continue File-Sharing, 4 CHI.-KENT J. INTELL. PROP. 304, 326 (2005).

5. See Senators Introduce COICA, *supra* note 1; see also Randall W. Schwartz, Comment, *Are Corporate Information Assets, in the Midst of Dynamic Technological and Infrastructural Advances, Best Secured by Legal or Self-Help Remedies?*, 26 HOUS. J. INT'L L. 163, 189 (2003) (noting the comparative ease by which electronic works can be copied and distributed).

6. Senators Introduce COICA, *supra* note 1

7. Michael Cieply, *Digital Piracy Spreads, and Defies a Fix*, N.Y. TIMES, April 7, 2009, at B1; see also Christopher D. Kruger, *Passing the Global Test: DMCA §1201 as an International Model for Transitioning Copyright Law into the Digital Age*, 28 HOUS. J. INT'L L. 281, 289 (2006) (“Most [measures taken to minimize illegal file-sharing] have proven ineffective in minimizing digital piracy because of practical limitations and their failure to realize the international dimension of digital piracy.”).

8. See Senators Introduce COICA, *supra* note 1.

9. See Cieply, *supra* note 7.

10. *Id.* See also Sefano Vranca, *Six Strategies to Protect Clients Against IP Theft*, 15 INTELL. PROP. STRATEGIST 1, (Oct. 2008) (estimating the U.S. portion of the global music market to be 60.7%, accounting for about 13.2 billion illegal downloads annually).

11. Wired.com, *MPAA Snooping for Spies*, July 22, 2002, <http://www.wired.com/politics/law/news/2002/07/54024>. In South Korea alone, the Motion Picture Association of America estimates annual losses of \$40 million stemming from illegal downloads coordinated through 7700 rogue websites. Stephen E. Blythe, *The Tiger on the Peninsula is Digitized: Korean E-Commerce Law as a Driving Force in the World's Most Computer-*

COICA would provide U.S. anti-piracy enforcement agencies with increased power to combat websites “dedicated to infringing activities.”¹² The Act would give “teeth to the Justice Department for enforcement by expediting the process for cracking down on websites that are dedicated to making infringing goods and services available.”¹³ Specifically, the Act would grant the Attorney General authority to issue temporary restraining orders, preliminary injunctions, or injunctions against websites determined to be “dedicated to infringing activities.”¹⁴

Moreover, COICA would grant the Attorney General authority to commence an *in rem* action against a domain name used by an infringing website.¹⁵ COICA would allow such actions to be brought (1) in the United State’s jurisdiction where the domain name registrar or registry is located, or (2) in the District of Columbia for websites registered outside the United States.¹⁶ This latter provision allows the Justice Department to prevent the importation of infringing and counterfeit goods.¹⁷ For example, if a foreign-registered website were participating in infringing activities, the Justice Department would be able to act against third-party Internet service providers (“ISPs”) payment processors and ad network providers—all of which would likely be critical to the infringing websites financial

Savvy Nation, 28 HOUS. J. INT’L L. 573, 660 (2006).

12. See Senators Introduce COICA, *supra* note 1. COICA proposes the addition of a new section called “Internet sites dedicated to infringing activities”. Combating Online Infringement and Counterfeits Act (“COICA”) § 2, S.R. 3084, 111th Cong. (2010). COICA defines a website as “dedicated to infringing activities” if (1) the website would constitute property that is subject to civil forfeiture under 18 U.S.C. § 2323 (a)(1); or (2) the website’s central purpose is to offer infringing goods and service or counterfeit products (18 U.S.C. § 2323 (a)(2)). See *id.* § 2(a)

13. Eliza Krigman, *Tech Daily Dose: Leahy and Hatch Drop Online Infringement Bill*, National Journal (Sep. 20, 2010, 2:55 PM), <http://techdailydose.nationaljournal.com/2010/09/leahy-and-hatch-drop-online-in.php>.

14. See COICA § 2(b).

15. *Id.* § 2(c). Such authority to bring in rem actions over domain names is similarly modeled after the jurisdictional provisions of the Anti-cyber-squatting Consumer Protection Act. *Id.*

16. *Id.*

17. *Id.*

viability—by, among other things, “blocking online access to the rogue [website] or not processing the website’s purchases.”¹⁸

COICA’s introduction comes in the midst of U.S.-led negotiations for a plurilateral multinational agreement establishing international standards for intellectual property rights enforcement: the Anti-Counterfeiting Trade Agreement (“ACTA”).¹⁹ To date, almost forty countries have agreed to ACTA’s guidelines for reducing online intellectual property theft, e.g. counterfeit goods, generic medicines and copyright infringement.²⁰ Similar to the COICA, one of ACTA’s major prongs addresses “Intellectual Property Rights Enforcement in the Digital Environment.”²¹ Because key U.S. role in drafting ACTA, COICA would effectively provide a mechanism for U.S. enforcement of ACTA’s digital environment prong.

Finally, from the alleged infringer’s prospective, COICA provides safeguards against potential government overreach. Under these safeguards, infringing site operators are granted special provisions for petitioning U.S. courts to lift infringement orders.²² In addition, the Act only allows the Justice Department to *initiate* actions against infringing sites; the federal courts have the final say over domain suspension and removal.²³

The U.S. Chamber of Commerce,²⁴ the Motion Picture Association of America (“MPAA”),²⁵ the Recording Industry

18. Senators Introduce COICA, *supra* note 1.

19. See Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1377 (2010); Barton Beebe, Intellectual Property and the Sumptuary Code, 123 HARV. L. REV. 809, 838 n.144 (2010).

20. Countries Reach Tentative Anti-Counterfeiting Pact, Reuters, Oct. 2, 2010.

21. See Anti-Counterfeiting Trade Agreement at § 5, Oct. 2, 2010, available at http://www.ustr.gov/webfm_send/2338. This prong specifically addresses “intellectual property rights infringement which takes place in the digital environment” and “the circumvention of technological protection measures.” *Id.*; see generally Margot Kaminski, Recent Development, *The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 34 YALE J. INT’L L. 247 (2009).

22. See COICA § 2(h), (j)(4).

23. See *id.* § 3.

24. Press Release, U.S. Chamber of Commerce, U.S. Chamber Joins Call for Congressional Action to Shut Down Rogue Websites (Oct. 21, 2010).

25. Press Release, Motion Picture Association of America (MPAA), MPAA Statement on the Introduction of the ‘Combating Online Infringements and Counterfeits Act’ (Sept. 20, 2010). The MPAA has praised the Act as “a major step forward” but

Association of America (“RIAA”),²⁶ and the Coalition Against Domain Name Abuse (“CADNA”)²⁷ are among the numerous entities that have come out in support of COICA.²⁸ However, COICA is as vehemently opposed as it is supported; the American Civil Liberties Union (“ACLU”),²⁹ the Center for Democracy and Technology (“CDT”),³⁰ Electronic Frontier Foundation (“EFF”),³¹ Human Rights Watch,³² and Reporters sans Frontières [Reporters without Borders]³³ are among the entities that have mounted vigorous campaigns against COICA. In a joint statement, several unions representing workers in the entertainment industry credited COICA as legislation that “[makes] it easier to shut down ‘rogue’ websites, which are dedicated to stealing the films, television programs and music created by our members.”³⁴ These organizations support COICA

maintains that it needs strengthening. *Id.*

26. Press Release, Recording Industry Association of America (RIAA), RIAA Applauds New Senate Bill Targeting Rogue Foreign Sites Trafficking in Illegal Music and Movies (Sept. 20, 2010). Like the MPA, the RIAA lauded COICA as “a good start” but cautioned that “improvements can be made to improve its effectiveness.” *Id.*

27. Press Release, Coalition Against Domain Name Abuse (CADNA), CADNA Commends Lawmakers on Bipartisan Bill to Fight Online Piracy (Sept. 22, 2010). Josh Bourne, president of the CADNA, has lauded Senators Leahy and Hatch for taking the first steps in providing the Justice Department with the power to crack down on infringing websites, but Bourne has further stated that CADNA would “like to see legislation that would complement [COICA] by creating stronger deterrents against cyber-squatting” because “[s]uch legislation would help prevent these types of sites from being created in the first place.” *Id.*

28. Other supporters include the American Federation of Television and Radio Artists (AFTRA), Directors Guild of America (DGA), and the Screen Actors Guild (SAG). See Ira Teinowitz, *Senate Steps Into the Anti-Piracy Fray*, The Wrap (Sept. 20, 2010, 11:59 AM), <http://www.thewrap.com/movies/column-post/senate-may-step-anti-piracy-fray-20998>.

29. Letter to Senators Patrick J. Leahy and Jeff Sessions 2 (Oct. 26, 2010) available at http://www.publicknowledge.org/files/docs/COICA_human_rights_letter_0.pdf.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Press Release, AFTRA, DGA, SAG, and International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada (IATSE), Joint Statement Regarding the Combating Online Infringements and Counterfeits Act (Sept. 20, 2010).

as a new weapon in the fight against “the largely foreign profiteers who operate these sites and rob our members of the ability to make a living from their creativity and labor, prevent funds from reaching their pension and health plans, and endanger their ability to work now and in the future.”³⁵

Opposition to COICA has centered on characterizing the Act as censorship. CDT, one of COICA’s opponents, has strongly voiced its concerns over the Act, stating that it “could hamper free speech on the Internet and force Internet intermediaries to become the gatekeepers of the Web.”³⁶ CDT officials further warned that “once you start asking ISPs to take a new role as enforcers against improper content, it’s hard to see where that stops.”³⁷ Because the United States is effectively responsible for the Internet’s domain name management system,³⁸ there are global fears that if COICA passes, the United States will destabilize the current Internet governance system by using “its historic position over the domain name system to censor content.”³⁹

In further opposition to the bill, ninety-six engineers who played a role in building the Internet have written a scathing letter urging the Senate to set COICA aside.⁴⁰ They argue that:

All censorship schemes impact speech beyond the category they were intended to restrict, but this bill will be particularly egregious in that regard because it causes entire domains to vanish from the Web, not just infringing pages or files. Worse, an incredible range of useful, law-abiding sites can be blacklisted under this bill.⁴¹

35. *Id.*

36. Juliana Gruenwald, *Group Voices Concerns with Leahy’s Online IP Bill*, Tech Daily Dose (Sept. 28, 2010, 12:35 PM), <http://techdailydose.nationaljournal.com/>.

37. *Id.*

38. In 1998, through an agreement with the U.S. Commerce Department, a California corporation was chosen to manage the Internet’s domain name system. *Id.*

39. *Id.*

40. Peter Eckersley, *An Open Letter from Internet Engineers to the Senate Judiciary Committee*, Deeplinks (Sept. 28, 2010) <http://www.eff.org/deeplinks/archive>.

41. *Id.*

These sentiments are echoed by numerous public interest and private organizations, especially in the human rights arena.⁴²

COICA represents a bold step toward parity between U.S. and European anti-piracy laws,⁴³ but in passing it, the United States will be forced to balance its international reputation and the rights of its citizens against the rights of intellectual property holders adversely affected by online piracy, infringement, and counterfeiting.

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42. See Letter to Senators Leahy and Sessions, *supra* note 29.

43. See *supra* notes 2–3 and accompanying text (discussing the U.K. Digital Economy Act and the French The Creation and Internet Law).

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