



Future of Music Coalition on

# The PROTECT IP Act

Intellectual Property enforcement and musicians

FMC FACT SHEET

The “Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act” (PROTECT IP) is a bill currently introduced in the Senate. It creates more opportunities for the government and interested individuals to police websites engaged in activities that infringe intellectual property (IP) rights. Under the bill, penalties for infringing websites may include activities by third parties such as credit card companies, advertising services, internet service providers and search engines. Before it can become law, the PROTECT IP bill must be passed by both the Senate and the House, and then signed by the President.

PROTECT IP follows a bill introduced by Senator Patrick Leahy (D-VT) — but not passed — in 2010, known as the “Combating Online Infringement and Counterfeits Act,” or COICA.

## The Landscape for Online Intellectual Property Enforcement

Under the current enforcement system, the Department of Immigration and Customs Enforcement (ICE) and the Department of Justice (DOJ) may obtain a court order allowing the government to seize a website’s domain name if a U.S.-based registrar manages that domain. Basically, ICE and the DOJ work together to investigate websites that may be infringing IP rights. If they determine a site is infringing, the Attorney General and the director of ICE may seek a court order (signed by a federal judge) allowing the agencies to seize the website’s domain name, making the site inaccessible to users.

Currently, ICE and the DOJ do not provide notice to the owners or operators of allegedly infringing websites before seizing their domain names, which means the owners or operators don’t have a chance to defend their sites’ potential legality. This is important because ICE and the DOJ have apparently already made a few mistakes (seizing the domain names of a few perfectly legal music blogs, for example). PROTECT IP, if enacted, would include certain provisions to protect sites and services from being unfairly targeted. However, it would also broaden the government’s ability to police online infringement and allow rightsholders — including major record labels, music publishers and film studios — to obtain a court order against such websites.

## IP Enforcement Online Under PROTECT IP

There are two types of actions that may be brought against an “internet site dedicated to infringing activities” under the PROTECT IP Act: those brought by the U.S. Attorney General against a non-domestic site (a site with a domain name registered outside of the U.S.) and those brought against a domestic website (a site with a domain name registered in the U.S.) by either the Attorney General or a private individual or company IP whose rights are allegedly being infringed upon.

## What’s in a Name?

Before we get to the remedies proposed by the PROTECT IP Act, we need to understand a basic feature of the everyday internet: domain names and Domain Name Servers (DNS). Think of DNS as a global phonebook for the web, where a site’s numerical address is converted to words and letters. Instead of typing in a string of numbers like 69.65.119.60, DNS servers let users type in easier-to-remember names,



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# Future of Music Coalition on Preserving the Open Internet

like futureofmusic.org. If a site appeared on a government blacklist, these servers would be instructed to no longer “resolve” the address. Meaning, unless the user typed in the actual string of numbers, they wouldn’t be able to access the site. Keep this in mind as you read the following sections.

## Non-domestic Websites

When the Attorney General brings an action against an allegedly infringing non-domestic website, the process looks much like the current system under which ICE and the DOJ may obtain a court order to seize a U.S.-based domain name. PROTECT IP basically extends this enforcement power from U.S. domain names to include non-domestic domain names as well. Under PROTECT IP, however, seizure isn’t the only remedy.

When the Attorney General finds that a site is dedicated to infringing activities and brings an action before a federal court, the court may issue an order that requires (1) the operator of a DNS server to prevent access to the infringing site through its domain name, (2) financial transaction providers (like credit card companies) to prevent or suspend their payment services for that site, (3) internet advertising services to stop providing ads for the site, and/or (4) providers of information location tools (such as search engines) to remove or disable access to the site. This type of action may be brought against the person who registered the site, the person who owns or operates the site, or, if such a person cannot be found, against the non-domestic domain name itself (which presumably means that no person affiliated with the site will be available to defend it).

## For Domestic Websites

PROTECT IP also allows individual IP owners harmed by an infringing website to bring an action themselves. This type of action, however, is limited to domestic websites or those with domain names registered within the U.S. When the Attorney General “or a person whose intellectual property rights are harmed by the allegedly infringing website” brings an action against a domestic site, the court may issue an order requiring (1) financial transaction providers to prevent or suspend their payment services for that site and/or (2) internet advertising services to stop providing ads for the site. This type of action may be brought against the person who registered the site, the person who owns or operates the site, or, if such a person cannot be found, against the domain name itself (again, without notice to any person affiliated with the website).

## Voluntary Action by Third-Party Service Providers

The PROTECT IP Act also encourages independent, voluntary action by some third parties (financial transaction providers and internet advertising services) against websites that engage in infringing activities. When a financial transaction provider or internet ad service refuses to serve a website it “has a reasonable belief” is dedicated to infringing activities, that service provider is given a “safe harbor” protecting it from liability for damages caused by the discontinued service. This means that no person harmed by a service provider’s actions may bring a suit against that service provider — even if the provider was wrong in its belief the particular site engaged in infringing activities — as long as the service provider acted in “good faith and based on credible evidence” of infringement. PROTECT IP doesn’t recommend any particular method for ad or financial service providers to determine whether a site really is engaging in infringing activities, leaving the service providers to rely largely on their own discretion.



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## Pros and Cons

The bill, if enacted, would certainly give the government and individual IP right holders new tools to combat infringement online. Websites found to be dedicated to infringing activities would quickly and efficiently become inaccessible to users (in the case of non-domestic sites) or at least rendered unprofitable by halting ad placement and other financial activity (in the case of domestic sites). Furthermore, it builds upon the current system through which ICE and the DOJ currently police domestic websites by expanding those enforcement powers.

However, there are some significant drawbacks to the bill. While protecting intellectual property rights is important and may outweigh the right to certain types of speech, freedom of expression is also important to creating new intellectual property. Needless to say, these values need to be weighed carefully in any proposed legislation. Furthermore, giving governments the power to require service providers to block access to websites may seem reasonable, but it could set a poor precedent for the global internet. Nations less concerned with free speech or democratic participation may see American efforts to restrict access as an endorsement of censorship. (On the other hand, nations that feel the need to suppress their citizens are likely to do so regardless of U.S. IP policy.)

Another concern is that mistakes could be made and innocent websites blocked. For example, if the person who registered a domain name cannot be found, an action may be brought against the site itself — meaning there is no one to defend the site owner or operator's interests. When a site is wrongly found liable for infringement, and the court issues an order demanding third parties to take the actions described above, the owner or operator of the site can only contest the actions after the damage is already done. On the bright side, the Act would only apply to sites "dedicated to infringing activities." Narrowly interpreted, this definition should help prevent the legislation from being used to target MP3 blogs that often get music from record label promotions agents or the artists themselves.

Finally, there are technical and practical problems with requiring DNS operators to block access to certain domain names. Doing so could undermine the longstanding, global system for domain names and may have additional cybersecurity implications. There is also little evidence that blocking access to domain names will have a lasting impact in the battle against unauthorized IP distribution. A site owner can easily register the blocked site under a new domain name or provide the site's numerical address instead of relying on the blocked domain name. Alternately, users can simply switch their domain name lookup provider to avoid the provider that was required to block the domain name.

## What does it mean for musicians?

The fact that PROTECT IP is working its way through the Senate right now means that Congress is thinking seriously about how the government can help protect American intellectual property online. This is clearly important to musicians, songwriters, composers and copyright owners. On the other hand, the proposed legislation's new enforcement tools may cause more harm than good. The internet has been an important platform for musicians to directly connect with fans and promote and distribute their work. Any legislation that impacts the underlying structure of the web without taking into account how today's artists do business is likely to be counterproductive.

PROTECT IP is an important step by the U.S. government in recognizing the importance of intellectual property to our society and economy. The goal of protecting creators from large-scale enterprises that profit from their works without compensating is a laudable one. There are likely ways to achieve this without altering the underlying functions of the global internet however. FMC urges lawmakers to consider



# Future of Music Coalition on Preserving the Open Internet

closely the real-world experiences of creators when determining the scope and application of any laws to protect intellectual property online.

## **Actions to Date**

As of 2011, PROTECT-IP was referred to the Senate Judiciary Committee and passed in committee on May 26, 2011; a companion bill is expected soon in the House of Representatives.

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