S. 968

To prevent online threats to economic creativity and theft of intellectual property, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 12, 2011

Mr. LEAHY (for himself, Mr. HATCH, Mr. GRASSLEY, Mr. SCHUMER, Mrs. FEINSTEIN, Mr. WHITEHOUSE, Mr. GRAHAM, Mr. KOHL, Mr. COONS, Mr. BLUMENTHAL, Ms. KLOBUCHAR, and Mr. FRANKEN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To prevent online threats to economic creativity and theft of intellectual property, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011” or the “PROTECT IP Act of 2011”.

SEC. 2. DEFINITIONS.

For purposes of this Act—
(1) the term “domain name” has the same meaning as in section 45 of the Lanham Act (15 U.S.C. 1127);

(2) the term “domain name system server” means a server or other mechanism used to provide the Internet protocol address associated with a domain name;

(3) the term “financial transaction provider” has the same meaning as in section 5362(4) of title 31, United States Code;

(4) the term “information location tool” has the same meaning as described in subsection (d) of section 512 of title 17, United States Code;

(5) the term “Internet advertising service” means a service that for compensation sells, purchases, brokers, serves, inserts, verifies, or clears the placement of an advertisement, including a paid or sponsored search result, link, or placement that is rendered in viewable form for any period of time on an Internet site;

(6) the term “Internet site” means the collection of digital assets, including links, indexes, or pointers to digital assets, accessible through the Internet that are addressed relative to a common domain name;
(7) the term “Internet site dedicated to infringing activities” means an Internet site that—

(A) 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 subparagraph (A);

(8) the term “Lanham Act” means the Act entitled “An Act to provide for the registration and
protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes”, approved July 5, 1946 (commonly referred to as the “Trademark Act of 1946” or the “Lanham Act”);

(9) the term “nondomestic domain name” means a domain name for which the domain name registry that issued the domain name and operates the relevant top level domain, and the domain name registrar for the domain name, are not located in the United States;

(10) the term “owner” or “operator” when used in connection with an Internet site shall include, respectively, any owner of a majority interest in, or any person with authority to operate, such Internet site; and

(11) the term “qualifying plaintiff” means—

(A) the Attorney General of the United States; or

(B) an owner of an intellectual property right, or one authorized to enforce such right, harmed by the activities of an Internet site dedicated to infringing activities occurring on that Internet site.
SEC. 3. ENHANCING ENFORCEMENT AGAINST ROGUE WEBSITES OPERATED AND REGISTERED OVERSEAS.

(a) Commencement of an Action.—

(1) In Personam.—The Attorney General may commence an in personam action against—

(A) a registrant of a nondomestic domain name used by an Internet site dedicated to infringing activities; or

(B) an owner or operator of an Internet site dedicated to infringing activities accessed through a nondomestic domain name.

(2) In Rem.—If through due diligence the Attorney General is unable to find a person described in subparagraphs (A) or (B) of paragraph (1), or no such person found has an address within a judicial district of the United States, the Attorney General may commence an in rem action against a nondomestic domain name used by an Internet site dedicated to infringing activities.

(b) Orders of the Court.—

(1) In General.—On application of the Attorney General following the commencement of an action under this section, the court may issue a temporary restraining order, a preliminary injunction, or an injunction, in accordance with rule 65 of the Fed-
eral Rules of Civil Procedure, against the non-
domestic domain name used by an Internet site dedi-
cated to infringing activities, or against a registrant
of such domain name, or the owner or operator of
such Internet site dedicated to infringing activities,
to cease and desist from undertaking any further ac-
tivity as an Internet site dedicated to infringing ac-
tivities, if—

(A) the domain name is used within the
United States to access such Internet site; and

(B) the Internet site—

(i) conducts business directed to resi-
dents of the United States; and

(ii) harms holders of United States in-
tellectual property rights.

(2) DETERMINATION BY THE COURT.—For pur-
poses of determining whether an Internet site con-
ducts business directed to residents of the United
States under paragraph (1)(B)(i), a court may con-
sider, among other indicia, whether—

(A) the Internet site is providing goods or
services described in section 2(7) to users lo-
cated in the United States;

(B) there is evidence that the Internet site
is not intended to provide—
(i) such goods and services to users located in the United States;

(ii) access to such goods and services to users located in the United States; and

(iii) delivery of such goods and services to users located in the United States;

(C) the Internet site has reasonable measures in place to prevent such goods and services from being accessed from or delivered to the United States;

(D) the Internet site offers services obtained in the United States; and

(E) any prices for goods and services are indicated in the currency of the United States.

(c) NOTICE AND SERVICE OF PROCESS.—

(1) IN GENERAL.—Upon commencing an action under this section, the Attorney General shall send a notice of the alleged violation and intent to proceed under this Act to the registrant of the domain name of the Internet site—

(A) at the postal and e-mail address appearing in the applicable publicly accessible database of registrations, if any and to the extent such addresses are reasonably available;
(B) via the postal and e-mail address of
the registrar, registry, or other domain name
registration authority that registered or as-
signed the domain name, to the extent such ad-
dresses are reasonably available; and

(C) in any other such form as the court
finds necessary, including as may be required
by Rule 4(f) of the Federal Rules of Civil Pro-
procedure.

(2) RULE OF CONSTRUCTION.—For purposes of
this section, the actions described in this subsection
shall constitute service of process.

(d) REQUIRED ACTIONS BASED ON COURT OR-
ders.—

(1) SERVICE.—A Federal law enforcement offi-
cer, with the prior approval of the court, may serve
a copy of a court order issued pursuant to this sec-
tion on similarly situated entities within each class
described in paragraph (2). Proof of service shall be
filed with the court.

(2) REASONABLE MEASURES.—After being
served with a copy of an order pursuant to this sub-
section:

(A) OPERATORS.—
(i) IN GENERAL.—An operator of a nonauthoritative domain name system server shall take the least burdensome technically feasible and reasonable measures designed to prevent the domain name described in the order from resolving to that domain name’s Internet protocol address, except that—

(I) such operator shall not be required—

(aa) other than as directed under this subparagraph, to modify its network, software, systems, or facilities;

(bb) to take any measures with respect to domain name lookups not performed by its own domain name server or domain name system servers located outside the United States; or

(cc) to continue to prevent access to a domain name to which access has been effectively disable by other means; and
(II) nothing in this subparagraph shall affect the limitation on the liability of such an operator under section 512 of title 17, United States Code.

(ii) Text of notice.—The Attorney General shall prescribe the text of the notice displayed to users or customers of an operator taking an action pursuant to this subparagraph. Such text shall specify that the action is being taken pursuant to a court order obtained by the Attorney General.

(B) Financial transaction providers.—A financial transaction provider shall take reasonable measures, as expeditiously as reasonable, designed to prevent, prohibit, or suspend its service from completing payment transactions involving customers located within the United States and the Internet site associated with the domain name set forth in the order.

(C) Internet advertising services.—An Internet advertising service that contracts with the Internet site associated with the domain name set forth in the order to provide ad-
vertising to or for that site, or which knowingly serves advertising to or for such site, shall take technically feasible and reasonable measures, as expeditiously as reasonable, designed to—

(i) prevent its service from providing advertisements to the Internet site associated with such domain name; or

(ii) cease making available advertisements for that site, or paid or sponsored search results, links or other placements that provide access to the domain name.

(D) INFORMATION LOCATION TOOLS.—An information location tool shall take technically feasible and reasonable measures, as expeditiously as possible, to—

(i) remove or disable access to the Internet site associated with the domain name set forth in the order; or

(ii) not serve a hypertext link to such Internet site.

(3) COMMUNICATION WITH USERS.—Except as provided under paragraph (2)(A)(ii), an entity taking an action described in this subsection shall determine whether and how to communicate such action to the entity’s users or customers.
(4) RULE OF CONSTRUCTION.—For purposes of an action commenced under this section, the obligations of an entity described in this subsection shall be limited to the actions set out in each paragraph or subparagraph applicable to such entity, and no order issued pursuant to this section shall impose any additional obligations on, or require additional actions by, such entity.

(5) ACTIONS PURSUANT TO COURT ORDER.—

(A) IMMUNITY FROM SUIT.—No cause of action shall lie in any Federal or State court or administrative agency against any entity receiving a court order issued under this subsection, or against any director, officer, employee, or agent thereof, for any act reasonably designed to comply with this subsection or reasonably arising from such order, other than in an action pursuant to subsection (e).

(B) IMMUNITY FROM LIABILITY.—Any entity receiving an order under this subsection, and any director, officer, employee, or agent thereof, shall not be liable to any party for any acts reasonably designed to comply with this subsection or reasonably arising from such order, other than in an action pursuant to sub-
section (e), and any actions taken by customers
of such entity to circumvent any restriction on
access to the Internet domain instituted pursu-
ant to this subsection or any act, failure, or in-
ability to restrict access to an Internet domain
that is the subject of a court order issued pur-
suant to this subsection despite good faith ef-
forts to do so by such entity shall not be used
by any person in any claim or cause of action
against such entity, other than in an action
pursuant to subsection (e).

(e) ENFORCEMENT OF ORDERS.—

(1) IN GENERAL.—In order to compel compli-
ance with this section, the Attorney General may
bring an action for injunctive relief against any
party receiving a court order issued pursuant to this
section that knowingly and willfully fails to comply
with such order.

(2) RULE OF CONSTRUCTION.—The authority
granted the Attorney General under paragraph (1)
shall be the sole legal remedy for enforcing the obli-
gations under this section of any entity described in
subsection (d).

(3) DEFENSE.—A defendant in an action under
paragraph (1) may establish an affirmative defense
by showing that the defendant does not have the technical means to comply with the subsection without incurring an unreasonable economic burden, or that the order is inconsistent with this Act. This showing shall serve as a defense only to the extent of such inability to comply or to the extent of such inconsistency.

(f) Modification or vacation of orders.—

(1) In general.—At any time after the issuance of an order under subsection (b), a motion to modify, suspend, or vacate the order may be filed by—

(A) any person, or owner or operator of property, bound by the order;

(B) any registrant of the domain name, or the owner or operator of the Internet site subject to the order;

(C) any domain name registrar or registry that has registered or assigned the domain name of the Internet site subject to the order; or

(D) any entity that has received a copy of an order pursuant to subsection (d) requiring such entity to take action prescribed in that subsection.
(2) RELIEF.—Relief under this subsection shall be proper if the court finds that—

(A) the Internet site associated with the domain name subject to the order is no longer, or never was, an Internet site dedicated to infringing activities; or

(B) the interests of justice require that the order be modified, suspended, or vacated.

(3) CONSIDERATION.—In making a relief determination under paragraph (2), a court may consider whether the domain name has expired or has been re-registered by a different party.

(g) RELATED ACTIONS.—The Attorney General, if alleging that an Internet site previously adjudicated to be an Internet site dedicated to infringing activities is accessible or has been reconstituted at a different domain name, may commence a related action under this section against the additional domain name in the same judicial district as the previous action.

SEC. 4. ELIMINATING THE FINANCIAL INCENTIVE TO STEAL INTELLECTUAL PROPERTY ONLINE.

(a) COMMENCEMENT OF AN ACTION.—

(1) IN PERSONAM.—A qualifying plaintiff may commence an in personam action against—
(A) a registrant of a domain name used by an Internet site dedicated to infringing activities; or

(B) an owner or operator of an Internet site dedicated to infringing activities accessed through a domain name.

(2) IN REM.—If through due diligence a qualifying plaintiff is unable to find a person described in subparagraphs (A) or (B) of paragraph (1), or no such person found has an address within a judicial district of the United States, the Attorney General may commence an in rem action against a domain name used by an Internet site dedicated to infringing activities.

(b) ORDERS OF THE COURT.—

(1) IN GENERAL.—On application of a qualifying plaintiff following the commencement of an action under this section, the 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, against the domain name used by an Internet site dedicated to infringing activities, or against a registrant of such domain name, or the owner or operator of such Internet site dedicated to infringing activities, to cease and desist
from undertaking any further activity as an Internet site dedicated to infringing activities, if—

(A) the domain name is registered or assigned by a domain name registrar or domain name registry that located or doing business in the United States; or

(B)(i) the domain name is used within the United States to access such Internet site; and

(ii) the Internet site—

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

(II) harms holders of United States intellectual property rights.

(2) DETERMINATION BY THE COURT.—For purposes of determining whether an Internet site conducts business directed to residents of the United States under paragraph (1)(B)(ii)(I), a court may consider, among other indicia, whether—

(A) the Internet site is providing goods or services described in section 2(7) to users located in the United States;

(B) there is evidence that the Internet site is not intended to provide—

(i) such goods and services to users located in the United States;
(ii) access to such goods and services

to users located in the United States; and

(iii) delivery of such goods and serv-
ices to users located in the United States;

(C) the Internet site has reasonable meas-
ures in place to prevent such goods and services
from being accessed from or delivered to the
United States;

(D) the Internet site offers services ob-
tained in the United States; and

(E) any prices for goods and services are
indicated in the currency of the United States.

(e) NOTICE AND SERVICE OF PROCESS.—

(1) IN GENERAL.—Upon commencing an action
under this section, the qualifying plaintiff shall send
a notice of the alleged violation and intent to pro-
ceed under this Act to the registrant of the domain
name of the Internet site—

(A) at the postal and e-mail address ap-
ppearing in the applicable publicly accessible
database of registrations, if any and to the ex-
tent such addresses are reasonably available;

(B) via the postal and e-mail address of
the registrar, registry, or other domain name
registration authority that registered or as-
signed the domain name, to the extent such ad-
dresses are reasonably available; and

(C) in any other such form as the court
finds necessary, including as may be required
by Rule 4(f) of the Federal Rules of Civil Pro-
cedure.

(2) RULE OF CONSTRUCTION.—For purposes of
this section, the actions described in this subsection
shall constitute service of process.

(d) REQUIRED ACTIONS BASED ON COURT OR-
DERS.—

(1) SERVICE.—A qualifying plaintiff, with the
prior approval of the court, may, serve a copy of a
court order issued pursuant to this section on simi-
larly situated entities within each class described in
paragraph (2). Proof of service shall be filed with
the court.

(2) REASONABLE MEASURES.—After being
served with a copy of an order pursuant to this sub-
section:

(A) FINANCIAL TRANSACTION PRO-
VIDERS.—A financial transaction provider shall
take reasonable measures, as expeditiously as
reasonable, designed to prevent, prohibit, or
suspend its service from completing payment
transactions involving customers located within
the United States and the Internet site associ-
ated with the domain name set forth in the
order.

(B) INTERNET ADVERTISING SERVICES.—
An Internet advertising service that contracts
with the Internet site associated with the do-
main name set forth in the order to provide ad-
vertising to or for that site, or which knowingly
serves advertising to or for such site, shall take
technically feasible and reasonable measures, as
expeditiously as reasonable, designed to—

(i) prevent its service from providing
advertisements to the Internet site associ-
ated with such domain name; or

(ii) cease making available advertise-
ments for that site, or paid or sponsored
search results, links, or placements that
provide access to the domain name.

(3) COMMUNICATION WITH USERS.—An entity
taking an action described in this subsection shall
determine how to communicate such action to the
entity’s users or customers.

(4) RULE OF CONSTRUCTION.—For purposes of
an action commenced under this section, the obliga-
tions of an entity described in this subsection shall be limited to the actions set out in each paragraph or subparagraph applicable to such entity, and no order issued pursuant to this section shall impose any additional obligations on, or require additional actions by, such entity.

(5) ACTIONS PURSUANT TO COURT ORDER.—

(A) IMMUNITY FROM SUIT.—No cause of action shall lie in any Federal or State court or administrative agency against any entity receiving a court order issued under this subsection, or against any director, officer, employee, or agent thereof, for any act reasonably designed to comply with this subsection or reasonably arising from such order, other than in an action pursuant to subsection (e).

(B) IMMUNITY FROM LIABILITY.—Any entity receiving an order under this subsection, and any director, officer, employee, or agent thereof, shall not be liable to any party for any acts reasonably designed to comply with this subsection or reasonably arising from such order, other than in an action pursuant to subsection (e), and any actions taken by customers of such entity to circumvent any restriction on
access to the Internet domain instituted pursuant to this subsection or any act, failure, or inability to restrict access to an Internet domain that is the subject of a court order issued pursuant to this subsection despite good faith efforts to do so by such entity shall not be used by any person in any claim or cause of action against such entity, other than in an action pursuant to subsection (e).

(e) ENFORCEMENT OF ORDERS.—

(1) In general.—In order to compel compliance with this section, the qualifying plaintiff may bring an action for injunctive relief against any party receiving a court order issued pursuant to this section that knowingly and willfully fails to comply with such order.

(2) Rule of construction.—The authority granted a qualifying plaintiff under paragraph (1) shall be the sole legal remedy for enforcing the obligations under this section of any entity described in subsection (d).

(3) Defense.—A defendant in an action commenced under paragraph (1) may establish an affirmative defense by showing that the defendant does not have the technical means to comply with
the subsection without incurring an unreasonable economic burden, or that the order is inconsistent with this Act. This showing shall serve as a defense only to the extent of such inability to comply or to the extent of such inconsistency.

(f) Modification or Vacation of Orders.—

(1) In general.—At any time after the issuance of an order under subsection (b), a motion to modify, suspend, or vacate the order may be filed by—

(A) any person, or owner or operator of property, bound by the order;

(B) any registrant of the domain name, or the owner or operator of the Internet site subject to the order;

(C) any domain name registrar or registry that has registered or assigned the domain name of the Internet site subject to the order; or

(D) any entity that has received a copy of an order pursuant to subsection (d) requiring such entity to take action prescribed in that subsection.

(2) Relief.—Relief under this subsection shall be proper if the court finds that—
(A) the Internet site associated with the domain name subject to the order is no longer, or never was, dedicated to infringing activities as defined in this Act; or

(B) the interests of justice require that the order be modified, suspended, or vacated.

(3) CONSIDERATION.—In making a relief determination under paragraph (2), a court may consider whether the domain name has expired or has been re-registered by a different party.

(g) RELATED ACTIONS.—A qualifying plaintiff, if alleging that an Internet site previously adjudicated to be an Internet site dedicated to infringing activities is accessible or has been reconstituted at a different domain name, may commence a related action under this section against the additional domain name in the same judicial district as the previous action.

SEC. 5. VOLUNTARY ACTION AGAINST WEBSITES STEALING AMERICAN INTELLECTUAL PROPERTY.

(a) IN GENERAL.—No financial transaction provider or Internet advertising service shall be liable for damages to any person for voluntarily taking any action described in section 3(d) or 4(d) with regard to an Internet site if the entity acting in good faith and based on credible evi-
dence has a reasonable belief that the Internet site is an
Internet site dedicated to infringing activities.

(b) Internet Sites Engaged in Infringing Activities that Endanger the Public Health.—

(1) Refusal of Service.—A domain name registry, domain name registrar, financial trans-
action provider, information location tool, or Internet advertising service, acting in good faith and
based on credible evidence, may stop providing or refuse to provide services to an infringing Internet
site that endangers the public health.

(2) Immunity from Liability.—An entity de-
dcribed in paragraph (1), including its directors, offi-
cers, employees, or agents, that ceases or refused to
provide services under paragraph (1) shall not be
liable to any party under any Federal or State law
for such action.

(3) Definitions.—For purposes of this sub-
section—

(A) the term “adulterated” has the same
meaning as in section 501 of the Federal Food,
Drug, and Cosmetic Act (21 U.S.C. 351); 

(B) an “infringing Internet site that en-
dangers the public health” means—
(i) an Internet site dedicated to infringing activities for which the counterfeit products that it offers, sells, dispenses, or distributes are controlled or non-controlled prescription medication; or

(ii) an Internet site that has no significant use other than, or 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—

(I) offering, selling, dispensing, or distributing any controlled or non-controlled prescription medication, and does so regularly without a valid prescription; or

(II) offering, selling, dispensing, or distributing any controlled or non-controlled prescription medication, and does so regularly for medication that is adulterated or misbranded;

(C) the term “misbranded” has the same meaning as in section 502 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 352); and
(D) the term “valid prescription” has the same meaning as in section 309(e)(2)(A) of the Controlled Substances Act (21 U.S.C. 829(e)(2)(A)).

SEC. 6. SAVINGS CLAUSES.

(a) Rule of Construction Relating to Civil and Criminal Remedies.—Nothing in this Act shall be construed to limit or expand civil or criminal remedies available to any person (including the United States) for infringing activities on the Internet pursuant to any other Federal or State law.

(b) Rule of Construction Relating to Vicarious or Contributory Liability.—Nothing in this Act shall be construed to enlarge or diminish vicarious or contributory liability for any cause of action available under title 17, United States Code, including any limitations on liability under section 512 of such title 17, or to create an obligation to take action pursuant to section 5 of this Act.

(c) Relationship With Section 512 of Title 17.—Nothing in this Act, and no order issued or served pursuant to sections 3 or 4 of this Act, shall serve as a basis for determining the application of section 512 of title 17, United States Code.
SEC. 7. GUIDELINES AND STUDIES.

(a) GUIDELINES.—The Attorney General shall—

(1) publish procedures developed in consultation
with other relevant law enforcement agencies, includ-
ing the United States Immigration and Customs En-
forcement, to receive information from the public
about Internet sites dedicated to infringing activi-
ties;

(2) provide guidance to intellectual property
rights holders about what information such rights
holders should provide law enforcement agencies to
initiate an investigation pursuant to this Act;

(3) provide guidance to intellectual property
rights holders about how to supplement an ongoing
investigation initiated pursuant to this Act;

(4) establish standards for prioritization of ac-
tions brought under this Act;

(5) provide appropriate resources and proce-
dures for case management and development to af-
flect timely disposition of actions brought under this
Act; and

(6) develop a deconfliction process in consulta-
tion with other law enforcement agencies, including
the United States Immigration and Customs En-
forcement, to coordinate enforcement activities
brought under this Act.
(b) Reports.—

(1) Report on effectiveness of certain measures.—Not later than 1 year after the date of enactment of this Act, the Secretary of Commerce, in coordination with the Attorney General, the Secretary of Homeland Security, and the Intellectual Property Enforcement Coordinator, shall conduct a study and report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives on the following:

(A) An assessment of the effects, if any, of the implementation of section 3(d)(2)(A) on the accessibility of Internet sites dedicated to infringing activity.

(B) An assessment of the effects, if any, of the implementation of section 3(d)(2)(A) on the deployment, security, and reliability of the domain name system and associated Internet processes, including Domain Name System Security Extensions.

(C) Recommendations, if any, for modifying or amending this Act to increase effectiveness or ameliorate any unintended effects of section 3(d)(2)(A).
(2) Report on overall effectiveness.—

The Register of Copyrights shall, in consultation with the appropriate departments and agencies of the United States and other stakeholders—

(A) conduct a study on—

(i) the enforcement and effectiveness of this Act; and

(ii) the need to modify or amend this Act to apply to emerging technologies; and

(B) not later than 2 years after the date of enactment of this Act, submit a report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives on—

(i) the results of the study conducted under subparagraph (A); and

(ii) any recommendations that the Register may have as a result of the study.