

Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011

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This new act, known as the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property 2011, popularly known as PROTECT IP ACT, 2011, is an act which is going to succeed the previously existing act on internet censorship. The previously existing act is the “Combating Online Infringements and Counterfeits Act”, popularly known as the COICA. The main of this act was to prevent copyright infringement on the internet. However, this bill was never passed by the Congress.

The new legislation, PROTECT IP ACT, 2011, is wider in scope than its predecessor. This act would allow the Judiciary to obtain orders from the court against sites infringing IPR and also, require third parties to “either prevent access to the internet site (in the case of an internet service provider or search engine), or cease doing business with the internet site (in the case of a payment processor or advertising network).” The bill is an attempt to deal with foreign sites which can be difficult for US enforcement to reach, even when those sites

explicitly target US citizens.

Another important feature of this act is that it protects those firms which themselves are trying to prevent other entities from selling illegitimate pharmaceuticals online. The bill also encourages everyone including domain name registries, search engines, payment processors, and ad networks to cut off access to infringing sites that “endanger the public health”, i.e. contribute to infringing.

FEATURES

Firstly, this legislation includes a private right of action for intellectual property owners. The consequence of this is that the government as well as the owners of IPR can bring injunctions against websites involved in IPR infringing activities. Also, as an extension of this clause, court orders can be brought against those websites which are providing services to these sites.

Secondly, the act has been drafted to include additional categories of third-party providers who can be subjected to court orders. Under this act, “interactive computer services” and “servers of sponsored links” can be required to cease linking to particular websites. Though initially it was felt that only “search engines”, like Google or Bing would be affected by this legislation, the extended scope of this legislation affects all other websites including the most popular websites like Facebook and Twitter. It basically includes all other website which displays a URL in them. Thirdly, in case of non-domestic domains, i.e. those domains which are not located in the United States, a case of infringement of IPR, a court order can be issued only by the Attorney General but not by the private parties. The meaning of this would mean that an action to stop linking to other websites, by “interactive websites” can be brought by the

Attorney General only against those domains which are non-domestic, i.e. are not located within the United States. Also, it means that such an action cannot be brought against domains which are not non-domestic, and it cannot be brought by private parties. Also, the new language no longer requires explicit action on the part of domain name registries and registrars, although it still reaches operators of non-authoritative domain name system servers. Because of Immigration and Customs Enforcement's ongoing practice of seizing domain names by prevailing on registries and registrars, however, the revision doesn't seem all that meaningful. The Electronic Frontier Foundation, EFF, denounced the earlier bill for its potential dangerous effects on the Internet's domain name system.

Another important feature of this act is that it requires the owners of IPR or the government, who claim to be potential plaintiffs, to identify a certain entity which they claim is infringing their IPR, before bringing an action against the domain name.

The act as mentioned above, has a broadened scope as compared to the previous act. This broadening of the scope has been achieved through both, adding new clauses, as well as, amending the previous clauses, by which the scope and the spectrum of the new act has become wider. Also, the detailing of this act has been deepened. Many a times, it can be found that certain general terms go undefined and in cases of conflict in meaning or in application, it is left for the judiciary to decide the actual meaning and scope of the clause.

However in this act, such general terms have also been defined for convenience as well as clarity. One such example is the definition of "Internet sites dedicated to infringing activities". Though the phrase itself says what the meaning is, the legislation has gone to define what it is. It has been defined as an internet site,

(A) which has no significant use other than engaging in, enabling, or facilitating the

(i) reproduction, distribution, or public performance of copyrighted works, in complete or substantially complete form, in a manner that constitutes copyright infringement under section 501 of title 17, United States Code;

(ii) violation of section 1201 of title 17, United States Code; or

(iii) sale, distribution, or promotion of goods, services, or materials bearing a counterfeit mark, as that term is defined in section 34(d) of the Lanham Act; or

(B) is designed, operated, or marketed by its operator or persons operating in concert with the operator, and facts or circumstances suggest is used, primarily as a means For engaging in, enabling, or facilitating the activities described under clauses (i), (ii), or (iii) of sub-paragraph (A);

This definition of a common term shows that the act has great detailing and has attempted at avoiding all conflicts. It also defines other simple terms like internet site and other such day to day phrases.

The next point of importance is that the act differentiates between what is known as the "domestic" and "non-domestic" domain names. A domestic domain is a domain located within the United States. The act stresses on the difference between the two because the form of action and the procedure that is to be followed in both the cases differ and hence, if the difference is not clear, the legislation might be ineffective.

Another feature is that the act gives the court the power to determine the nature and location of business of a company. Though it is the normal procedure of the court to look into all the whereabouts of a company, the legislation itself stressing on one of the procedures that has to be followed is an indication that this action is of great importance. The next feature of this act is that the Attorney General, the legal advisor of the government has a great role to play in the procedures enshrined under this act. He has been vested with

the powers which include initiating actions against non-domestic domains. The act not only specifies the involvement of the attorney general, it also mentions certain duties and liabilities of the attorney general. It is his duty to publish the latest procedures adopted in relation to the act. He is also responsible for carrying on communication with the IPR owners. He is also expected to tell the IPR owners their rights and in cases of infringement, the different types of action that is available to them. The ending of the act, includes a clause which is of great importance. It says that the reports regarding the implementation, effectiveness and applicability of the act ought to be made. This report would help the legislature in making the act more effective and it would also help in the application of the act.

Thus these are some of the features of the act which would make it important in terms of protecting the IPR, preventing the infringement of IPR, and in cases of infringement, it mentions the right remedies.

CRITICISM:

Though this act is a successor of the previously existing act, many critics are of the opinion that this act is no improvement over its predecessor. It is criticized on the grounds that the act rather than addressing the current problems, it places too much burden on the accused and also, it has got internet control clauses which can be used to abuse, as it allows an "instant lockdown of infringing sites". Also, the fact that an injunction can be brought without the issuing of a notice is considered to be very unfair.

The act is also criticized because it requires search engines to stop returning results for seized domain names. According to the official summary of the act, this move is necessary because this clause "responds to concerns raised that search

engines are part of the ecosystem that directs Internet user traffic and therefore should be part of the solution.”

The act, though it provides for safeguards of the accused party, it is only after a court order has been issued and all the third party service providers (payment process, ad networks, ISPs, search engines) have been required to block service to the site, the site can “petition the court to suspend or vacate the order.” This clause is criticized as the safeguarding process begins at a very late stage.

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