#OPEN: The Online Protection and Enforcement of Digital Trade Act

To amend the Tariff Act of 1930 to address unfair trade practices relating to infringement of copyrights and trademarks by certain Internet sites, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES Mr. ISSA introduced the following bill; which was referred to the Committee on X

A BILL to amend the Tariff Act of 1930 to address unfair trade practices relating to infringement of copyrights and trademarks by certain Internet sites, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled

SECTION 1. SHORT TITLE. This Act may be cited as the Online Protection and Enforcement of Digital Trade Act, or the OPEN Act.

SEC. 2. UNFAIR TRADE PRACTICES RELATING TO INFRINGEMENT OF COPYRIGHTS AND TRADE MARKS BY CERTAIN INTERNET SITES.

(a) IN GENERAL Title III of the Tariff Act of 1930 (19 U.S.C. 1304 et seq.) is amended by inserting after section 337 the following:

SEC. 337A. UNFAIR TRADE PRACTICES RELATING TO INFRINGEMENT OF COPYRIGHTS AND TRADEMARKS BY CERTAIN INTERNET SITES.

(a) DEFINITIONS In this section:

(1) COMPLAINANT. The term complainant means a person who files a complaint with the Commission under subsection (d).

(2) DOMAIN NAME. The term domain name has the meaning given that term in section 45 of the Lanham Act (15 U.S.C. 1127).

(3) FINANCIAL TRANSACTION PROVIDER. The term financial transaction provider has the meaning given that term in section 5362(4) of title 31, United States Code.

(4) INFRINGING ACTIVITY. The term infringing activity means an activity that

(A) infringes a copyright under section 506 of title 17, United States Code;

(B) violates section 1201 of title 17, United States Code; or
(C) uses counterfeit marks in a manner that violates section 32(1) of the Lanham Act (15 U.S.C. 1113(1)).

(5) INTERNET ADVERTISING SERVICE. The term Internet advertising service means a service that serves an online advertisement in viewable form for any period of time on an Internet site.

(6) INTERNET SITE. The term Internet site means the collection of digital assets, including links, indexes, or pointers to digital assets, accessible through the Internet that are addressed relative to a common domain name.

(7) INTERNET SITE DEDICATED TO INFRINGING ACTIVITY.

(A) IN GENERAL The term Internet site dedicated to infringing activity means an Internet site that

(i) is accessed through a non-domestic domain name;

(ii) conducts business directed to residents of the United States; and

(iii) has only limited purpose or use other than engaging in infringing activity and whose owner or operator primarily uses the site to willfully engage in infringing activity.

(B) BUSINESS DIRECTED TO RESIDENTS OF THE UNITED STATES. For purposes of determining whether an Internet site conducts business directed to residents of the United States under subparagraph (A)(ii), the Commission may consider, among other indicators, whether

(i) the Internet site is providing goods or services to users located in the United States;

(ii) there is evidence that the Internet site is not intended to provide goods and services to such users or access to or delivery of goods and services to such users;

(iii) the Internet site has reasonable measures in place to prevent goods and services provided by the Internet site from being accessed from or delivered to the United States;

(iv) the Internet site offers services obtained in the United States; and

(v) any prices for goods and services provided by the Internet site are indicated in the currency of the United States.
(C) EXCLUSIONS. An Internet site is not an Internet site dedicated to infringing activity

(i) if the Internet site has a practice of expeditiously removing, or disabling access to, material that is claimed to be infringing or to be the subject of infringing activity after notification by the owner of the copyright or trademark alleged to be infringed or its authorized representative;

(ii) because the Internet site engages in an activity that would not make the operator liable for monetary relief for infringing the copyright under section 512 of title 17, United States Code; or

(iii) because of the distribution by the Internet site of copies that were made without infringing a copyright or trademark.

(8) LANHAM ACT. The term Lanham Act means the Act entitled An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes, approved July 5, 1946 (15 U.S.C. 1051 et seq.) (commonly referred to as the Trademark Act of 1946 or the Lanham Act.

(9) NONDOMESTIC DOMAIN NAME. The term nondomestic domain name, means a domain name for which the domain name registry that issued the domain name and operates the relevant top level domain, the domain name registrar for the domain name, and the owner or operator of the Internet site associated with the domain name, are not located in the United States.

(10) OPERATOR. The term operator when used in connection with an Internet site, includes any person with authority to operate the Internet site.

(11) OWNER. The term owner, when used in connection with an Internet site, includes any owner of a majority interest in the Internet site.

(12) TRADEMARK. The term trademark has the meaning given that term in section 45 of the Lanham Act (15 U.S.C. 1127).

(b) APPLICABILITY OF SECTION. It shall be unlawful to operate or maintain an Internet site dedicated to infringing activity. In any case in which the Commission determines under this section that a violation of this subsection occurs, the provisions of this section shall apply.

(c) INVESTIGATION OF VIOLATIONS BY COMMISSION.

(1) IN GENERAL. The Commission may investigate an alleged violation of subsection (b) on its own initiative; and
(B) shall investigate any alleged violation of subsection (b) upon receiving a complaint filed under subsection (d).

(2) PROCEDURES. An investigation initiated under paragraph (1) shall be subject to the requirements of section 337(b)(1) with respect to notice of investigations and timing of determinations.

(3) CONSULTATIONS. In conducting an investigation initiated under paragraph (1), the Commission shall consult with, and seek advice and information from, the Attorney General, the Secretary of State, the Secretary of Homeland Security, the Secretary of Commerce, the Intellectual Property Enforcement Coordinator, the United States Trade Representative, and such other officials as the Commission considers appropriate.

(4) TERMINATION OF INVESTIGATIONS; REFERRAL. If the Commission has reason to believe, based on information before the Commission, that the domain name associated with an Internet site that is the subject of a complaint filed under subsection (d) is not a nondomestic domain name, the Commission shall terminate, or not initiate, an investigation with respect to the complaint, and shall refer the matter, including any evidentiary record that the Commission has developed, to the Attorney General for such further proceedings as the Attorney General determines appropriate.

(5) LIMITATION ON INVESTIGATIONS OF DOMAIN NAMES; CONSENT TO JURISDICTION. Notwithstanding any other provision of this section, the Commission may not initiate an investigation under paragraph (1) with respect to a domain name if the operator of the Internet site associated with the domain name

(A) provides in a legal notice on the site accurate information consisting of

(i) the name of an individual authorized to receive process on behalf of the site;

(ii) an address at which process may be served;

(iii) a telephone number at which the individual described in clause (i) may be contacted; and

(iv) a statement that the operator of the site

(I) consents to the jurisdiction and venue of the United States district courts with respect to a violation under section 506 of title 17, United States Code, a criminal offense under section 1204 of title 17, United States Code, for a violation of section 1201 of such title, or a violation of section 2320 of title 18 of such Code; and

(II) will accept service of process from the Attorney General with respect to those violations and the offense set forth in subclause (I); and
(B) upon the filing of any civil action in the appropriate United States district court,

(i) for infringement of copyright under section 501 of title 17, United States Code,

(ii) under section 1203 of title 17, United States Code, for a violation of section 1201 of such title, or

(iii) under section 32(1) of the Lanham Act, accepts service and waives, in a timely manner, any objections to jurisdiction as set forth in the statement described in subparagraph (A)(iv).

(d) COMPLAINTS.

(1) IN GENERAL. A complaint alleging, under oath, that an Internet site dedicated to infringing activity is being operated or maintained in violation of subsection (b) may be filed with the Commission by the owner of a copyright or trademark that is the subject of the infringing activity alleged in the complaint.

(2) NOTICE TO REGISTRANT OF DOMAIN NAME OF INTERNET SITE ALLEGED TO BE VIOLATING THIS SECTION.

(A) IN GENERAL. Upon filing a complaint under paragraph (1), the complainant shall send a notice of the violation alleged in the complaint to the registrant of the domain name of the Internet site alleged to be operated or maintained in violation of subsection (b)

(i) at the postal and e-mail addresses appearing in the applicable publicly accessible database of registrations, if any, to the extent such addresses are reasonably available;

(ii) via the postal and e-mail addresses of the registrar, registry, or other domain name registration authority that registered or assigned the domain name, to the extent such addresses are reasonably available; and

(iii) in any other such form as the Commission finds necessary.

(B) RULE OF CONSTRUCTION. For purposes of this subsection, the actions described in this paragraph shall constitute service of process.

(3) IDENTIFICATION OF, AND NOTICE TO, ENTITIES THAT MAY BE REQUIRED TO TAKE ACTION PURSUANT TO THIS SECTION.

(A) IDENTIFICATION. A complaint filed under paragraph (1) shall identify any financial transaction provider or Internet advertising service that may be required to take measures described in subsection (g)
(2) if the Commission issues an order under subsection (f) with respect to the complaint and the order is served on the provider or service pursuant to subsection (g)(1).

(B) NOTICE. Upon filing a complaint under paragraph (1), the complainant shall provide notice to any financial transaction provider or Internet advertising service identified in the complaint pursuant to subparagraph (A) or any amendments to the complaint.

(C) INTERVENTION.

(i) IN GENERAL. A financial transaction provider or Internet advertising service identified in a complaint pursuant to subparagraph (A) may intervene upon timely request filed with the Commission in

(I) an investigation initiated under subsection (c) pursuant to the complaint; or

(II) pursuant to subsection (f)(5), an action to modify, suspend, or vacate an order issued pursuant to the complaint.

(ii) RULE OF CONSTRUCTION. Failure to intervene under clause (i) in an investigation under subsection (c) does not preclude a financial transaction provider or Internet advertising service notified of the investigation from subsequently seeking an order to modify, suspend, or terminate an order issued by the Commission under subsection (f).

(4) FEES.

(A) IMPOSITION OF FEE. The Commission may impose on each complainant a fee in an amount determined appropriate by the Commission to defray the costs of investigations under subsection (c).

(B) AVAILABILITY OF FEES. Fees imposed pursuant to subparagraph (A) shall be available to the Commission, without further appropriation, to carry out investigations under subsection (c).

(e) DETERMINATIONS.

(1) IN GENERAL. The Commission shall determine, with respect to each investigation initiated under subsection (c) alleging that an Internet site dedicated to infringing activity is operated or maintained in violation of subsection (b), whether or not the Internet site is operated or maintained in violation of subsection (b).
(2) EXCEPTIONS AND PROCEDURES RELATING TO DETERMINATIONS. The provisions of the first, second, third, and eighth sentences of subsection (c) of section 337 providing for exceptions and procedures relating to determinations of the Commission under that section shall apply with respect to a determination under paragraph (1) to the same extent and in the same manner as those provisions apply to determinations under section 337.

(3) ADDITIONAL PROCEDURES RELATING TO REVIEW OF CERTAIN DETERMINATIONS. Notwithstanding the provisions of this subsection or any provision of section 337(c), a determination of the Commission under this section with respect to the appropriate remedy provided by the Commission, and a determination under subsection (i) with respect to the imposition of sanctions for abuse of discovery or abuse of process, shall be reviewable in accordance with section 706 of title 5, United States Code.

(4) EFFECTIVE DATE. A determination made under paragraph (1) shall take effect on the date on which the Commission publishes the determination in the Federal Register.

(5) REFERRALS TO PRESIDENT; TERMINATION FOR DISAPPROVAL.

(A) IN GENERAL. If the Commission determines under paragraph (1) that an Internet site dedicated to infringing activity is operated or maintained in violation of subsection (b), the Commission shall promptly submit to the President a copy of a determination, the record upon which the determination is based, and any order issued under subsection (f) pursuant to the determination.

(B) TERMINATION OF DETERMINATION BASED ON DISAPPROVAL OF PRESIDENT. If the President disapproves of a determination of the Commission for policy reasons and notifies the Commission of that disapproval, the determination and any order issued pursuant to the determination shall cease to have force or effect on the date on which the President notifies the Commission of that disapproval.

(f) CEASE AND DESIST ORDERS.

(1) IN GENERAL. If the Commission determines under subsection (e) that an Internet site dedicated to infringing activity is operated or maintained in violation of subsection (b), the Commission may,

(A) issue an order to cease and desist the infringing activity of the Internet site against the Internet site and to the owner and the operator of the Internet site; and

(B) cause the order to be served on the owner and the operator.

(2) TEMPORARY AND PRELIMINARY CEASE AND DESIST ORDERS.
(A) PETITION BY COMPLAINANT. A complainant may file with the Commission a petition, in accordance with this paragraph, for the issuance of a temporary or preliminary order against the Internet site and to the owner and the operator of the Internet site to cease and desist the infringing activity alleged in the complaint filed under subsection (d).

(B) ISSUANCE OF ORDER. If, upon receiving a petition under subparagraph (A), the Commission determines that there is reason to believe that an Internet site dedicated to infringing activity is operated or maintained in violation of subsection (b), the Commission may issue a temporary or preliminary cease and desist order against, and cause the order to be served on, the Internet site and to the owner and the operator of the Internet site.

(C) STANDARD FOR RELIEF. The Commission shall grant temporary or preliminary cease and desist orders under this paragraph in a manner consistent with the provisions of rule 65 of the Federal Rules of Civil Procedure, or any successor thereto, relating to preliminary injunctions and temporary restraining orders.

(D) PROCEDURES FOR TEMPORARY CEASE AND DESIST ORDER.

(i) EXPEDITED CONSIDERATION. Upon a showing of extraordinary circumstances by the complainant filing a petition for a temporary cease and desist order under subparagraph (A), the Commission shall make a determination with respect to the petition on an expedited basis.

(ii) EXPIRATION OF ORDER.

(I) IN GENERAL. Except as provided in subclause (II), a temporary cease and desist order issued under this paragraph shall expire at a time determined by the Commission that is not later than 14 days after the issuance of the order.

(II) EXTENSION OF ORDER. The Commission may extend a temporary cease and desist order issued under this paragraph for additional periods of not more than 14 days for good cause or with the consent of the entity against which the order is issued.

(E) PROCEDURES FOR PRELIMINARY CEASE AND DESIST ORDER.

(i) IN GENERAL. Except as provided in clause (ii), the Commission shall make a determination with respect to a petition for a preliminary cease and desist order not later than 30 days after the Commission publishes notice of the initiation of an investigation under subsection (c) in the Federal Register.

(ii) EXTENSIONS OF TIME FOR DETERMINATION. The Commission may extend the date by which the Commission is required to make a determination under clause (i)
with respect to a petition for a preliminary cease and desist order for an additional 30 days if the Commission
(I) determines that the petition presents a more complicated case; and
(II) publishes in the Federal Register an explanation of why the Commission
determined that the case is more complicated under subclause (I).

(3) MODIFICATION OR REVOCATION OF ORDERS.

(A) IN GENERAL. At any time after the issuance of an order under this subsection, a
motion to modify, suspend, or vacate the order may be filed by,
(i) any person, or owner or operator of property, bound by the order;
(ii) any registrant of the domain name or the owner or operator of the Internet site
subject to the order;
(iii) any domain name registrar or registry that has registered or assigned the
domain name of the Internet site subject to the order; or
(iv) a financial transaction provider or Internet advertising service on which a copy
of an order has been served pursuant to paragraph (1) of subsection (g) requiring
the provider or service to take action described in paragraph (2) of that subsection.

(B) RELIEF. The Commission shall modify, suspend, or vacate an order, as
appropriate, if the Commission determines that,
(i) the Internet site associated with the domain name subject to the order is no
longer, or never was, an Internet site dedicated to infringing activity; or
(ii) the interests of justice require that the order be modified, suspended, or vacated.

(C) CONSIDERATION. In making a determination under subparagraph (B), the
Commission may consider whether the domain name subject to the order has
expired or has been reregistered by a different entity.

(4) AMENDMENT OF ORDERS. A complainant may petition the Commission to
amend an order issued under this subsection if an Internet site determined under
subsection (d) to be an Internet site dedicated to infringing activity is accessible or
has been reconstituted at a different domain name.

(5) OPPORTUNITY TO BE HEARD FOR CERTAIN ENTITIES. Before the Commission
issues an order under this subsection or modifies, suspends, vacates, or amends
such an order under paragraph (5) or (6), a financial transaction provider or
Internet advertising service that intervened pursuant to subsection (d)(3) in an
investigation or action relating to the order shall have an opportunity to be heard before the Commission with respect to whether the Commission should issue the order and the scope of relief available under the order or whether the Commission should modify, suspend, vacate, or amend the order, as the case may be.

(6) EXPIRATION OF ORDERS WITH RESPECT TO DOMAIN NAMES. An order issued under this subsection against a domain name shall cease to have any force or effect upon expiration of the registration of the domain name.

(g) REQUIRED ACTIONS BASED ON COMMISSION ORDERS.

(1) IN GENERAL. If the Commission reasonably believes that a financial transaction provider or an Internet advertising service identified in a complaint pursuant to subsection (d)(3), or any amendment to the complaint, supplies services to the Internet site associated with the domain name that is subject to the order issued under subsection (f) with respect to the complaint,

(A) the Commission may give permission to the complainant to serve a copy of the order on the financial transaction provider or Internet advertising service, as the case may be;

(B) if the Commission gives permission to the complainant under subparagraph (A), the complainant shall file proof of service with the Commission; and

(C) upon receiving a copy of the order pursuant to subparagraph (A), the financial transaction provider or Internet advertising service, as the case may be, shall implement that measures described in paragraph (2).

(2) MEASURES DESCRIBED. The measures described in this paragraph are the following:

(A) MEASURES TO BE IMPLEMENTED BY FINANCIAL TRANSACTION PROVIDERS.

(i) IN GENERAL. Subject to clause (ii), a financial transaction provider shall take reasonable measures, as expeditiously as reasonable, designed to prevent or prohibit the completion of payment transactions by the provider that involve customers located in the United States and the Internet site associated with the domain name subject to the order issued under subsection (f).

(ii) LIMITATIONS ON MEASURES. financial transaction provider may not be required pursuant to clause (i), (I) to implement measures that are not commercially reasonable;

(II) to modify services or facilities of the provider to comply with the order issued under subsection (f); or
(III) to prevent or prohibit the completion of a payment transaction if the provider could not reasonably determine in advance whether the entity was using the domain name subject to the order.

(B) INTERNET ADVERTISING SERVICES.

(i) IN GENERAL. Subject to clause (ii), an Internet advertising service shall, as expeditiously as reasonable, take technically feasible measures intended to cease serving advertisements to the domain name subject to the order issued under subsection (f) in situations in which the service would directly share revenues generated by the advertisements with the operator of the Internet site associated with that domain name.

(ii) LIMITATIONS ON MEASURES. An Internet advertising service may not be required pursuant to clause (i),

(I) to implement measures that are not commercially reasonable;

(II) to modify the services or facilities of the service to comply with the order issued under subsection (f); or

(III) to cease serving an advertisement to a domain name if the service could not reasonably determine before serving the advertisement that the advertisement was being served to the domain name subject to the order.

(3) COMMUNICATION WITH USERS. A financial transaction provider or an Internet advertising service required to implement measures described in paragraph (2) shall determine how to communicate with the users or customers of the provider or service, as the case may be, with respect to those measures.

(4) RULES OF CONSTRUCTION.

(A) LIMITATION ON OBLIGATIONS. A financial transaction provider or an Internet advertising service required to implement measures described in paragraph (2) shall not be required to take measures or actions in addition to the measures described in paragraph (2) pursuant to this section or an order issued under this section.

(B) MANNER OF COMPLIANCE. A financial transaction provider or an Internet advertising service required to implement measures described in paragraph (2) shall be in compliance with this subsection if the provider or service, as the case may be, implements the measures described in that paragraph with respect to accounts of the provider or service, as the case may be, on or after the date on which a copy of an order is served under paragraph (1) or, if applicable, the date on which the order is modified or amended under paragraph (5) or (6) of subsection (f).
(5) ACTIONS PURSUANT TO COMMISSION ORDER.

(A) IMMUNITY FROM CIVIL ACTIONS. No cause of action shall lie in any court against a financial transaction provider or an Internet advertising service on which a copy of an order is served under paragraph (1), or against any director, officer, employee, or agent thereof, other than in an action pursuant to subsection (h), for,

(i) any act reasonably designed to comply with this subsection or reasonably arising from the order; or

(ii) any act, failure, or inability to meet the obligations under this subsection of the provider or service if the provider or service, as the case may be, makes a good faith effort to comply with such obligations.

(B) IMMUNITY FROM LIABILITY. A financial transaction provider or an Internet advertising service on which a copy of an order is served under paragraph (1), and any director, officer, employee, or agent thereof, shall not be liable to any person for any acts reasonably designed to comply with this subsection or reasonably arising from the order, other than in an action pursuant to subsection (h).

(C) IMMUNITY FROM ACTIONS OF THIRD PARTIES. An action taken by a third party to circumvent any measures implemented pursuant to an order served on a financial transaction provider or Internet advertising service under paragraph (1) may not be used by any person in any claim or cause of action against the provider or service, as the case may be, other than in an action pursuant to subsection (h).

(h) ENFORCEMENT OF ORDERS.

(1) IN GENERAL. In order to compel compliance with this section, the Attorney General may bring an action for injunctive relief against any person subject to an order issued under subsection (f) or on which such an order is served under subsection (g) that knowingly and willfully fails to comply with the order.

(2) RULE OF CONSTRUCTION. The authority granted to the Attorney General under paragraph (1) shall be the sole legal remedy for enforcing the obligations under subsection (g) of a financial transaction provider or Internet advertising service on which an order is served under paragraph (1) of that subsection.

(3) AFFIRMATIVE DEFENSES. A defendant in an action commenced under paragraph (1) may establish an affirmative defense by showing that the defendant does not have the technical means to comply with this section without incurring an unreasonable economic burden or that the order is inconsistent with this section. That showing shall serve as a defense only to the extent of the inability of the defendant to comply or to the extent of the inconsistency.
(i) SANCTIONS FOR ABUSE OF PROCESS. The Commission may, by rule, prescribe sanctions for abuse of process in a manner consistent with the provisions of rule 11 and rule 37 of the Federal Rules of Civil Procedure.

(j) IMMUNITY FOR TAKING VOLUNTARY ACTION AGAINST SITES DEDICATED TO INFRINGING ACTIVITY. No cause of action shall lie in any court, no person may rely on any claim or cause of action, and no liability for damages to any person shall be granted, against a financial transaction provider or Internet advertising service for taking any action described in subsection (g)(2) with respect to an Internet site, or otherwise declining to serve or terminating transactions with an Internet site, in the reasonable belief based on credible evidence that,

(1) the Internet site is an Internet site dedicated to infringing activity; and

(2) the action is consistent with the terms of service and other contractual obligations of the provider or service, as the case may be.

(k) IMMUNITY FOR TAKING VOLUNTARY ACTION AGAINST SITES THAT ENDANGER PUBLIC HEALTH.

(1) REFUSAL OF SERVICE. A financial transaction provider or Internet advertising service, acting in good faith and based on credible evidence, may cease providing or refuse to provide services to an Internet site the provider or service determines to be an Internet site that endangers the public health.

(2) IMMUNITY FROM LIABILITY. A financial transaction provider or Internet advertising service described in paragraph (1), including its directors, officers, employees, or agents, that ceases or refuses to provide services under that paragraph shall not be liable to any person under any Federal or State law for ceasing or refusing to provide such services.

(3) DEFINITIONS. In this subsection:

(A) DRUG. The term drug has the meaning given that term in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1)).

(B) INTERNET SITE THAT ENDANGERS THE PUBLIC HEALTH. The term Internet site that endangers the public health, means an Internet site that is primarily designed or operated for the purpose of, has only limited purpose or use other than, or is marketed by its operator or another person acting in concert with that operator for use in offering, selling, dispensing, or distributing any prescription medication, and does so regularly without a valid prescription.

(C) PRESCRIPTION MEDICATION. The term prescription medication means a drug that is subject to section 503(b) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 353(b)).
(D) VALID PRESCRIPTION. The term valid prescription has the meaning given that term in section 309(e)(2)(A) of the Controlled Substances Act (21 U.S.C. 829(e)(2)(A)).

(I) SAVINGS CLAUSES.

(1) IN GENERAL. Nothing in this section shall be construed to limit or expand civil or criminal remedies available to any person (including the United States) for activities that infringe intellectual property rights on the Internet pursuant to any other Federal or State law.

(2) RULE OF CONSTRUCTION RELATING TO VICARIOUS OR CONTRIBUTORY LIABILITY. Nothing in this section shall be construed,

(A) to enlarge or diminish vicarious or contributory liability for any cause of action available under title 17, United States Code, or the Lanham Act, including any limitations on liability under section 512 of such title 17; or

(B) to create an obligation to take action pursuant to subsection (k).

(3) RULE OF CONSTRUCTION RELATING TO LIMITATIONS, EXCEPTIONS, AND DEFENSES. Nothing in this section shall be construed to affect, limit, or deny application of any limitation, exception, or defense to copyright or trademark causes of action, including fair use and other exceptions, limitations, or defenses available to any person pursuant to any other Federal or State law.

(4) RULE OF CONSTRUCTION RELATING TO CIVIL ACTIONS. The issuance of an order and actions taken or not taken pursuant to this section shall be inadmissible as evidence in any civil action (other than an action under this section to enforce compliance with subsection (b)) to establish that a party who has received, or is otherwise made aware of, such an order has knowledge regarding any infringing activities relating to the Internet site subject to the order, including under section 512 of title 17, United States Code, in determining whether any service provider had actual knowledge or should have known of the infringing activity.

(b) DISCLOSURE OF CONFIDENTIAL INFORMATION. Section 337(n) of the Tariff Act of 1930 (19 U.S.C. 1337(n)) is amended, (1) in paragraph (1), by inserting , or section 337A after this section; and (2) in paragraph (2) (A) in subparagraph (A) (i) in clause (ii), by striking (j) and inserting (j) of this section; (ii) in clause (iii), by striking (g), a cease and desist order issued pursuant to subsection (f), or a consent order issued pursuant to subsection (c), and inserting (g) of this section, a cease and desist order issued pursuant to subsection (f) of this section or subsection (f) of section 337A, or a consent order issued pursuant to subsection (c) of this section or subsection (d) of section 337A; and (iii) in clause (iv), by striking (i), or a consent order issued under this section and inserting ,(i) of this section or subsection (f) of
section 337A, or a consent order issued under this section or subsection (d) of section 337A; (B) in subparagraph (B), by striking (j) and inserting (j) of this section or subsection (e)(5) of section 337A; and (C) in subparagraph (C), by striking (g) and inserting (g) of this section.


Title III of the Tariff Act of 1930 (19 U.S.C. 1304 et seq.), as amended by section 2, is further amended by inserting after section 337A the following:

SEC. 337B. SECTION 337 JUDGES.

(a) IN GENERAL. Notwithstanding section 556(b) of title 5, United States Code, the Commission may appoint hearing officers, other than administrative law judges appointed under section 3105 of title 5, United States Code, to preside at the taking of evidence at hearings required by sections 337 and 337A and to make initial and recommended decisions in accordance with sections 554, 556, and 557 of such title in investigations under sections 337 and 337A. The hearing officers appointed under this subsection shall be known as section 337 judges.

(b) QUALIFICATIONS. An individual appointed as a section 337 judge under paragraph (1) shall possess a minimum of 7 years of legal experience and be licensed to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the Constitution of the United States. The Commission may promulgate such other regulations as the Commission considers necessary with respect to the qualifications of section 337 judges, including technical expertise and experience in patent, trademark, copyright, and unfair competition law.

(c) ROTATION. Section 337 judges shall be assigned to cases in rotation to the extent practicable or as otherwise provided for in the rules of the Commission.

(d) OTHER DUTIES. A section 337 judge may not perform duties inconsistent with the duties and responsibilities of a section 337 judge.

(e) REMOVAL. A section 337 judge may be removed only for good cause shown upon a hearing conducted on the record by the Merit Systems Protection Board. The failure of the Commission to adopt the initial or recommended decision of a section 337 judge shall not constitute good cause.

(f) COMPETITIVE SERVICE. Except as otherwise provided, the laws, rules, and regulations applicable to positions in the competitive service apply to section 337 judges. Upon appointment, a section 337 judge shall be paid in accordance with the pay rates provided for in section 5372 of title 5, United States Code, commensurate
with the pay rate of an administrative law judge with similar time in service. Section 337 judges shall not be Senior Executive Service positions (as defined in section 3132(a) of title 5, United States Code).

(g) PERFORMANCE EVALUATIONS. Section 337 judges shall not receive performance evaluations and shall not be compensated based on performance.

SEC. 4. INFORMATION SHARING WITH RESPECT TO THE IMPORTATION OF INFRINGING MERCHANDISE.

(a) MERCHANDISE THAT INFRINGES TRADE MARKS.

(1) IN GENERAL. Notwithstanding section 1905 of title 18, United States Code, if the Commissioner responsible for U.S. Customs and Border Protection suspects that merchandise is being imported into the United States in violation of section 42 of the Lanham Act, and subject to any applicable bonding requirements, the Secretary of Homeland Security may, for purposes of determining whether the merchandise is being imported in violation of that section, share with the holder of the trademark suspected of being infringed

(A) information about the merchandise or packaging or labels of the merchandise; or

(B) unredacted samples, or photographs of, the merchandise or packaging or labels of the merchandise.

(2) LANHAM ACT DEFINED. In this subsection, the term Lanham Act means the Act entitled An Act to provide for the registration and protection of trademarks used in commerce, to carry out the pro visions of certain international conventions, and for other purposes approved July 5, 1946 (commonly referred to as the Trademark Act of 1946 or the Lanham Act).

(b) MERCHANDISE THAT CIRCUMVENTS COPY RIGHTS.

(1) IN GENERAL. Notwithstanding section 1905 of title 18, United States Code, if the Commissioner seizes merchandise that the Commissioner suspects of being imported into the United States in violation of subsection (a)(2) or (b) of section 1201 of title 17, United States Code, the Secretary of Homeland Security may notify a copyright owner described in paragraph (2) of the seizure of the merchandise.

(2) COPYRIGHT OWNER DESCRIBED. A copyright owner described in this paragraph is the owner of a copyright under title 17, United States Code, if merchandise seized on the suspicion of being imported in violation of subsection (a)(2) or (b) of section 1201 of title 17, United States Code
(A) is primarily designed or produced for the purpose of circumventing, has only limited commercially significant purpose or use other than to circumvent, or is marketed for use in circumventing, a technological measure that effectively controls access to a work protected by that copyright; or

(B) is primarily designed or produced for the purpose of circumventing, has only limited commercially significant purpose or use other than to circumvent, or is marketed for use in circumventing, protection afforded by a technological measure that effectively protects the rights of the copyright owner in a work or a portion of a work.

SEC. 5. REGULATIONS. Not later than 270 days after the date of the enactment of this Act, the United States International Trade Commission shall prescribe regulations,

(1) to provide for procedures for receiving information from the public about Internet sites dedicated to infringing activity (as defined in section 337A(a) of the Tariff Act of 1930 (as added by section 2 of this Act));

(2) to provide guidance to intellectual property rights holders about,

(A) what information those rights holders should provide to initiate an investigation pursuant to section 337A(c) of the Tariff Act of 1930 (as added by section 2 of this Act); and

(B) how to supplement an ongoing investigation initiated pursuant to that section;

(3) to establish standards for the prioritization of investigations initiated under that section; and

(4) to provide appropriate resources and procedures for case management and development to affect timely disposition of investigations initiated under that section.

SEC. 6. STUDY AND REPORTS BY REGISTER OF COPY RIGHTS. The Register of Copyrights shall

(1) in consultation with appropriate Federal agencies and other stakeholders, conduct a study on (A) the enforcement and effectiveness of section 337A of the Tariff Act of 1930 (as added by section 2 of this Act); and

(B) any modifications to the authorities provided in that section necessary to address emerging technologies; and

(2) not later than 2 years after the date of enactment of this Act, submit to the Committee on Finance and the Committee on the Judiciary of the Senate, and to the
Committee on the Ways and Means and the Committee on the Judiciary of the House of Representatives, a report containing the results of the study conducted under paragraph (1) and any recommendations that the Register may have as a result of the study.