

111TH CONGRESS  
2D SESSION

# S. 3804

To combat online infringement, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

SEPTEMBER 20, 2010

Mr. LEAHY (for himself, Mr. HATCH, Ms. KLOBUCHAR, Mr. WHITEHOUSE, Mr. SCHUMER, Mr. KOHL, Mr. SPECTER, Mr. DURBIN, Mr. BAYH, Mr. VOINOVICH, and Mrs. FEINSTEIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To combat online infringement, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Combating Online In-  
5       fringement and Counterfeits Act”.

6       **SEC. 2. INTERNET SITES DEDICATED TO INFRINGING AC-**  
7       **TIVITIES.**

8       Chapter 113 of title 18, United States Code, is  
9       amended by adding at the end the following:

1 **“§ 2324. Internet sites dedicated to infringing activi-**  
2 **ties**

3 “(a) DEFINITION.—For purposes of this section, an  
4 Internet site is ‘dedicated to infringing activities’ if such  
5 site—

6 “(1) is otherwise subject to civil forfeiture to  
7 the United States Government under section 2323;  
8 or

9 “(2) is—

10 “(A) primarily designed, has no demon-  
11 strable, commercially significant purpose or use  
12 other than, or is marketed by its operator, or  
13 by a person acting in concert with the operator,  
14 to offer—

15 “(i) goods or services in violation of  
16 title 17, United States Code, or enable or  
17 facilitate a violation of title 17, United  
18 States Code, including by offering or pro-  
19 viding access to, without the authorization  
20 of the copyright owner or otherwise by op-  
21 eration of law, copies of, or public perform-  
22 ance or display of, works protected by title  
23 17, in complete or substantially complete  
24 form, by any means, including by means of  
25 download, transmission, or otherwise, in-  
26 cluding the provision of a link or aggre-

1 gated links to other sites or Internet re-  
2 sources for obtaining such copies for ac-  
3 cessing such performance or displays; or

4 “(ii) to sell or distribute goods, serv-  
5 ices, or materials bearing a counterfeit  
6 mark, as that term is defined in section  
7 34(d) of the Act entitled ‘An Act to pro-  
8 vide for the registration and protection of  
9 trademarks used in commerce, to carry out  
10 the provisions of certain international con-  
11 ventions, and for other purposes’, approved  
12 July 5, 1946 (commonly referred to as the  
13 ‘Trademark Act of 1946’ or the ‘Lanham  
14 Act’; 15 U.S.C. 1116(d)); and

15 “(B) engaged in the activities described in  
16 subparagraph (A), and when taken together,  
17 such activities are central to the activity of the  
18 Internet site or sites accessed through a specific  
19 domain name.

20 “(b) INJUNCTIVE RELIEF.—On application of the At-  
21 torney General following the commencement of an action  
22 pursuant to subsection (c), the court may issue a tem-  
23 porary restraining order, a preliminary injunction, or an  
24 injunction against the domain name used by an Internet  
25 site dedicated to infringing activities to cease and desist

1 from undertaking any infringing activity in violation of  
2 this section, in accordance with rule 65 of the Federal  
3 Rules of Civil Procedure. A party described in subsection  
4 (e) receiving an order issued pursuant to this section shall  
5 take the appropriate actions described in subsection (e).

6 “(c) IN REM ACTION.—

7 “(1) IN GENERAL.—The Attorney General may  
8 commence an in rem action against any domain  
9 name used by an Internet site in the judicial district  
10 in which the domain name registrar or domain name  
11 registry is located, or, if pursuant to subsection  
12 (d)(2), in the District of Columbia, if—

13 “(A) the domain name is dedicated to in-  
14 fringing activities; and

15 “(B) the Attorney General simulta-  
16 neously—

17 “(i) sends a notice of the alleged vio-  
18 lation and intent to proceed under this  
19 subsection to the registrant of the domain  
20 name at the postal and e-mail address pro-  
21 vided by the registrant to the registrar, if  
22 available; and

23 “(ii) publishes notice of the action as  
24 the court may direct promptly after filing  
25 the action.

1           “(2) SERVICE OF PROCESS.—For purposes of  
2 this section, the actions described under paragraph  
3 (1)(B) shall constitute service of process.

4           “(d) SITUS.—

5           “(1) DOMAINS FOR WHICH THE REGISTRY OR  
6 REGISTRAR IS LOCATED DOMESTICALLY.—In an in  
7 rem action commenced under subsection (c), a do-  
8 main name shall be deemed to have its situs in the  
9 judicial district in which—

10           “(A) the domain name registrar or registry  
11 is located, provided that for a registry that is  
12 located in more than 1 judicial district, venue  
13 shall be appropriate at the principal place  
14 where the registry operations are performed; or

15           “(B) documents sufficient to establish con-  
16 trol and authority regarding the disposition of  
17 the registration and use of the domain name  
18 are deposited with the court.

19           “(2) DOMAINS FOR WHICH THE REGISTRY OR  
20 REGISTRAR IS NOT LOCATED DOMESTICALLY.—

21           “(A) ACTION BROUGHT IN DISTRICT OF  
22 COLUMBIA.—If the provisions of paragraph (1)  
23 do not apply to a particular domain name, the  
24 in rem action may be brought in the District of  
25 Columbia to prevent the importation into the

1 United States of goods and services offered by  
2 an Internet site dedicated to infringing activi-  
3 ties if—

4 “(i) the domain name is used to ac-  
5 cess such Internet site in the United  
6 States; and

7 “(ii) the Internet site—

8 “(I) conducts business directed to  
9 residents of the United States; and

10 “(II) harms intellectual property  
11 rights holders that are residents of  
12 the United States.

13 “(B) DETERMINATION BY THE COURT.—

14 For purposes of determining whether an Inter-  
15 net site conducts business directed to residents  
16 of the United States under subparagraph  
17 (A)(ii)(I), a court shall consider, among other  
18 indicia whether—

19 “(i) the Internet site is actually pro-  
20 viding goods or services to subscribers lo-  
21 cated in the United States;

22 “(ii) the Internet site states that it is  
23 not intended, and has measures to prevent,  
24 infringing material from being accessed in  
25 or delivered to the United States;

1                   “(iii) the Internet site offers services  
2                   accessible in the United States; and

3                   “(iv) any prices for goods and services  
4                   are indicated in the currency of the United  
5                   States.

6                   “(e) SERVICE OF COURT ORDER.—

7                   “(1) DOMESTIC DOMAINS.—In an in rem action  
8                   to which subsection (d)(1) applies, the Attorney  
9                   General shall serve any court order issued pursuant  
10                  to this section on the domain name registrar or, if  
11                  the domain name registrar is not located within the  
12                  United States, upon the registry. Upon receipt of  
13                  such order, the domain name registrar or domain  
14                  name registry shall suspend operation of, and lock,  
15                  the domain name.

16                  “(2) NONDOMESTIC DOMAINS.—

17                  “(A) ENTITY TO BE SERVED.—In an in  
18                  rem action to which subsection (d)(2) applies,  
19                  the Attorney General may serve any court order  
20                  issued pursuant to this section on any entity  
21                  listed in clauses (i) through (iii) of subpara-  
22                  graph (B).

23                  “(B) REQUIRED ACTIONS.—Upon receipt  
24                  of a court order issued pursuant to this sec-  
25                  tion—

1           “(i) a service provider, as that term is  
2 defined in section 512(k)(1) of title 17,  
3 United States Code, or other operator of a  
4 domain name system server shall take rea-  
5 sonable steps that will prevent a domain  
6 name from resolving to that domain  
7 name’s Internet protocol address;

8           “(ii) a financial transaction provider,  
9 as that term is defined in section 5362(4)  
10 of title 31, United States Code, shall take  
11 reasonable measures, as expeditiously as  
12 practical, to prevent—

13                 “(I) its service from processing  
14 transactions for customers located  
15 within the United States based on  
16 purchases associated with the domain  
17 name; and

18                 “(II) its trademarks from being  
19 authorized for use on Internet sites  
20 associated with such domain name;  
21 and

22           “(iii) a service that serves contextual  
23 or display advertisements to Internet sites  
24 shall take reasonable measures, as expedi-  
25 tiously as practical, to prevent its network

1                   from serving advertisements to an Internet  
2                   site accessed through such domain name.

3                   “(3) IMMUNITY.—No cause of action shall lie in  
4                   any Federal or State court or administrative agency  
5                   against any entity receiving a court order issued  
6                   under this section, or against any director, officer,  
7                   employee, or agent thereof, for any action reasonably  
8                   calculated to comply with this section or arising  
9                   from such order.

10                  “(f) PUBLICATION OF ORDERS.—The Attorney Gen-  
11                  eral shall inform the Intellectual Property Enforcement  
12                  Coordinator of all court orders issued under this section  
13                  directed to specific domain names associated with Internet  
14                  sites dedicated to infringing activities. The Intellectual  
15                  Property Enforcement Coordinator shall post such domain  
16                  names on a publicly available Internet site, together with  
17                  other relevant information, in order to inform the public.

18                  “(g) ENFORCEMENT OF ORDERS.—In order to com-  
19                  pel compliance with this section, the Attorney General may  
20                  bring an action against any party receiving a court order  
21                  issued pursuant to this section that willfully or persistently  
22                  fails to comply with such order. A showing by the defend-  
23                  ing party in such action that it does not have the technical  
24                  means to comply with this section shall serve as a complete  
25                  defense to such action.

1       “(h) MODIFICATION OR VACATION OF ORDERS; DIS-  
2 MISSAL.—

3               “(1) MODIFICATION OR VACATION OF ORDER.—

4       At any time after the issuance of a court order con-  
5 stituting injunctive relief under this section—

6               “(A) the Attorney General may apply for a  
7 modification of the order—

8                       “(i) to expand the order to apply to a  
9 domain name that is reconstituted using a  
10 different domain name subsequent to the  
11 original order, and

12                      “(ii) to include additional domain  
13 names that are used in substantially the  
14 same manner as the Internet site against  
15 which the action was brought,

16 by providing the court with clear indicia of joint  
17 control, ownership, or operation of the Internet  
18 site associated with the domain name subject to  
19 the order and the Internet site associated with  
20 the requested modification; and

21               “(B) a defendant or owner or operator of  
22 a domain name subject to the order, or any  
23 party required to take action based on the  
24 order, may petition the court to modify, sus-

1           pend, or vacate the order, based on evidence  
2           that—

3                   “(i) the Internet site associated with  
4                   the domain name subject to the order is no  
5                   longer dedicated to infringing activities; or

6                   “(ii) the interests of justice require  
7                   that the order be modified, suspended, or  
8                   vacated.

9                   “(2) DISMISSAL OF ORDER.—A court order  
10                  constituting injunctive relief under this section  
11                  issued against a domain name used by an Internet  
12                  site dedicated to infringing activities shall automati-  
13                  cally cease to have any force or effect upon expira-  
14                  tion of the registration of the domain name. It shall  
15                  be the responsibility of the domain name registrar to  
16                  notify the court of such expiration.

17                  “(i) SAVINGS CLAUSE.—Nothing in this section shall  
18                  be construed to limit civil or criminal remedies available  
19                  to any person (including the United States) for infringing  
20                  activities on the Internet pursuant to any other Federal  
21                  or State law.

22                  “(j) INTERNET SITES ALLEGED BY THE DEPART-  
23                  MENT OF JUSTICE TO BE DEDICATED TO INFRINGING  
24                  ACTIVITIES.—

1           “(1) IN GENERAL.—The Attorney General shall  
2 maintain a public listing of domain names that,  
3 upon information and reasonable belief, the Depart-  
4 ment of Justice determines are dedicated to infring-  
5 ing activities but for which the Attorney General has  
6 not filed an action under this section.

7           “(2) PROTECTION FOR UNDERTAKING CORREC-  
8 TIVE MEASURES.—If an entity described under sub-  
9 section (e) takes any action specified in such sub-  
10 section with respect to a domain name that appears  
11 on the list established under paragraph (1), then  
12 such entity shall receive the immunity protections  
13 described under subsection (e)(3).

14           “(3) REMOVAL FROM LIST.—The Attorney Gen-  
15 eral shall establish and publish procedures for the  
16 owner or operator of a domain name appearing on  
17 the list established under paragraph (1) to petition  
18 the Attorney General to remove such domain name  
19 from the list based on any of the factors described  
20 under subsection (h)(1)(B).

21           “(4) JUDICIAL REVIEW.—

22           “(A) IN GENERAL.—After the Attorney  
23 General makes a final determination on a peti-  
24 tion to remove a domain name appearing on the  
25 list established under paragraph (1) filed by an

1 individual pursuant to the procedures referred  
2 to in paragraph (3), the individual may obtain  
3 judicial review of such determination in a civil  
4 action commenced not later than 90 days after  
5 notice of such decision, or such further time as  
6 the Attorney General may allow.

7 “(B) JURISDICTION.—A civil action for  
8 such judicial review shall be brought in the dis-  
9 trict court of the United States for the judicial  
10 district in which the plaintiff resides, or has a  
11 principal place of business, or, if the plaintiff  
12 does not reside or have a principal place of  
13 business within any such judicial district, in the  
14 District Court of the United States for the Dis-  
15 trict of Columbia.

16 “(C) ANSWER.—As part of the Attorney  
17 General’s answer to a complaint for such judi-  
18 cial review, the Attorney General shall file a  
19 certified copy of the administrative record com-  
20 piled pursuant to the petition to remove, includ-  
21 ing the evidence upon which the findings and  
22 decision complained of are based.

23 “(D) JUDGMENT.—The court shall have  
24 power to enter, upon the pleadings and tran-  
25 script of the record, a judgment affirming or re-

1           versing the result of the Attorney General’s de-  
2           termination on the petition to remove, with or  
3           without remanding the cause for a rehearing.”.

4 **SEC. 3. REQUIRED ACTIONS BY THE ATTORNEY GENERAL.**

5           The Attorney General shall—

- 6           (1) publish procedures to receive information  
7           from the public about Internet sites that are dedi-  
8           cated to infringing activities, as that term is defined  
9           under section 2324 of title 18, United States Code;
- 10          (2) provide guidance to intellectual property  
11          rights holders about what information such rights  
12          holders should provide the Department of Justice to  
13          initiate an investigation pursuant to such section  
14          2324;
- 15          (3) provide guidance to intellectual property  
16          rights holders about how to supplement an ongoing  
17          investigation initiated pursuant to such section  
18          2324;
- 19          (4) establish standards for prioritization of ac-  
20          tions brought under such section 2324; and
- 21          (5) provide appropriate resources and proce-  
22          dures for case management and development to af-  
23          fect timely disposition of actions brought under such  
24          section 2324.

○