

American Civil Liberties Union
American Library Association
Center for Democracy and Technology
Electronic Frontier Foundation
Public Knowledge

May 4, 2004

Re: H.R. 3754, Concerns with Fraudulent Online Identity Sanctions Act

Dear Chairman Sensenbrenner and Ranking Member Conyers:

The undersigned libraries and public interests groups urge you to delay the markup of H.R. 3754, "The Fraudulent Online Identity Sanctions Act," scheduled for this Wednesday, May 5. While we recognize the need to improve the accuracy of the WHOIS domain name database, we write to express our concern that this bill will penalize and potentially jail Americans who seek only to protect their privacy and right to anonymous free speech online.

We are concerned that because no privacy or civil liberties advocates were present at the Subcommittee hearing on HR 3754, the Subcommittee members were not made aware of the unintentional but severe impact that H.R.3754 will have the privacy and free speech rights of Americans. Before this Committee takes action on the bill, we urge that there be a further hearing to examine its full impact.

The WHOIS database requires that individual Internet users, when they register domain names, make their names, home addresses, home phone numbers, and home e-mail addresses available to the world, with no privacy protections. Users covered by this requirement include human rights activists, corporate whistleblowers seeking to avoid retribution, and ordinary Americans seeking to avoid spam, stalking, or identity theft. As long as WHOIS lacks safeguards to protect their privacy and security these users will feel compelled to place inaccurate data in the database for reasons that have nothing to do with furtherance of illegal activity.

However, HR 3754 would amend the U.S. Criminal Code, Trademark Act, and Copyright Act to create a presumption that inaccurately registered WHOIS data represents evidence of malicious intent. Sections 2 and 3 of the bill would make violations of copyright or trademark in conjunction with an inaccurately registered domain "willful," carrying the highest penalties, even if the activity were otherwise innocent. Thus, for example:

- Under current law, an online activist or whistleblower accused of infringing a trademark in the course of criticizing a company would be subject only to an injunction. Under HR 3754, he or she would face substantial monetary penalties, including all plaintiff's attorney's fees.

- Under current law, the author of an anonymous web log who innocently quotes a portion of a news article that a judge later decides to be too long to qualify for “fair use” protection would be considered an “innocent infringer” and subject to reduced statutory damages. Under H.R. 3754, the same “blogger” would face damages up to \$150,000 and potential criminal liability.

These changes would chill speech online.

The Supreme Court has affirmed the importance of anonymous publication:

“Anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995).

The same holds true online. Domain name holders who submit inaccurate WHOIS data: 1) on the basis of bona fide concerns with privacy, or 2) to protect their legitimate rights to anonymous free speech, ***should not be branded criminals***.

Time is needed to address these serious concerns, which have not yet received adequate consideration. The undersigned groups ask that HR 3754 be held pending a further hearing or deliberation on its potential unintended consequences for privacy and speech online.

Sincerely,

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