

ADVERTISING, MARKETING & PROMOTIONS

>>ALERT

STOP ONLINE PIRACY ACT: THE DETAILS

House Judiciary Committee Chairman Lamar Smith (R-Tex.), Ranking Member John Conyers (D-Mich.), IP Subcommittee Chairman Bob Goodlatte (R-Va.), and former Subcommittee Chairman Howard Berman (D-Calif.), together with a number of other Republican and Democratic House Members, have introduced H. R. 3261, the “Stop Online Piracy Act,” to “promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property.”

The bill empowers the U.S. Attorney General to take court action “to protect U.S. customers and prevent U.S. support of foreign infringing sites” and creates a “[m]arket-based system to protect U.S. customers and prevent U.S. funding of sites dedicated to theft of U.S. property.” The bill also imposes important obligations on service providers, Internet search engines, payment network providers, Internet advertising services, and other parties.

If this bill were to become law, it would impose new obligations on these parties, where virtually none existed in the past, to assist in the fight against online piracy.

U.S. vs. FOREIGN INFRINGING SITES

The bill seeks to address piracy on both U.S.-directed sites and foreign infringing websites. Factors that are to be considered when analyzing if an Internet site is a “U.S.-directed site” include whether:

>> the site is used to provide goods or services to users located in the United States;

- >> there is evidence that the site or portion thereof is intended to (i) offer or provide, (ii) allow access to, or (iii) deliver these goods and services to users located in the United States;
- >> the site or portion thereof does not contain “reasonable measures” to prevent these goods and services from being obtained in or delivered to the United States; and
- >> any prices for goods and services are indicated or billed in the currency of the United States.

Factors that are to be considered when analyzing if an Internet site is a foreign infringing site include whether:

- >> the site “is a U.S.-directed site” and “is used by users in the United States;”
- >> the site’s owner or operator “is committing or facilitating” (i) trafficking in counterfeit labels, illicit labels, or counterfeit documentation or packaging; (ii) criminal infringement of a copyright; (iii) unauthorized fixation of and trafficking in sound recordings and music videos of live musical

THE BOTTOM LINE

If the “Stop Online Piracy Act” were to become law, service providers, payment network providers, Internet advertising services, Internet search engines, domain name registries and domain name registrars would see their role in the fight against online piracy change from virtual bystanders to soldiers on the front line with real responsibilities.

- performances; (iv) unauthorized recording of motion pictures in a motion picture exhibition facility; (v) trafficking in counterfeit goods or services; and (vi) economic espionage and theft of trade secrets; and
- >> the Internet site would be subject to seizure in the United States in an action brought by the Attorney General if the site were a domestic Internet site.

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ADVERTISING, MARKETING & PROMOTIONS

>>ALERT

ACTIONS BY THE ATTORNEY GENERAL

The bill grants authority to the Attorney General to commence an *in personam* action against a registrant of a domain name used by a foreign infringing site or an owner or operator of a foreign infringing site. The bill also provides that where an *in personam* action is not possible, the Attorney General may commence an *in rem* action against a foreign infringing site or the foreign domain name used by the site.

After sending a notice of the alleged violation and intent to proceed to the registrant of the domain name of the Internet site or to the owner or operator of the site, the Attorney General may make an application for an injunction against the registrant or owner, or against the site itself or the site's domain name, "to cease and desist from undertaking any further activity as a foreign infringing site."

OBLIGATIONS OF OTHER ENTITIES

This section of the bill also provides that, with prior approval of the court, the Attorney General may serve a copy of a court order on a wide range of other entities: service providers, Internet search engines, payment network providers, and Internet advertising services. After being served with a copy of a court order, these entities must take the actions described below.

Service Providers

A service provider that operates a nonauthoritative domain name system server (which is a server that does not

contain complete copies of domains but uses a cache file that is comprised of previous domain name server lookups, for which the server has received an authoritative response in the past) must take, as expeditiously as possible, but in any case within 5 days, "technically feasible and reasonable measures designed to prevent access by its subscribers located within the United States to the foreign infringing site (or portion thereof) that is subject to the order." A service provider generally is not required to modify its network, software, systems, or facilities; take any measures with respect to domain name resolutions not performed by its own domain name server; or continue to prevent access to a domain name to which access has been effectively disabled by other means.

Internet Search Engines

An Internet search engine must take, as expeditiously as possible, but in any case within 5 days, "technically feasible and reasonable measures" that are "designed to prevent the foreign infringing site that is subject to the order, or a portion of such site specified in the order, from being served as a direct hypertext link."

Payment Network Providers

A payment network provider, defined as "an entity that directly or indirectly provides the proprietary services, infrastructure, and software to effect or facilitate a debit, credit, or other payment transaction," must take, as expeditiously as possible, but in any

case within 5 days, "technically feasible and reasonable measures" that are "designed to prevent, prohibit, or suspend its service from completing payment transactions involving customers located within the United States or subject to the jurisdiction of the United States and the payment account that is used by the foreign infringing site, or portion thereof, that is subject to the order and through which the payment network provider would complete payment transactions."

Internet Advertising Services

"Internet advertising services" are broadly defined as a service that for compensation sells, purchases, brokers, serves, inserts, verifies, clears or otherwise facilitates the placement of an advertisement, including a paid or sponsored search result, link or placement, that is rendered in a viewable form for any period of time on an Internet site. An Internet advertising service that contracts to provide advertising to or for the foreign infringing site, or portion thereof, that is subject to the order, or that knowingly serves advertising to or for the site or a portion thereof, must take, as expeditiously as possible, but in any case within 5 days, "technically feasible and reasonable measures" that are designed to:

- >> prevent its service from providing advertisements to or relating to the foreign infringing site that is subject to the order or a portion of the site specified in the order;

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ADVERTISING, MARKETING & PROMOTIONS

>>ALERT

- >> cease making available advertisements for the foreign infringing site or a portion thereof, or paid or sponsored search results, links, or other placements that provide access to the foreign infringing site or a portion thereof; and
- >> cease providing or receiving any compensation for advertising or related services to, from, or in connection with a foreign infringing site or a portion thereof.

The bill provides that the Attorney General can bring an action against an entity that fails to meet the obligations discussed above, but the bill otherwise provides these entities with immunity against claims arising from any acts they take that are “reasonably designed to comply” with the court order.

THE “MARKET-BASED” SYSTEM

The bill further explains how it intends to deny U.S. financial support of sites “dedicated to theft of U.S. property.” One of its primary methods is imposing obligations on payment network providers and Internet advertising services following their receipt of notification that an Internet site is “dedicated to theft of U.S. property.”

Except in the case of an effective counter notification (as discussed below), a payment network provider must take “technically feasible and reasonable measures,” as expeditiously as possible, but in any case within 5 days, that are designed

“to prevent, prohibit, or suspend its service from completing payment transactions involving customers located within the United States and the Internet site, or portion thereof, that is specified in the notification.”

In addition, except in the case of an effective counter notification (as discussed below), an Internet advertising service that contracts with the operator of an Internet site, or portion thereof, that is specified in a notification, to provide advertising to or for the site or portion thereof, or that knowingly serves advertising to or for the site or portion thereof, must take “technically feasible and reasonable measures,” as expeditiously as possible, but in any case within 5 days, that are designed to:

- >> prevent its service from providing advertisements to or relating to the Internet site, or portion thereof, that is specified in the notification;
- >> cease making available advertisements for the Internet site, or portion thereof, that is specified in the notification, or paid or sponsored search results, links, or other placements that provide access to the Internet site, or portion thereof, that is specified in the notification; and
- >> cease providing or receiving any compensation for advertising or related services to, from, or in connection with the Internet site, or portion thereof, that is specified in the notification.

A notification that an Internet site is dedicated to theft of U.S. property is effective only if it is a written communication that is provided to the designated agent of a payment network provider or an Internet advertising service and only if it includes the specifically enumerated points set forth in the bill.

Counter Notification

The bill also provides for what it calls a “counter notification.” A counter notification is effective only if it is a written communication that is provided to the designated agent of a payment network provider or an Internet advertising service and only if it includes its own set of specific points set forth in the bill.

If an effective counter notification is made, or if a payment network provider or an Internet advertising service fails to meet their obligations following receipt of a notification, a qualifying plaintiff may file an *in personam* or *in rem* action for a temporary restraining order, a preliminary injunction, or an injunction against a registrant of a domain name used by the Internet site, or against an owner or operator of the Internet site, or, in an *in rem* action, against the Internet site or against the domain name used by the Internet site, to “cease and desist from undertaking any further activity as an Internet site dedicated to theft of U.S. property.”

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ADVERTISING, MARKETING & PROMOTIONS

>>ALERT

IMMUNITY

The bill contains a provision providing immunity for a service provider, payment network provider, Internet advertising service, advertiser, Internet search engine, domain name registry, or domain name registrar that takes voluntary action against sites “dedicated to theft of U.S. property.” It also contains a provision providing immunity to a service provider, payment network provider, Internet advertising service, advertiser, Internet search engine, domain name registry, or domain name registrar, that, acting in good faith and based on credible evidence, stops providing or refuses to provide services to an Internet site “that endangers the public health.”

CONCLUSION

The bill has many similarities to the current Digital Millennium Copyright Act (the DMCA) which imposes obligations on service providers to respond to notifications of claimed copyright infringement in order to be relieved from infringement liability for content provided by a third party.

Like those subject to the DMCA, those subject to this bill would have to put procedures in place to ensure that they could properly receive, analyze and respond to notifications of piracy under the bill. These procedures, particularly for advertisers, likely do not exist at this time.

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