

SENATOR GRASSLEY'S WRITTEN QUESTIONS FOR JUDICIARY COMMITTEE HEARING, "TARGETING WEBSITES DEDICATED TO STEALING AMERICAN INTELLECTUAL PROPERTY," FEBRUARY 16, 2011

Responses of Thomas M. Dailey (Verizon)

1. What do you believe is the appropriate role for search engines to play in combating rogue websites?

Verizon Response:

Verizon's view on matters of Internet policy and regulation is that all participants in the Internet ecosystem should participate in efforts to further national interests where their involvement is reasonably necessary to achieving a public goal. When it comes to the role of search engines in combating Internet-based theft of intellectually property, the Committee should evaluate the extent to which their involvement would further the legislation's goals, balanced against the extent to which such participation would adversely impact their businesses or operations. This Committee and the search engine providers are in the best position to assess whether to include search engines within the scope of COICA.

2. What role should payment processors play in combating rogue websites?

Verizon Response:

As noted above, Verizon's general view is that all participants in the Internet ecosystem should participate in efforts to further national interests where their involvement is reasonably related to the issue at hand. In the case of combating Internet-based theft of intellectually property, payment processors clearly play a role in facilitating the sale and distribution of unlawful content to the extent they enable online merchants to receive payments for material sold on their websites. "Following the money" and cutting off the sources of funding of these rogue websites is the single most effective way to slow the unlawful distribution of trademarked and copyrighted material.

3. Do you believe a private right of action should be included in any bill combating online infringement?

Verizon Response:

No. For the reasons stated in my written testimony, Verizon strongly believes there should not be a private right of action under COICA. The website blocking proposed in the legislation is a major departure from U.S. policy on Internet blocking and it should be approached cautiously, if it is to be pursued at all. We have proposed a number of steps to help ensure that any ISP blocking requirements are narrowly tailored, including

the establishment of procedures (in joint consultation between the Department of Justice, ISPs and others in the Internet community) to limit the number and duration of DNS blocks and properly to target the domain names to be blocked. While these procedures can be effective in limiting potential negative side-effects of the legislation when legal action is pursued by the DOJ, they will not be effective if private parties, motivated by their own financial and business interests, are allowed to pursue the blocks. The DOJ is far more likely than a private litigant to exercise discretion both in the number of cases it brings and the number and type of domain names it targets. The same cannot be said if private litigants are allowed to obtain a judicial blocking order. Moreover, administration of a process for notifying all ISPs and DNS service providers of the domains to be blocked (and when to unblock) is far better left to the DOJ than to private litigants. Finally, the blocking of third party, nondomestic websites is an extraordinary and unprecedented remedy that should not be entrusted to any entity with a direct pecuniary interest in the outcome of the litigation.

4. In 2008, the Ryan Haight Online Pharmacy Consumer Protection Act was signed into law. That law allows States to bring civil actions against websites that deliver or distribute controlled substances over the internet without a valid prescription. The law also allows courts to enjoin those websites from operating. Shouldn't the government have the same authority to combat websites that sell counterfeit goods that may pose a danger to consumers? Why or why not?

Verizon Response:

Verizon agrees that the government should have the authority to enjoin the operation of websites that traffic in unlawful trademark goods and copyright content, and remedies already exist under U.S. law to enjoin the operation of U.S. based websites that distribute such unlawful goods. The more difficult issue is how to address non-U.S. based websites. The questions COICA presents to U.S. policymakers in this regard are these: (1) how far should the U.S. should go in sanctioning Internet blocking of unlawful content resident on servers **outside** our borders; (2) how heavily should the government rely on the actions of private actors, like ISPs, to enforce the criminal and civil laws of the U.S.; and (3) is the financial and operational burden placed on such private actors justified and who should bear the cost of enforcing court orders to block access to websites deemed unlawful under COICA? These questions raise important Internet policy concerns, including the impact of a federally-sanctioned blocking scheme on global Internet freedoms and the free flow of online commerce.

4. If the government already has the authority to domestically seize domain names of rogue websites, why shouldn't we authorize the government to take measures to combat these websites when they move outside our borders? Is it appropriate to ask corporate citizens to help us in the fight against counterfeiting and piracy?

Verizon Response:

The U.S. government's authority to act with respect to domestic websites is clear and well-established, but its authority to act regarding nondomestic websites is murkier and not only is likely to be the subject of significant debate but potentially could subject U.S. websites to retaliation by foreign governments. The issue is made all the more complex in light of the impact of website blocking on the free flow of information and commerce, and on issues of freedom of expression. As stated in my testimony, Verizon firmly believes that all responsible members of the Internet ecosystem can and should take steps to address the problem of online piracy, but the steps taken in furtherance of this legitimate goal should be cautiously taken and narrowly circumscribed to minimize the adverse impact of an Internet blocking scheme on the free flow of information and commerce across the globe.

5. On November 29, 2010, ICE executed seizure orders against 82 domain names of websites engaged in the illegal sale and distribution of counterfeit goods and copyrighted works. Prior to Super Bowl 45, government authorities in New York seized several streaming websites that they accused of illegally showing live and pay-per-view sports events. Opponents of further legislative efforts argue that these actions were an overreach and that additional authority will lead to further abuse. What measures can be included in legislation to ensure DOJ does not overreach when exercising its authority?

Verizon Response:

Verizon believes that a number of steps can be taken to help ensure that the DoJ does not overreach when exercising its authority under COICA. First and foremost, the legislation should limit the authority to bring an enforcement action under COICA to the DoJ. The DoJ is in the best position to independently investigate and narrowly tailor any judicial action to those rogue websites that should properly be targeted. Second, no private right of action should be allowed and the legislation should be amended to expressly state this limitation. Third, the DoJ should be required to work with ISPs and other members of the Internet community to determine the most effective ways to target the rogue websites – and only those domain names – that are unlawfully distributing trademark goods and copyrighted material, and to establish a set of procedures to ensure all ISPs are timely notified of their blocking obligations and, importantly, when the blocks should be removed. Finally, as outlined in my testimony, blocking should be used sparingly and only when it is the least burdensome remedy available and the rights holder community should provide reimbursement to ISPs for the costs ISPs incur in complying with blocking orders beyond established thresholds. These important steps will help ensure that overblocking does not occur and that the concerns raised over the ICE domain name seizures are not repeated.

6. First Amendment constitutional concerns have been raised about last year's bill. Do you agree? Do you believe the narrow definition of infringing websites, remedies directed at

preventing only infringing content and the incorporation of the relevant Federal Rules of Civil Procedure alleviate concerns that the bill is overbroad?

Verizon Response:

Narrowing the definition of infringing websites, targeting remedies at only infringing content and incorporating relevant sections of the Federal Rules of Civil Procedure will help alleviate concerns regarding overbreadth, but they won't eliminate them. Verizon believes that additional safeguards are necessary to address further the constitutional concerns that have been raised regarding COICA. First, it is critically important that the blocking remedy be employed narrowly and, as stated in my testimony, only when it is the least burdensome way to achieve the stated goal of preventing the operation of a rogue website. Interfering with the financial operation of rogue websites will be a more effective means of combating unlawful websites and will be less likely to generate the constitutional concerns that accompany DNS blocking. The legislation should encourage the exhaustion of these financial remedies before turning to Internet blocking. Second, lawsuits should target only the "worst of the worst" rogue websites and judicial blocking orders should be narrowly tailored to focus on domain names that do not link to protected speech. Third, the additional precautions proposed in my testimony – no private right of action, implementation of proper procedures for notification to ISPs of the websites to be blocked and unblocked, and proper cost reimbursement – will further help alleviate the risk of an overblocking situation.

Finally, we recommend that the Committee avoid unnecessary extra-territorial concerns by changing the words "obtained in" to "targeted to" in Section 2(d)(2)(B)(iv). The use of the term "obtained", like the term "accessed", risks being seen as an endorsement of a line of foreign court decisions (such as *Dow Jones v. Gutnick*) that have subjected U.S. news and e-commerce websites to defamation and parallel imports lawsuits simply because they were accessible in other countries. Replacing "obtained in" with "targeted to" would avoid raising this potential exposure for U.S. websites.

7. The Federal Rules of Civil Procedure incorporated in last year's bill require advance notice for preliminary injunctions. For temporary restraining orders, they require a specific factual showing of immediate and irreparable damage and written certification explaining efforts made to give notice and the reason it is not required in a specific instance. Does the incorporation of these rules alleviate concerns that the bill does not protect process?

Verizon Response:

Yes, we believe that reference to Federal Rule of Civil Procedure 65 regarding the standards for injunctive relief would be helpful. We also believe that it is important that the legislation establish a balanced and fair process, including robust notice procedures, particularly where *ex parte* proceedings are contemplated.