Senator Patrick Leahy
Chairman, US Senate Judiciary Committee
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**Dear Senator Leahy and Members of the US Senate Judiciary Committee,**
We know that you are advocates for freedom of speech around the world, and supporters of a free and open Internet.  So groups around the world are writing to you with the deepest of concerns regarding a bill you have introduced, S.3804, *Combating Online Infringement and Counterfeits Act*. The undersigned global public interest groups, all of whom are active in the ICANN Generic Names Supporting Organization, urge you to delay passage of the Bill pending consideration of the following international concerns.

We believe that COICA will pose challenges and create problems not only within the United States but also at an international level. There is no doubt that copyright infringement and the sale of counterfeit goods constitute a major challenge on the Internet. The promotion of fake goods, the availability of illegal, and often dangerous, pharmaceutical products and the use of the Internet to infringe copyrighted material place in danger not only users, businesses and intellectual property owners but also undermine the Internet as a social and commercial space. This, however, does not excuse the implementation and enforcement of national legislation that seeks to impose its rules extra-territorially and pave the way for the creation of a dangerous precedent.

We believe that S. 3804 hurts freedom of speech globally, sets a precedent for absence of due process around the world and, last but not least, sets a roadmap for all governments to seize control of speech and limit Internet freedoms, just as we are opening up new Top-Level Domain Names.

1. **The Impact upon international Registrants and Free Speech**

S. 3804 fails to bargain for due process and freedom of speech. On many occasions, the United States’ approaches to freedom of expression and due process have provided guidance to the international community regarding their ability to strike a balance between commercial interests and constitutional rights. This is, in particular, evident within intellectual property laws where free speech and fair use provisions have been ‘internalized’ within copyright and trademark statutes, providing safeguards against unfair and abusive intellectual property claims. For example, copyright’s ‘fair use’ doctrine contains built-in First Amendment accommodations”.[[1]](#footnote-1)

Unfortunately, S. 3804 fails dramatically to address these intrinsic and quintessential free speech concerns. Depending on whether jurisdiction can be sustained, the Bill suggests an indiscriminate takedown or blocking of domain names that facilitate copyright infringement without paying regard to potentially protected content. The Bill does not allow a substantive evaluation of the content of the domain name in an effort to distinguish protected from unprotected speech. This will have a severe impact upon the legitimate rights of users and, more importantly, will ‘upset’ the existing legal balance between free speech and intellectual property rights - a balance that is recognized and supported by judicial opinion and reasoning.[[2]](#footnote-2)

1. **Imposition of US law globally**

Within the context of international law, the only instance that could justify the application of any national law and its imposition on foreign conduct is the jurisdiction to prescribe. As classically defined, jurisdiction to prescribe refers to the manner in which the international community makes “its laws applicable to the activities, relations, or status of persons, or the interests of persons in things […]”.[[3]](#footnote-3)

At the outset, it appears that S. 3804 provisions on domain name takedowns and domain name blocking is in line with the ‘nationality principle’ and the ‘effect principle’ respectively.[[4]](#footnote-4) However and especially in relation to the ‘effect principle’ the situation is highly controversial. As one expert wrote, “once we move out of the sphere of direct physical consequences, however, to employ the formula of “effects” is to enter upon a very slippery slope; for here the effects within the territory may be no more than an element of alleged consequential damage which may be more or less remote […]. To extent the notion of effects, without qualification, from the simple cases of direct physical injury to cases such as defamation, sedition and the like is to introduce a dangerous ambiguity into the basis of the doctrine. If indeed it were permissible to find objective territorial jurisdiction upon the territoriality of more or less remote repercussions of an act wholly performed in another territory, then there were virtually no limits to a State’s territorial jurisdiction”.[[5]](#footnote-5)

In today’s global Internet economy, the ‘effect principles’ permits almost limitless legislative jurisdiction with S. 3804 being a true manifestation of this. The Bill also sends a dangerous message to the rest of the world as it sets a rather treacherous precedent. Nothing can stop other sovereign nations from proceeding to similar legislation and use the ‘effects principle’ in an effort to either impose their own interests or prevent the imposition of American law within their territory. A scenario like this will create many new legal conflicts that could undermine the value of the Internet as a global medium.

1. **The Impact of the Bill to the Internet**

Last but not least, in its current form this Bill can have a severe impact upon the Internet’s global governance. Given the considerable attempts to moderate the United States’ overall authority over the Domain Name System, S. 3804 reintroduces the debate on the potentially abusive role of the United States Government upon the DNS.

Over the past few years, Internet Governance participants have tried hard to justify the relationship between the US Government and the DNS as one based on issues of practicality rather on abuse. In this context, it has been suggested that the US control over the DNS should be seen by the international community as contributing to the security, stability and evolution of the DNS and not as a way through which the US Government seeks to impose its will on the Internet.

It is important for the US to be seen as protecting the global DNS and not as taking advantage of it to pursue narrow national interests. Unfortunately, S. 3804 suggests the willingness of Congress to exploit the DNS to its advantage, an issue which can have detrimental effects upon the efforts of the international community to promote a global and inclusive Internet.

Signatories:

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1. Eldred v. Ashcroft, 537 U.S. 186, 219-21 (2003) [↑](#footnote-ref-1)
2. Freecycle Network, Inc. V. Oey, 505 F. 3d. 898 (9th Cir.2007); Twin Peaks Prods. Inc. V. Publ’ns Int’l Ltd, 996 F. 2d. 1366 (2nd Cir. 1993) [↑](#footnote-ref-2)
3. Restatement (Third) of Foreign Relations Law of the Untied States, 101 cmt. E, 402 (1986) [↑](#footnote-ref-3)
4. The Restatement of Foreign Relations Law in the U.S. identifies two potential situations where jurisdiction to prescribe might be apposite – the ‘effect principle’ and the ‘nationality principle’. Under the ‘effect principle’ extraterritorial exercise of US law is allowed if the conduct abroad influences substantially trade in the US. Under the ‘nationality principle’, jurisdiction is permitted when the activities and interests of foreign nationals have an impact upon the activities and interests of US citizens. These two principles are internationally recognised and under international law all countries have them at their disposal. [↑](#footnote-ref-4)
5. Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, [1957] Brit. Y.B. Int’l L. 146, p.159 [↑](#footnote-ref-5)