

112TH CONGRESS
2D SESSION

H. R. 3782

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

JANUARY 18, 2012

Mr. ISSA (for himself, Mr. CAMPBELL, Mr. CHAFFETZ, Mr. DOGGETT, Mr. DOYLE, Ms. ESHOO, Mr. FARENTHOLD, Mr. HONDA, Ms. ZOE LOFGREN of California, Ms. MATSUI, Mr. POLIS, Ms. SPEIER, Mr. THOMPSON of California, Mr. JOHNSON of Illinois, Mr. STARK, Mr. LANGEVIN, Mr. MCHENRY, Mr. GEORGE MILLER of California, Mr. ROSS of Florida, Mr. SENSENBRENNER, Mr. HASTINGS of Florida, Mr. BACHUS, Mr. ELLISON, Mr. GRIJALVA, Mr. DEFazio, and Ms. WOOLSEY) introduced the following bill; which was referred to the Committee on Ways and Means, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Online Protection and
3 Enforcement of Digital Trade Act” or the “OPEN Act”.

4 **SEC. 2. UNFAIR TRADE PRACTICES RELATING TO IN-**
5 **FRINGEMENT OF COPYRIGHTS AND TRADE-**
6 **MARKS BY CERTAIN INTERNET SITES.**

7 (a) IN GENERAL.—Title III of the Tariff Act of 1930
8 (19 U.S.C. 1304 et seq.) is amended by inserting after
9 section 337 the following:

10 **“SEC. 337A. UNFAIR TRADE PRACTICES RELATING TO IN-**
11 **FRINGEMENT OF COPYRIGHTS AND TRADE-**
12 **MARKS BY CERTAIN INTERNET SITES.**

13 “(a) DEFINITIONS.—In this section:

14 “(1) COMPLAINANT.—The term ‘complainant’
15 means a person who files a complaint with the Com-
16 mission under subsection (d).

17 “(2) DOMAIN NAME.—The term ‘domain name’
18 has the meaning given that term in section 45 of the
19 Lanham Act (15 U.S.C. 1127).

20 “(3) FINANCIAL TRANSACTION PROVIDER.—

21 “(A) IN GENERAL.—Except as provided in
22 subparagraph (B), the term ‘financial trans-
23 action provider’ has the meaning given that
24 term in section 5362(4) of title 31, United
25 States Code.

1 “(B) EXCEPTION.—The term ‘financial
2 transaction provider’ does not include an Inter-
3 net service platform or an affiliate of an Inter-
4 net service platform.

5 “(4) INFRINGING ACTIVITY.—The term ‘infring-
6 ing activity’ means an activity that—

7 “(A) infringes a copyright in a manner
8 punishable under section 506 of title 17, United
9 States Code;

10 “(B) violates section 1201 of title 17,
11 United States Code; or

12 “(C) uses counterfeit marks in a manner
13 punishable under section 34(d) of the Lanham
14 Act (15 U.S.C. 1116(d)).

15 “(5) INTERNET ADVERTISING SERVICE.—The
16 term ‘Internet advertising service’ means a service
17 that serves an online advertisement in viewable form
18 for any period of time on an Internet site that is not
19 owned or controlled by the Internet advertising serv-
20 ice.

21 “(6) INTERNET SERVICE PLATFORM.—The
22 term ‘Internet service platform’ means an interactive
23 digital service the provider of which—

1 “(A) does not act merely as a payment
2 intermediary between a user and a supplier of
3 goods or services; and

4 “(B) provides additional services to facili-
5 tate interaction between users unrelated to pur-
6 chases from suppliers of goods and services.

7 “(7) INTERNET SITE.—The term ‘Internet site’
8 means the collection of digital assets, including links,
9 indexes, or pointers to digital assets, accessible
10 through the Internet that are addressed relative to
11 a common domain name.

12 “(8) INTERNET SITE DEDICATED TO INFRING-
13 ING ACTIVITY.—

14 “(A) IN GENERAL.—The term ‘Internet
15 site dedicated to infringing activity’ means an
16 Internet site that—

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

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

21 “(iii) has only limited purpose or use
22 other than engaging in infringing activity
23 and whose owner or operator primarily
24 uses the site—

25 “(I) to willfully—

1 “(aa) infringe a copyright in
2 a manner punishable under sec-
3 tion 506 of title 17, United
4 States Code; or

5 “(bb) violate section 1201 of
6 title 17, United States Code; or

7 “(II) to use counterfeit marks in
8 a manner punishable under section
9 34(d) of the Lanham Act (15 U.S.C.
10 1116(d)).

11 “(B) BUSINESS DIRECTED TO RESIDENTS
12 OF THE UNITED STATES.—For purposes of de-
13 termining whether an Internet site conducts
14 business directed to residents of the United
15 States under subparagraph (A)(ii), the Commis-
16 sion may consider, among other indicators,
17 whether—

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

21 “(ii) there is evidence that the Inter-
22 net site is not intended to provide goods
23 and services to such users or access to or
24 delivery of goods and services to such
25 users;

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

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

8 “(v) any prices for goods and services
9 provided by the Internet site are indicated
10 in the currency of the United States.

11 “(C) EXCLUSIONS.—An Internet site is
12 not an Internet site dedicated to infringing ac-
13 tivity—

14 “(i) if the Internet site has a practice
15 of expeditiously removing, or disabling ac-
16 cess to, material that is claimed to be in-
17 fringing or to be the subject of infringing
18 activity after notification by the owner of
19 the copyright or trademark alleged to be
20 infringed or its authorized representative;

21 “(ii) because the Internet site engages
22 in an activity that would not make the op-
23 erator liable for monetary relief for infring-
24 ing a copyright under section 512 of title
25 17, United States Code; or

1 “(iii) because of the distribution by
2 the Internet site of copies that were made
3 without infringing a copyright or trade-
4 mark.

5 “(9) LANHAM ACT.—The term ‘Lanham Act’
6 means the Act entitled ‘An Act to provide for the
7 registration and protection of trademarks used in
8 commerce, to carry out the provisions of certain
9 international conventions, and for other purposes’,
10 approved July 5, 1946 (15 U.S.C. 1051 et seq.)
11 (commonly referred to as the ‘Trademark Act of
12 1946’ or the ‘Lanham Act’).

13 “(10) NONDOMESTIC DOMAIN NAME.—The
14 term ‘nondomestic domain name’ means a domain
15 name for which the domain name registry that
16 issued the domain name and operates the relevant
17 top level domain, the domain name registrar for the
18 domain name, and the owner and the operator of the
19 Internet site associated with the domain name, are
20 not located in the United States.

21 “(11) OPERATOR.—The term ‘operator’, when
22 used in connection with an Internet site, includes
23 any person with authority to operate the Internet
24 site.

1 “(12) OWNER.—The term ‘owner’, when used
2 in connection with an Internet site, includes any
3 owner of a majority interest in the Internet site.

4 “(13) TRADEMARK.—The term ‘trademark’ has
5 the meaning given that term in section 45 of the
6 Lanham Act (15 U.S.C. 1127).

7 “(b) APPLICABILITY OF SECTION.—It shall be a vio-
8 lation of this section to operate or maintain an Internet
9 site dedicated to infringing activity. If the Commission de-
10 termines that there has been a violation of this subsection,
11 that violation shall be dealt with as provided in this sec-
12 tion.

13 “(c) INVESTIGATION OF VIOLATIONS BY COMMIS-
14 SION.—

15 “(1) IN GENERAL.—The Commission—

16 “(A) may investigate an alleged violation
17 of subsection (b) on its own initiative; and

18 “(B) shall investigate any alleged violation
19 of subsection (b) upon receiving a complaint
20 filed under subsection (d).

21 “(2) PROCEDURES.—An investigation initiated
22 under paragraph (1) shall be subject to the require-
23 ments of section 337(b)(1) with respect to notice of
24 investigations and timing of determinations.

1 “(3) CONSULTATIONS.—In conducting an inves-
2 tigation initiated under paragraph (1), the Commis-
3 sion may consult with, and seek advice and informa-
4 tion from, the Attorney General, the Secretary of
5 State, the Secretary of Homeland Security, the Sec-
6 retary of Commerce, the Intellectual Property En-
7 forcement Coordinator, the United States Trade
8 Representative, and such other officials as the Com-
9 mission considers appropriate.

10 “(4) TERMINATION OF INVESTIGATIONS; RE-
11 FERRAL.—If the Commission has reason to believe,
12 based on information before the Commission, that
13 the domain name associated with an Internet site
14 that is the subject of a complaint filed under sub-
15 section (d) is not a nondomestic domain name, the
16 Commission shall terminate, or not initiate, an in-
17 vestigation with respect to the complaint, and shall
18 refer the matter, including any evidentiary record
19 that the Commission has developed, to the Attorney
20 General for such further proceedings as the Attorney
21 General determines appropriate.

22 “(5) LIMITATION ON INVESTIGATIONS OF DO-
23 MAIN NAMES; CONSENT TO JURISDICTION.—Not-
24 withstanding any other provision of this section, the
25 Commission shall terminate, or not initiate, an in-

1 investigation under paragraph (1) with respect to a
2 domain name—

3 “(A) if the operator of the Internet site as-
4 sociated with the domain name provides in a
5 legal notice on the site accurate information
6 consisting of—

7 “(i) the name of an individual author-
8 ized to receive process on behalf of the site;

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

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

14 “(iv) a statement that the operator of
15 the site—

16 “(I) consents to the jurisdiction
17 and venue of the United States dis-
18 trict courts with respect to a violation
19 punishable under section 506 of title
20 17, United States Code, a criminal of-
21 fense under section 1204 of title 17,
22 United States Code, for a violation of
23 section 1201 of such title, or a viola-
24 tion of section 2320 of title 18 of such
25 Code; and

1 “(II) will accept service of proc-
2 ess from the Attorney General with
3 respect to those violations and the of-
4 fense set forth in subclause (I); and

5 “(B) provided that, in the event of the fil-
6 ing of any civil action in the appropriate United
7 States district court—

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

11 “(ii) under section 1203 of title 17,
12 United States Code, for a violation of sec-
13 tion 1201 of such title, or

14 “(iii) under section 32(1) of the
15 Lanham Act,

16 accepts service and waives, in a timely manner,
17 any objections to jurisdiction as set forth in the
18 statement described in subparagraph (A)(iv).

19 “(d) COMPLAINTS.—

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

1 subject of the infringing activity alleged in the com-
2 plaint.

3 “(2) NOTICE TO OWNER OR REGISTRANT OF
4 DOMAIN NAME OF INTERNET SITE ALLEGED TO BE
5 VIOLATING THIS SECTION.—

6 “(A) IN GENERAL.—Upon filing a com-
7 plaint under paragraph (1), the complainant
8 shall send a notice of the violation alleged in
9 the complaint to the owner or registrant of the
10 domain name of the Internet site alleged to be
11 operated or maintained in violation of sub-
12 section (b)—

13 “(i) at the postal and e-mail addresses
14 appearing in the applicable publicly acces-
15 sible database of registrations, if any, to
16 the extent such addresses are reasonably
17 available;

18 “(ii) via the postal and e-mail ad-
19 dresses of the registrar, registry, or other
20 domain name registration authority that
21 registered or assigned the domain name, to
22 the extent such addresses are reasonably
23 available; and

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

1 “(B) RULE OF CONSTRUCTION.—For pur-
2 poses of this subsection, the actions described
3 in this paragraph shall constitute service of
4 process.

5 “(3) IDENTIFICATION OF, AND NOTICE TO, EN-
6 TITIES THAT MAY BE REQUIRED TO TAKE ACTION
7 PURSUANT TO THIS SECTION.—

8 “(A) IDENTIFICATION.—A complaint filed
9 under paragraph (1) shall identify any financial
10 transaction provider or Internet advertising
11 service that may be required to take measures
12 described in subsection (g)(2) if the Commis-
13 sion issues an order under subsection (f) with
14 respect to the complaint and the order is served
15 on the provider or service pursuant to sub-
16 section (g)(1).

17 “(B) NOTICE.—Upon filing a complaint
18 under paragraph (1), the complainant shall pro-
19 vide notice to any financial transaction provider
20 or Internet advertising service identified in the
21 complaint pursuant to subparagraph (A) or any
22 amendments to the complaint.

23 “(C) INTERVENTION.—

24 “(i) IN GENERAL.—A financial trans-
25 action provider or Internet advertising

1 service identified in a complaint pursuant
2 to subparagraph (A) may intervene upon
3 timely request filed with the Commission
4 in—

5 “(I) an investigation initiated
6 under subsection (c) pursuant to the
7 complaint; or

8 “(II) pursuant to subsection
9 (f)(3), an action to modify, suspend,
10 or vacate an order issued pursuant to
11 the complaint.

12 “(ii) RULE OF CONSTRUCTION.—Fail-
13 ure to intervene under clause (i) in an in-
14 vestigation under subsection (c) does not
15 preclude a financial transaction provider or
16 Internet advertising service notified of the
17 investigation from subsequently seeking an
18 order to modify, suspend, or terminate an
19 order issued by the Commission under sub-
20 section (f).

21 “(e) DETERMINATIONS.—

22 “(1) IN GENERAL.—The Commission shall de-
23 termine, with respect to each investigation initiated
24 under subsection (c) alleging that an Internet site
25 dedicated to infringing activity is operated or main-

1 tained in violation of subsection (b), whether or not
2 the Internet site is operated or maintained in viola-
3 tion of subsection (b).

4 “(2) EXCEPTIONS AND PROCEDURES RELATING
5 TO DETERMINATIONS.—Except as specifically pro-
6 vided in this subsection, the provisions of the first,
7 second, third, and eighth sentences of subsection (c)
8 of section 337 providing for exceptions and proce-
9 dures relating to determinations of the Commission
10 under that section shall apply with respect to a de-
11 termination under paragraph (1) to the same extent
12 and in the same manner as those provisions apply
13 to determinations under section 337.

14 “(3) EFFECTIVE DATE.—A determination made
15 under paragraph (1) shall take effect on the date on
16 which the Commission publishes the determination
17 in the Federal Register.

18 “(4) REFERRALS TO PRESIDENT; TERMINATION
19 FOR DISAPPROVAL.—

20 “(A) IN GENERAL.—If the Commission de-
21 termines under paragraph (1) that an Internet
22 site dedicated to infringing activity is operated
23 or maintained in violation of subsection (b), the
24 Commission shall promptly submit to the Presi-
25 dent or a copy of the determination, the record

1 upon which the determination is based, and any
2 order issued under subsection (f) pursuant to
3 the determination.

4 “(B) TERMINATION OF DETERMINATION
5 BASED ON DISAPPROVAL OF PRESIDENT.—If
6 the President disapproves of a determination of
7 the Commission for policy reasons and notifies
8 the Commission of that disapproval, the deter-
9 mination and any order issued pursuant to the
10 determination shall cease to have force or effect
11 on the date on which the President notifies the
12 Commission of that disapproval.

13 “(5) ELECTRONIC SUBMISSION OF INFORMA-
14 TION AND PROCEEDINGS.—The Commission may, in
15 making any determination under this section—

16 “(A) allow the submission of information
17 electronically; and

18 “(B) hold hearings electronically or obtain
19 testimony or other information electronically or
20 by such means as the Commission determines
21 allows participation in proceedings under this
22 section at as low a cost as possible to partici-
23 pants in the proceedings.

24 “(6) ADDITIONAL PROCEDURES RELATING TO
25 REVIEW OF CERTAIN DETERMINATIONS.—Notwith-

1 standing the provisions of this subsection or any
2 provision of section 337(c), a determination of the
3 Commission under this section with respect to the
4 appropriate remedy provided by the Commission, a
5 determination under subsection (f)(2) with respect
6 to the forfeiture of a bond, and a determination
7 under subsection (i) with respect to the imposition
8 of sanctions for abuse of discovery or abuse of pro-
9 cess, shall be reviewable in accordance with section
10 706 of title 5, United States Code.

11 “(f) CEASE AND DESIST ORDERS.—

12 “(1) IN GENERAL.—If the Commission deter-
13 mines under subsection (e) that an Internet site
14 dedicated to infringing activity is operated or main-
15 tained in violation of subsection (b), the Commission
16 may—

17 “(A) issue an order to cease and desist the
18 infringing activity of the Internet site against
19 the Internet site and to the owner and the oper-
20 ator of the Internet site; and

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

23 “(2) TEMPORARY AND PRELIMINARY CEASE
24 AND DESIST ORDERS.—

1 “(A) PETITION BY COMPLAINANT.—A
2 complainant may file with the chairperson of
3 the Commission (or the designee of the chair-
4 person) a petition, in accordance with this para-
5 graph, for the issuance of a temporary or pre-
6 liminary order against the Internet site and to
7 the owner and the operator of the Internet site
8 to cease and desist the infringing activity al-
9 leged in the complaint filed under subsection
10 (d).

11 “(B) ISSUANCE OF ORDER.—If, upon re-
12 ceiving a petition under subparagraph (A) and
13 after providing an opportunity to be heard
14 under subparagraph (C), the chairperson of the
15 Commission (or the designee of the chair-
16 person) determines that there is reason to be-
17 lieve that an Internet site dedicated to infring-
18 ing activity is operated or maintained in viola-
19 tion of subsection (b), the chairperson of the
20 Commission (or the designee of the chair-
21 person) may issue a temporary or preliminary
22 cease and desist order against, and cause the
23 order to be served on, the Internet site and the
24 owner and the operator of the Internet site.

25 “(C) OPPORTUNITY TO BE HEARD.—

1 “(i) IN GENERAL.—Before issuing a
2 temporary or preliminary cease and desist
3 order under this paragraph, the chair-
4 person of the Commission (or the designee
5 of the chairperson) shall provide to the
6 owner and the operator of the Internet site
7 alleged to be operated or maintained in
8 violation of subsection (b) an opportunity
9 to be heard and to submit relevant infor-
10 mation to the chairperson of the Commis-
11 sion (or the designee of the chairperson).

12 “(ii) ELECTRONIC SUBMISSION OF IN-
13 FORMATION AND PROCEEDINGS.—The
14 chairperson of the Commission (or the des-
15 ignee of the chairperson) may provide an
16 opportunity to be heard and to submit in-
17 formation under clause (i) electronically or
18 in such other manner as the chairperson of
19 the Commission (or the designee of the
20 chairperson) determines appropriate.

21 “(D) STANDARD FOR RELIEF.—If the
22 chairperson of the Commission (or the designee
23 of the chairperson) issues a temporary or pre-
24 liminary cease and desist order under this para-
25 graph, the order shall be issued in a manner

1 consistent with the provisions of rule 65 of the
2 Federal Rules of Civil Procedure, or any suc-
3 cessor thereto, relating to preliminary injunc-
4 tions and temporary restraining orders.

5 “(E) PROCEDURES FOR TEMPORARY
6 CEASE AND DESIST ORDER.—

7 “(i) EXPEDITED CONSIDERATION.—
8 Upon a showing of extraordinary cir-
9 cumstances by the complainant filing a pe-
10 tition for a temporary cease and desist
11 order under subparagraph (A), the chair-
12 person of the Commission (or the designee
13 of the chairperson) may make a determina-
14 tion with respect to the petition on an ex-
15 pedited basis.

16 “(ii) EXPIRATION OF ORDER.—

17 “(I) IN GENERAL.—Except as
18 provided in subclause (II), a tem-
19 porary cease and desist order issued
20 under this paragraph shall expire at a
21 time determined by the chairperson of
22 the Commission (or the designee of
23 the chairperson) that is not later than
24 14 days after the issuance of the
25 order.

1 “(II) EXTENSION OF ORDER.—

2 The chairperson of the Commission
3 (or the designee of the chairperson)
4 may extend a temporary cease and de-
5 sist order issued under this paragraph
6 for additional periods of not more
7 than 14 days for good cause or with
8 the consent of the entity against
9 which the order is issued.

10 “(F) PROCEDURES FOR PRELIMINARY
11 CEASE AND DESIST ORDER.—

12 “(i) IN GENERAL.—Except as pro-
13 vided in clause (ii), the chairperson of the
14 Commission (or the designee of the chair-
15 person) shall make a determination with
16 respect to a petition for a preliminary
17 cease and desist order not later than 30
18 days after the Commission publishes notice
19 of the initiation of an investigation under
20 subsection (c) in the Federal Register.

21 “(ii) EXTENSIONS OF TIME FOR DE-
22 TERMINATION.—The chairperson of the
23 Commission (or the designee of the chair-
24 person) may extend the date by which the
25 chairperson of the Commission (or the des-

1 ignee of the chairperson) is required to
2 make a determination under clause (i) with
3 respect to a petition for a preliminary
4 cease and desist order for an additional 30
5 days if the chairperson of the Commission
6 (or the designee of the chairperson)—

7 “(I) determines that the petition
8 presents a more complicated case; and

9 “(II) publishes in the Federal
10 Register an explanation of why the
11 chairperson of the Commission (or the
12 designee of the chairperson) deter-
13 mined that the case is more com-
14 plicated under subclause (I).

15 “(G) BONDING REQUIREMENT.—

16 “(i) IN GENERAL.—The chairperson
17 of the Commission (or the designee of the
18 chairperson) may require a complainant
19 that files a petition for the issuance of a
20 temporary or preliminary cease and desist
21 order under subparagraph (A) to post a
22 bond before issuing the order.

23 “(ii) FORFEITURE OF BOND.—If,
24 after issuing a temporary or preliminary
25 cease and desist order under this para-

1 graph, the Commission determines that the
2 Internet site against which the order was
3 issued was not an Internet site dedicated
4 to infringing activity operated in violation
5 of subsection (b), the Commission may,
6 pursuant to such terms and conditions as
7 the Commission prescribes, require the for-
8 feiture of the bond posted by the complain-
9 ant under clause (i) and the provision of
10 the bond to the owner or the operator of
11 the Internet site.

12 “(H) APPLICABILITY OF ADMINISTRATIVE
13 PROCEDURE ACT.—The provisions of section
14 554 of title 5, United States Code, shall not
15 apply with respect to the issuance of prelimi-
16 nary or temporary cease and desist orders
17 under this paragraph.

18 “(3) MODIFICATION OR REVOCATION OF OR-
19 DERS.—

20 “(A) IN GENERAL.—At any time after the
21 issuance of an order under this subsection, a
22 motion to modify, suspend, or vacate the order
23 may be filed by—

24 “(i) any entity, or owner or operator
25 of property, bound by the order;

1 “(ii) the owner or operator of the
2 Internet site subject to the order;

3 “(iii) any domain name registrar or
4 registry that has registered or assigned the
5 domain name of the Internet site subject
6 to the order; or

7 “(iv) a financial transaction provider
8 or Internet advertising service on which a
9 copy of an order has been served pursuant
10 to paragraph (1) of subsection (g) requir-
11 ing the provider or service to take action
12 described in paragraph (2) of that sub-
13 section.

14 “(B) RELIEF.—The Commission shall
15 modify, suspend, or vacate an order, as appro-
16 priate, if the Commission determines that—

17 “(i) the Internet site subject to the
18 order is no longer, or never was, an Inter-
19 net site dedicated to infringing activity; or

20 “(ii) the interests of justice require
21 that the order be modified, suspended, or
22 vacated.

23 “(C) CONSIDERATION.—In making a de-
24 termination under subparagraph (B), the Com-
25 mission may consider whether the domain name

1 of the Internet site subject to the order has ex-
2 pired or has been re-registered by a different
3 entity.

4 “(4) AMENDMENT OF ORDERS.—A complainant
5 may petition the Commission to amend an order
6 issued under this subsection if an Internet site de-
7 termined under subsection (e) to be an Internet site
8 dedicated to infringing activity is accessible or has
9 been reconstituted at a different domain name.

10 “(5) OPPORTUNITY TO BE HEARD FOR CERTAIN
11 ENTITIES.—Before the Commission issues an order
12 under this subsection or modifies, suspends, or va-
13 cates, or amends such an order under paragraph (3)
14 or (4), a financial transaction provider or Internet
15 advertising service that intervened pursuant to sub-
16 section (d)(3) in an investigation or action relating
17 to the order shall have an opportunity to be heard
18 before the Commission with respect to whether the
19 Commission should issue the order and the scope of
20 relief available under the order or whether the Com-
21 mission should modify, suspend, vacate, or amend
22 the order, as the case may be.

23 “(6) EXPIRATION OF ORDERS WITH RESPECT
24 TO INTERNET SITE.—An order issued under this
25 subsection against an Internet site shall cease to

1 have any force or effect upon expiration of the reg-
2 istration of the domain name of the Internet site.

3 “(g) REQUIRED ACTIONS BASED ON COMMISSION
4 ORDERS.—

5 “(1) IN GENERAL.—If the Commission reason-
6 ably believes that a financial transaction provider or
7 an Internet advertising service identified in a com-
8 plaint pursuant to subsection (d)(3), or any amend-
9 ment to the complaint, supplies services to the Inter-
10 net site that is subject to the order issued under
11 subsection (f) with respect to the complaint—

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

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

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

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

3 “(A) MEASURES TO BE IMPLEMENTED BY
4 FINANCIAL TRANSACTION PROVIDERS.—

5 “(i) IN GENERAL.—Subject to clause
6 (ii), a financial transaction provider shall
7 expeditiously take reasonable measures de-
8 signed to prevent or prohibit the comple-
9 tion of payment transactions by the pro-
10 vider that involve customers located in the
11 United States and the Internet site subject
12 to the order issued under subsection (f).

13 “(ii) LIMITATIONS ON MEASURES.—A
14 financial transaction provider may not be
15 required pursuant to clause (i)—

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

18 “(II) to modify services or facili-
19 ties of the provider to comply with the
20 order issued under subsection (f); or

21 “(III) to prevent or prohibit the
22 completion of a payment transaction
23 if the provider could not reasonably
24 determine in advance whether the en-

1 tity was using the Internet site sub-
2 ject to the order.

3 “(B) INTERNET ADVERTISING SERVICES.—

4 “ (i) IN GENERAL.—Subject to clause
5 (ii), an Internet advertising service shall
6 expeditiously take technically feasible
7 measures intended to cease serving adver-
8 tisements to the Internet site subject to
9 the order issued under subsection (f) in
10 situations in which the service would di-
11 rectly share revenues generated by the ad-
12 vertisements with the operator of the
13 Internet site.

14 “(ii) LIMITATIONS ON MEASURES.—
15 An Internet advertising service may not be
16 required pursuant to clause (i)—

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

19 “(II) to modify the services or fa-
20 cilities of the service to comply with
21 the order issued under subsection (f);
22 or

23 “(III) to cease serving an adver-
24 tisement to an Internet site if the
25 service could not reasonably determine

1 before serving the advertisement that
2 the advertisement was being served to
3 the Internet site subject to the order.

4 “(3) COMMUNICATION WITH USERS.—A finan-
5 cial transaction provider or an Internet advertising
6 service required to implement measures described in
7 paragraph (2) shall determine how to communicate
8 with the users or customers of the provider or serv-
9 ice, as the case may be, with respect to those meas-
10 ures.

11 “(4) RULES OF CONSTRUCTION.—

12 “(A) LIMITATION ON OBLIGATIONS.—A fi-
13 nancial transaction provider or an Internet ad-
14 vertising service required to implement meas-
15 ures described in paragraph (2) shall not be re-
16 quired to take measures or actions in addition
17 to the measures described in paragraph (2) pur-
18 suant to this section or an order issued under
19 this section.

20 “(B) MANNER OF COMPLIANCE.—A finan-
21 cial transaction provider or an Internet adver-
22 tising service required to implement measures
23 described in paragraph (2) shall be in compli-
24 ance with this subsection if the provider or
25 service, as the case may be, implements the

1 measures described in that paragraph with re-
2 spect to accounts of the provider or service, as
3 the case may be, on or after the date on which
4 a copy of an order is served under paragraph
5 (1) or, if applicable, the date on which the
6 order is modified or amended under paragraph
7 (3) or (4) of subsection (f).

8 “(5) ACTIONS PURSUANT TO COMMISSION
9 ORDER.—

10 “(A) IMMUNITY FROM CIVIL ACTIONS.—No
11 cause of action shall lie in any court against a
12 financial transaction provider or an Internet ad-
13 vertising service on which a copy of an order is
14 served under paragraph (1), or against any di-
15 rector, officer, employee, or agent thereof, other
16 than in an action pursuant to subsection (h),
17 for—

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

21 “(ii) any act, failure, or inability to
22 meet the obligations under this subsection
23 of the provider or service if the provider or
24 service, as the case may be, makes a good

1 faith effort to comply with such obliga-
2 tions.

3 “(B) IMMUNITY FROM LIABILITY.—A fi-
4 nancial transaction provider or an Internet ad-
5 vertising service on which a copy of an order is
6 served under paragraph (1), and any director,
7 officer, employee, or agent thereof, shall not be
8 liable to any person for any acts reasonably de-
9 signed to comply with this subsection or reason-
10 ably arising from the order, other than in an
11 action pursuant to subsection (h).

12 “(C) IMMUNITY FROM ACTIONS OF THIRD
13 PARTIES.—An action taken by a third party to
14 circumvent any measures implemented pursuant
15 to an order served on a financial transaction
16 provider or Internet advertising service under
17 paragraph (1) may not be used by any person
18 in any claim or cause of action against the pro-
19 vider or service, as the case may be, other than
20 in an action pursuant to subsection (h).

21 “(h) ENFORCEMENT OF ORDERS.—

22 “(1) IN GENERAL.—In order to compel compli-
23 ance with this section, the Attorney General may
24 bring an action for injunctive relief against any per-
25 son subject to an order issued under subsection (f)

1 or on which such an order is served under subsection
2 (g) that knowingly and willfully fails to comply with
3 the order.

4 “(2) RULE OF CONSTRUCTION.—The authority
5 granted to the Attorney General under paragraph
6 (1) shall be the sole legal remedy for enforcing the
7 obligations under subsection (g) of a financial trans-
8 action provider or Internet advertising service on
9 which an order is served under paragraph (1) of
10 that subsection.

11 “(3) AFFIRMATIVE DEFENSES.—A defendant in
12 an action commenced under paragraph (1) may es-
13 tablish an affirmative defense by showing that the
14 defendant does not have the technical means to com-
15 ply with this section without incurring an unreason-
16 able economic burden or that the order is incon-
17 sistent with this section. That showing shall serve as
18 a defense only to the extent of the inability of the
19 defendant to comply or to the extent of the incon-
20 sistency.

21 “(i) SANCTIONS FOR ABUSE OF PROCESS AND DIS-
22 COVERY.—The Commission may, by rule, prescribe sanc-
23 tions for abuse of process in a manner consistent with the
24 provisions of rule 11 and rule 37 of the Federal Rules
25 of Civil Procedure.

1 “(j) IMMUNITY FOR ENFORCEMENT OF ORDERS.—
2 No cause of action shall lie in any court, no person may
3 rely on any claim or cause of action, and no liability for
4 damages to any person shall be granted, against a finan-
5 cial transaction provider or Internet advertising service for
6 taking any action pursuant to subsection (g)(2) with re-
7 spect to an Internet site, or otherwise declining to serve
8 or terminating transactions with an Internet site, in the
9 reasonable belief based on credible evidence that—

10 “(1) the Internet site is an Internet site dedi-
11 cated to infringing activity; and

12 “(2) the action is consistent with the terms of
13 service and other contractual obligations of the pro-
14 vider or service, as the case may be.

15 “(k) IMMUNITY FOR TAKING VOLUNTARY ACTION
16 AGAINST SITES THAT ENDANGER PUBLIC HEALTH.—

17 “(1) REFUSAL OF SERVICE.—A financial trans-
18 action provider or Internet advertising service, act-
19 ing in good faith and based on credible evidence,
20 may cease providing or refuse to provide services to
21 an Internet site the provider or service determines to
22 be an Internet site that endangers the public health.

23 “(2) IMMUNITY FROM LIABILITY.—A financial
24 transaction provider or Internet advertising service
25 described in paragraph (1), including its directors,

1 officers, employees, or agents, that ceases or refuses
2 to provide services under that paragraph shall not be
3 liable to any person under any Federal or State law
4 for ceasing or refusing to provide such services.

5 “(3) DEFINITIONS.—In this subsection:

6 “(A) DRUG.—The term ‘drug’ has the
7 meaning given that term in section 201(g)(1) of
8 the Federal Food, Drug, and Cosmetic Act (21
9 U.S.C. 321(g)(1)).

10 “(B) INTERNET SITE THAT ENDANGERS
11 THE PUBLIC HEALTH.—The term ‘Internet site
12 that endangers the public health’ means an
13 Internet site that is primarily designed or oper-
14 ated for the purpose of, has only limited pur-
15 pose or use other than, or is marketed by its
16 operator or another person acting in concert
17 with that operator for use in offering, selling,
18 dispensing, or distributing any prescription
19 medication, and does so regularly without a
20 valid prescription.

21 “(C) PRESCRIPTION MEDICATION.—The
22 term ‘prescription medication’ means a drug
23 that is subject to section 503(b) of the Federal
24 Food, Drug, and Cosmetic Act (21 U.S.C.
25 353(b)).

1 “(D) VALID PRESCRIPTION.—The term
2 ‘valid prescription’ has the meaning given that
3 term in section 309(e)(2)(A) of the Controlled
4 Substances Act (21 U.S.C. 829(e)(2)(A)).

5 “(1) SAVINGS CLAUSES.—

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

12 “(2) RULE OF CONSTRUCTION RELATING TO VI-
13 CARIOUS OR CONTRIBUTORY LIABILITY.—Nothing in
14 this section shall be construed—

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

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

22 “(3) RULE OF CONSTRUCTION RELATING TO
23 LIMITATIONS, EXCEPTIONS, AND DEFENSES.—Noth-
24 ing in this section shall be construed to affect, limit,
25 or deny application of any limitation, exception, or

1 defense to copyright or trademark causes of action,
2 including fair use and other exceptions, limitations,
3 or defenses available to any person pursuant to any
4 other Federal or State law.

5 “(4) RULE OF CONSTRUCTION RELATING TO
6 CIVIL ACTIONS.—The issuance of an order and ac-
7 tions taken or not taken pursuant to this section
8 shall be inadmissible as evidence in any civil action
9 (other than an action under this section to enforce
10 compliance with subsection (b)) to establish that a
11 party who has received, or is otherwise made aware
12 of, such an order has knowledge regarding any in-
13 fringing activities relating to the Internet site sub-
14 ject to the order, including under section 512 of title
15 17, United States Code, in determining whether any
16 service provider had actual knowledge or should have
17 known of the infringing activity.”.

18 (b) DISCLOSURE OF CONFIDENTIAL INFORMA-
19 TION.—Section 337(n) of the Tariff Act of 1930 (19
20 U.S.C. 1337(n)) is amended—

21 (1) in paragraph (1), by inserting “or section
22 337A” after “this section”; and

23 (2) in paragraph (2)—

24 (A) in subparagraph (A)—

1 (i) in clause (ii), by striking “(j)” and
2 inserting “(j) of this section”;

3 (ii) in clause (iii), by striking “(g), a
4 cease and desist order issued pursuant to
5 subsection (f), or a consent order issued
6 pursuant to subsection (c)” and inserting
7 “(g) of this section, a cease and desist
8 order issued pursuant to subsection (f) of
9 this section or subsection (f) of section
10 337A, or a consent order issued pursuant
11 to subsection (e) of this section or sub-
12 section (d) of section 337A”; and

13 (iii) in clause (iv), by striking “(i), or
14 a consent order issued under this section”
15 and inserting “(i) of this section or sub-
16 section (f) of section 337A, or a consent
17 order issued under this section or sub-
18 section (d) of section 337A”;

19 (B) in subparagraph (B), by striking “(j)”
20 and inserting “(j) of this section or subsection
21 (e)(5) of section 337A”; and

22 (C) in subparagraph (C), by striking “(g)”
23 and inserting “(g) of this section”.

1 **SEC. 3. APPOINTMENT OF HEARING OFFICERS FOR PRO-**
2 **CEEDINGS UNDER SECTIONS 337 AND 337A OF**
3 **THE TARIFF ACT OF 1930.**

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

7 **“SEC. 337B. SECTION 337 JUDGES.**

8 “(a) IN GENERAL.—Notwithstanding section 556(b)
9 of title 5, United States Code, the Commission may ap-
10 point hearing officers, other than administrative law
11 judges appointed under section 3105 of title 5, United
12 States Code, to preside at the taking of evidence at hear-
13 ings required by sections 337 and 337A and to make ini-
14 tial and recommended decisions in accordance with sec-
15 tions 554, 556, and 557 of such title in investigations
16 under sections 337 and 337A. The hearing officers ap-
17 pointed under this subsection shall be known as ‘section
18 337 judges’.

19 “(b) QUALIFICATIONS.—An individual appointed as
20 a section 337 judge under paragraph (1) shall possess a
21 minimum of 7 years of legal experience and be licensed
22 to practice law under the laws of a State, the District of
23 Columbia, the Commonwealth of Puerto Rico, or any terri-
24 torial court established under the Constitution of the
25 United States. The Commission may promulgate such
26 other regulations as the Commission considers necessary

1 with respect to the qualifications of section 337 judges,
2 including technical expertise and experience in patent,
3 trademark, copyright, and unfair competition law.

4 “(c) ROTATION.—Section 337 judges shall be as-
5 signed to cases in rotation to the extent practicable or as
6 otherwise provided for in the rules of the Commission.

7 “(d) OTHER DUTIES.—A section 337 judge may not
8 perform duties inconsistent with the duties and respon-
9 sibilities of a section 337 judge.

10 “(e) REMOVAL.—A section 337 judge may be re-
11 moved only for good cause shown upon a hearing con-
12 ducted on the record by the Merit Systems Protection
13 Board. The failure of the Commission to adopt the initial
14 or recommended decision of a section 337 judge shall not
15 constitute good cause.

16 “(f) COMPETITIVE SERVICE.—Except as otherwise
17 provided, the laws, rules, and regulations applicable to po-
18 sitions in the competitive service apply to section 337
19 judges. Upon appointment, a section 337 judge shall be
20 paid in accordance with the pay rates provided for in sec-
21 tion 5372 of title 5, United States Code, commensurate
22 with the pay rate of an administrative law judge with simi-
23 lar time in service. Section 337 judges shall not be Senior
24 Executive Service positions (as defined in section 3132(a)
25 of title 5, United States Code).

1 “(g) PERFORMANCE EVALUATIONS.—Section 337
2 judges shall not receive performance evaluations and shall
3 not be compensated based on performance.”.

4 **SEC. 4. INFORMATION SHARING WITH RESPECT TO THE IM-**
5 **PORTATION OF INFRINGING MERCHANDISE.**

6 (a) **MERCHANDISE THAT INFRINGES TRADE-**
7 **MARKS.—**

8 (1) **IN GENERAL.**—Notwithstanding section
9 1905 of title 18, United States Code, if the Commis-
10 sioner responsible for U.S. Customs and Border
11 Protection suspects that merchandise is being im-
12 ported into the United States in violation of section
13 42 of the Lanham Act, and subject to any applicable
14 bonding requirements, the Secretary of Homeland
15 Security may, for purposes of determining whether
16 the merchandise is being imported in violation of
17 that section, share with the holder of the trademark
18 suspected of being infringed—

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

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

24 (2) **LANHAM ACT DEFINED.**—In this subsection,
25 the term “Lanham Act” means the Act entitled “An

1 Act to provide for the registration and protection of
2 trademarks used in commerce, to carry out the pro-
3 visions of certain international conventions, and for
4 other purposes”, approved July 5, 1946 (commonly
5 referred to as the “Trademark Act of 1946” or the
6 “Lanham Act”).

7 (b) MERCHANDISE THAT CIRCUMVENTS COPY-
8 RIGHTS.—

9 (1) IN GENERAL.—Notwithstanding section
10 1905 of title 18, United States Code, if the Commis-
11 sioner seizes merchandise that the Commissioner
12 suspects of being imported into the United States in
13 violation of subsection (a)(2) or (b) of section 1201
14 of title 17, United States Code, the Secretary of
15 Homeland Security may notify a copyright owner de-
16 scribed in paragraph (2) of the seizure of the mer-
17 chandise.

18 (2) COPYRIGHT OWNER DESCRIBED.—A copy-
19 right owner described in this paragraph is the owner
20 of a copyright under title 17, United States Code, if
21 merchandise seized on the suspicion of being im-
22 ported in violation of subsection (a)(2) or (b) of sec-
23 tion 1201 of title 17, United States Code—

24 (A) is primarily designed or produced for
25 the purpose of circumventing, has only limited

1 commercially significant purpose or use other
2 than to circumvent, or is marketed for use in
3 circumventing, a technological measure that ef-
4 fectively controls access to a work protected by
5 that copyright; or

6 (B) is primarily designed or produced for
7 the purpose of circumventing, has only limited
8 commercially significant purpose or use other
9 than to circumvent, or is marketed for use in
10 circumventing, protection afforded by a techno-
11 logical measure that effectively protects the
12 rights of the copyright owner in a work or a
13 portion of a work.

14 **SEC. 5. REGULATIONS.**

15 Not later than 270 days after the date of the enact-
16 ment of this Act, the United States International Trade
17 Commission shall prescribe regulations—

18 (1) to provide for procedures for receiving infor-
19 mation from the public about Internet sites dedi-
20 cated to infringing activity (as defined in section
21 337A(a) of the Tariff Act of 1930 (as added by sec-
22 tion 2 of this Act));

23 (2) to provide guidance to intellectual property
24 rights holders about—

1 (A) what information those rights holders
2 should provide to initiate an investigation pur-
3 suant to section 337A(e) of the Tariff Act of
4 1930 (as added by section 2 of this Act); and

5 (B) how to supplement an ongoing inves-
6 tigation initiated pursuant to that section;

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

9 (4) to provide appropriate resources and proce-
10 dures for case management and development to af-
11 fect timely disposition of investigations initiated
12 under that section.

13 **SEC. 6. STUDY AND REPORTS BY REGISTER OF COPY-**
14 **RIGHTS.**

15 The Register of Copyrights shall—

16 (1) in consultation with appropriate Federal
17 agencies and other stakeholders, conduct a study
18 on—

19 (A) the enforcement and effectiveness of
20 section 337A of the Tariff Act of 1930 (as
21 added by section 2 of this Act); and

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

1 (2) not later than 2 years after the date of en-
2 actment of this Act, submit to the Committee on Fi-
3 nance and the Committee on the Judiciary of the
4 Senate, and to the Committee on the Ways and
5 Means and the Committee on the Judiciary of the
6 House of Representatives, a report containing the
7 results of the study conducted under paragraph (1)
8 and any recommendations that the Register may
9 have as a result of the study.

○