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Senate to Weigh Controversial Cybercrime Treaty

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NEWS

marriage have no alternative but to take this issue permanently out of the hands of activist judges and put it in the hands of the people."¹⁵ On the other side of the debate, Representative Larry McKeon (D-13th District) argues that the bills are not only homophobic, but also unnecessary in light of the Defense of Marriage Act, which passed the Illinois General Assembly in 1996 and defined marriage as a union between a man and woman.¹⁶

According to McKeon, the bills also serve as a disturbing display of election-year politicking, proposed simply as "an attempt to gain votes in districts where there is a contested election."¹⁷

An amendment to the Illinois Constitution first requires an affirmative vote by three-fifths of both houses within the legislature, and then must receive a majority of votes on a general election ballot.¹⁸

When asked about the proposed amendments, Commissioner Quigley responded, "The inability of same-sex couples to get married amounts to the government telling people who they can and cannot love . . . It's the ultimate form of governmental intrusion."¹⁹

1. Domestic Partnership Registry Ordinance, available at <http://www.cookctyclerk.com/agen-das/2003/070103/070103orddoc.htm>

2. Oak Park Village Clerk, Domestic Partnership, available at http://vil.oak.park.il.us/Village_Clerk/Domestic_Partnership.html

3. Steph Smith, Chicago Creates Domestic Partner Registry, 365Gay.com, July 2, 2003, <http://365gay.com/NewsContent/070103chicagoPartner.htm>.

4. Telephone interview with Mike Quigley, Cook County Commissioner, 10th District, (Jan. 24, 2003).

5. Telephone interview with Tim Dever, Director of Vital Statistics, Cook County (Jan. 21, 2003).

6. As of Jan. 21, 2004.

7. Telephone interview with Tim Dever, Director of Vital Statistics, Cook County (Jan. 21, 2003).

8. Cook County Clerk's Office, Domestic Partnership Registry, available at <http://www.cookctyclerk.com/dom-part.html>.

9. Telephone interview with Mike Quigley, Cook County Commissioner, 10th District, (Jan. 24, 2003).

10. Debbie Howlett, Same-Sex Couples Line Up for Recognition in Chicago, USA Today, Oct. 1, 2003, available at http://www.usatoday.com/news/nation/2003-10-01-reg-istry-usat_x.htm; and Steph Smith, Chicago Creates Domestic Partner Registry, 365Gay.com, July 2, 2003, available at <http://365gay.com/NewsContent/070103chicagoPartner.htm>.

11. Telephone interview with Mary Ann Hackett, President, Catholic Citizens of Illinois, (Jan. 21, 2003).

12. Id.

13. Leader-Springfield Bureau, Constitutional Amendments to Protect Marriage Proposed in General Assembly, The Illinois Leader, Jan. 23, 2004, available at <http://www.illinoisleader.com/news/newsview.asp?c=11589>.

14. Id.

15. Illinois Family Institute, IFI Announces Support for IL Constitutional Amendment to 'Protect Marriage from Being

Destroyed by Activist Judges,' (Jan. 19, 2004), available at <http://www.illinoisfamily.org/issuesposting.asp?docID=295>.

16. Press Release, Rep. Larry McKeon, McKeon Denounces Amendment to Illinois Constitution (Jan. 20, 2004), available at <http://www.larrymckeeon.com/html/pr/McKeon-Denounces->

Amendment-to-Illinois-Constitution-147.asp

17. Id.

18. Ill. Const., art. XIV, §2.

19. Telephone interview with Mike Quigley, Cook County Commissioner, 10th District, (Jan. 24, 2003).

Senate to Weigh Controversial Cybercrime Treaty

Gavin Mhley

Over the past several years, cybercrime has risen dramatically on a global scale.¹ As a way to combat crime on the Internet that occurs across borders, the Convention on Cybercrime was drafted by the 43-member Council of Europe in November 2001. In November 2003, President Bush asked the U.S. Senate to ratify the treaty.²

According to Treatywatch.org, the treaty does three main things. First, it includes a list of crimes that each member country must have on its books.³ The treaty requires criminalization of offenses such as hacking, the production, sale or distribution of hacking tools, and child pornography, and an expansion of criminal liability for intellectual property violations. Second, it requires each participating nation to grant new powers of search and seizure to its law enforcement authorities, including the power to force an Internet Service Provider (ISP) to preserve and relinquish a citizen's internet usage records or other data, and the power to monitor a citizen's online activities in real time. Finally, it requires law enforcement in every participating country to assist police from other participating countries by cooperating with "mutual assistance requests" from police in other participating nations.

In his letter to the Senate, Bush called the treaty "an effective tool in the global effort to combat computer-related crime" as well as "the only multilateral treaty to address the problems of computer-related crime and electronic evidence gathering."⁴ Bush said the treaty will "help deny 'safe havens' to criminals, including terrorists, who can cause damage to U.S. interests from abroad, using computer systems."⁵ According to the U.S. Department of Justice, the treaty will eliminate procedural and jurisdictional obstacles that can delay or endanger international investigations.⁶

Civil liberties groups, including the American Civil Liberties Union, have called on the Senate to reject the treaty. The ACLU argues that the surveillance powers granted by the treaty are not balanced out by privacy or civil liberties restraints. For example, the ACLU believes that because the treaty allows police to conduct searches and seizures of data from ISPs without reimbursing them for the costs, it encourages police to use that power indiscriminately with no checks or balances.⁷

The ACLU also says the treaty should have a "dual criminality" requirement, which would require an activity to be a crime in both countries before one nation could enlist

the police in the other nation to help investigate. The result without such a requirement, the ACLU says, would be that American law enforcement agencies would be forced to cooperate with foreign authorities by conducting surveillance on American citizens who have committed no crime under U.S. law. Worse yet, they contend that some of the requests could come from countries that have minimal civil liberties protections such as Ukraine and Bulgaria, or just much different free speech standards such as the U.K. The treaty does allow countries to refuse to cooperate if the offense being investigated is deemed "political", but the ACLU says these exemptions do not apply to things such as real-time data monitoring and are ineffective because different countries have varying definitions of what "political" means.

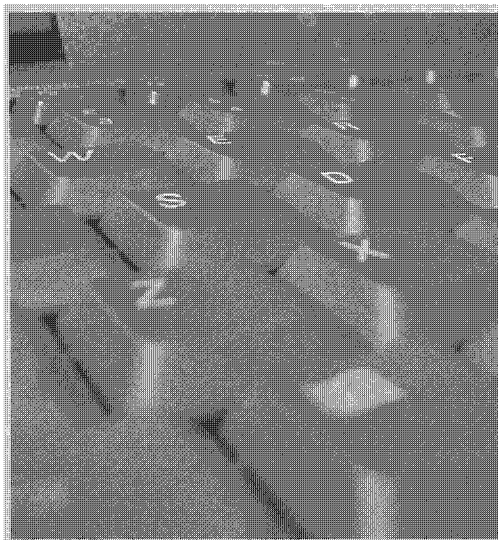
Regarding intellectual property laws, the ACLU says the treaty could significantly expand criminal liability for intellectual property violations and further tilt copyright law away from the public interest. One main concern is that the law of "fair

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use", which permits copyrighted material to be used for things such as parodies, is not mentioned as a way to avoid copyright infringement.

Civil liberties groups also are concerned about the fact that the treaty's drafting committee was dominated by law enforcement, while

industry and public interest groups had little or no input. The result, they say, is a wish list for law enforcement that lacks the balance of other viewpoints, a balance that the U.S. Constitution requires. The ACLU also



says the treaty wrongly allows real-time collection and recording of Internet transmissions, thus permitting the widescale use of controversial government spyware programs such as Carnivore, which the ACLU says violates the Constitution's Fourth Amendment's guarantee against unreasonable searches and seizures.⁸

The treaty will enter into force when ratified by five signatory countries, three of which must be European.⁹ So far, only three countries – Albania, Croatia and Estonia – have ratified the treaty.¹⁰ If the Senate approves it, the Bush administration says no further legal changes would be necessary because U.S. law already abides by provisions in the treaty.

According to Barry Steinhardt, Director of the ACLU's Technology and Liberty Program, there has not yet been much public outcry against the treaty in the U.S. "The Bush Administration took two years to send it to the Senate," Steinhardt said. "It just hasn't hit the

radar screen yet."

If the Senate does pass the treaty, ACLU Technology and Liberty Program Communications Director Jay Stanley says, it will likely be changed eventually.

"Technology is moving so fast that it's difficult for the laws to sometimes catch up," Stanley said. "It took the Supreme Court 40 years to recognize privacy in telephone calls. The laws will catch up, but the danger is that certain structures will be put into place before the laws can catch up."

"A lot of times, people hear about privacy concerns and they say, 'What can you do?' But really they think they have a lot more privacy than they do."

1. Global LI Industry Forum, *The Convention on Cybercrime: What is it?*, available at <http://www.gliif.org/ratifynow/reasons.htm>
2. Declan McCullagh, *Bush Pushes for Cybercrime Treaty* (Nov. 18, 2003), available at <http://news.com.com/2100-1028-5108854.html>
3. *Eight Reasons the International Cybercrime Treaty Should Be Rejected*, available at TreatyWatch.org
4. Declan McCullagh, *Bush Pushes for Cybercrime Treaty* (Nov. 18, 2003), available at <http://news.com.com/2100-1028-5108854.html>
5. *Id.*
6. *Id.*
7. *The Seven Reasons Why the Senate Should Reject the International Cybercrime Treaty* (Dec. 18, 2003), available at <http://www.aclu.org/privacy/privacy.cfm?id=13475&c=131>
8. *Id.*
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