

112TH CONGRESS
1ST SESSION

S. 2029

To amend the Tariff Act of 1930 to deter unfair imports that infringe United States intellectual property rights, and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 17, 2011

Mr. WYDEN (for himself, Mr. MORAN, and Ms. CANTWELL) introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To amend the Tariff Act of 1930 to deter unfair imports that infringe United States intellectual property rights, 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,*

3 **SECTION 1. SHORT TITLE.**

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

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

4 (a) IN GENERAL.—Title III of the Tariff Act of 1930
 5 (19 U.S.C. 1304 et seq.) is amended by inserting after
 6 section 337 the following:

7 **“SEC. 337A. UNFAIR TRADE PRACTICES RELATING TO IN-**
 8 **FRINGEMENT OF COPYRIGHTS AND TRADE-**
 9 **MARKS BY CERTAIN INTERNET SITES.**

10 “(a) DEFINITIONS.—In this section:

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

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

17 “(3) FINANCIAL TRANSACTION PROVIDER.—

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

23 “(B) EXCEPTION.—The term ‘financial
 24 transaction provider’ does not include an Inter-
 25 net service platform or an affiliate of an Inter-
 26 net service platform.

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

3 “(A) infringes a copyright in a manner
4 punishable under section 506 of title 17, United
5 States Code;

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

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

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

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

20 “(A) does not act merely as a payment
21 intermediary between a user and a supplier of
22 goods or services; and

23 “(B) provides additional services to facili-
24 tate interaction between users unrelated to pur-
25 chases from suppliers of goods and services.

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

6 “(8) INTERNET SITE DEDICATED TO INFRING-
7 ING ACTIVITY.—

8 “(A) IN GENERAL.—The term ‘Internet
9 site dedicated to infringing activity’ means an
10 Internet site that—

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

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

15 “(iii) has only limited purpose or use
16 other than engaging in infringing activity
17 and whose owner or operator primarily
18 uses the site—

19 “(I) to willfully—

20 “(aa) infringe a copyright in
21 a manner punishable under sec-
22 tion 506 of title 17, United
23 States Code; or

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

1 “(II) to use counterfeit marks in
2 a manner punishable under section
3 34(d) of the Lanham Act (15 U.S.C.
4 1116(d)).

5 “(B) BUSINESS DIRECTED TO RESIDENTS
6 OF THE UNITED STATES.—For purposes of de-
7 termining whether an Internet site conducts
8 business directed to residents of the United
9 States under subparagraph (A)(ii), the Commis-
10 sion may consider, among other indicators,
11 whether—

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

15 “(ii) there is evidence that the Inter-
16 net site is not intended to provide goods
17 and services to such users or access to or
18 delivery of goods and services to such
19 users;

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

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

3 “(v) any prices for goods and services
4 provided by the Internet site are indicated
5 in the currency of the United States.

6 “(C) EXCLUSIONS.—An Internet site is
7 not an Internet site dedicated to infringing ac-
8 tivity—

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

16 “(ii) because the Internet site engages
17 in an activity that would not make the op-
18 erator liable for monetary relief for infring-
19 ing a copyright under section 512 of title
20 17, United States Code; or

21 “(iii) because of the distribution by
22 the Internet site of copies that were made
23 without infringing a copyright or trade-
24 mark.

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

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

17 “(11) OPERATOR.—The term ‘operator’, when
18 used in connection with an Internet site, includes
19 any person with authority to operate the Internet
20 site.

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

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

4 “(b) APPLICABILITY OF SECTION.—It shall be a vio-
5 lation of this section, and an unfair practice in import
6 trade, for an Internet site dedicated to infringing activity
7 to facilitate imports into the United States. If the Com-
8 mission determines that there has been a violation of this
9 subsection, that violation shall be dealt with as provided
10 in this section.

11 “(c) INVESTIGATION OF VIOLATIONS BY COMMIS-
12 SION.—

13 “(1) IN GENERAL.—The Commission—

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

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

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

23 “(3) CONSULTATIONS.—In conducting an inves-
24 tigation initiated under paragraph (1), the Commis-
25 sion shall consult with, and seek advice and informa-

1 tion from, the Attorney General, the Secretary of
2 State, the Secretary of Homeland Security, the Sec-
3 retary of Commerce, the Intellectual Property En-
4 forcement Coordinator, the United States Trade
5 Representative, and such other officials as the Com-
6 mission considers appropriate.

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

19 “(5) LIMITATION ON INVESTIGATIONS OF DO-
20 MAIN NAMES; CONSENT TO JURISDICTION.—Not-
21 withstanding any other provision of this section, the
22 Commission shall terminate, or not initiate, an in-
23 vestigation under paragraph (1) with respect to a
24 domain name—

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

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

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

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

12 “(iv) a statement that the operator of
13 the site—

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

24 “(II) will accept service of proc-
25 ess from the Attorney General with

1 respect to those violations and the of-
2 fense set forth in subclause (I); and

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

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

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

12 “(iii) under section 32(1) of the
13 Lanham Act,

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

17 “(d) COMPLAINTS.—

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

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

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

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

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

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

23 “(B) RULE OF CONSTRUCTION.—For pur-
24 poses of this subsection, the actions described

1 in this paragraph shall constitute service of
2 process.

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

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

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

21 “(C) INTERVENTION.—

22 “(i) IN GENERAL.—A financial trans-
23 action provider or Internet advertising
24 service identified in a complaint pursuant
25 to subparagraph (A) may intervene upon

1 timely request filed with the Commission
2 in—

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

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

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

19 “(e) DETERMINATIONS.—

20 “(1) IN GENERAL.—The Commission shall de-
21 termine, with respect to each investigation initiated
22 under subsection (c) alleging that an Internet site
23 dedicated to infringing activity is operated or main-
24 tained in violation of subsection (b), whether or not

1 the Internet site is operated or maintained in viola-
2 tion of subsection (b).

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

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

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

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

1 issued under subsection (f) pursuant to the de-
2 termination.

3 “(B) TERMINATION OF DETERMINATION
4 BASED ON DISAPPROVAL OF PRESIDENT.—If
5 the President disapproves of a determination of
6 the Commission for policy reasons and notifies
7 the Commission of that disapproval not later
8 than 60 days after the determination is made,
9 the determination and any order issued pursu-
10 ant to the determination shall cease to have
11 force or effect on the date on which the Presi-
12 dent notifies the Commission of that dis-
13 approval.

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

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

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

1 “(6) ADDITIONAL PROCEDURES RELATING TO
2 REVIEW OF CERTAIN DETERMINATIONS.—Notwith-
3 standing the provisions of this subsection or any
4 provision of section 337(c), a determination of the
5 Commission under this section with respect to the
6 appropriate remedy provided by the Commission, a
7 determination under subsection (f)(2) with respect
8 to the forfeiture of a bond, and a determination
9 under subsection (i) with respect to the imposition
10 of sanctions for abuse of discovery or abuse of proc-
11 ess, shall be reviewable in accordance with section
12 706 of title 5, United States Code.

13 “(f) CEASE AND DESIST ORDERS.—

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

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

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

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

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

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

1 order to be served on, the Internet site and the
2 owner and the operator of the Internet site.

3 “(C) OPPORTUNITY TO BE HEARD.—

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

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

24 “(D) STANDARD FOR RELIEF.—If the
25 chairperson of the Commission (or the designee

1 of the chairperson) issues a temporary or pre-
2 liminary cease and desist order under this para-
3 graph, the order shall be issued in a manner
4 consistent with the provisions of rule 65 of the
5 Federal Rules of Civil Procedure, or any suc-
6 cessor thereto, relating to preliminary injunc-
7 tions and temporary restraining orders.

8 “(E) PROCEDURES FOR TEMPORARY
9 CEASE AND DESIST ORDER.—

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

19 “(ii) EXPIRATION OF ORDER.—

20 “(I) IN GENERAL.—Except as
21 provided in subclause (II), a tem-
22 porary cease and desist order issued
23 under this paragraph shall expire at a
24 time determined by the chairperson of
25 the Commission (or the designee of

1 the chairperson) that is not later than
2 14 days after the issuance of the
3 order.

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

13 “(F) PROCEDURES FOR PRELIMINARY
14 CEASE AND DESIST ORDER.—

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

24 “(ii) EXTENSIONS OF TIME FOR DE-
25 TERMINATION.—The chairperson of the

1 Commission (or the designee of the chair-
2 person) may extend the date by which the
3 chairperson of the Commission (or the des-
4 ignee of the chairperson) is required to
5 make a determination under clause (i) with
6 respect to a petition for a preliminary
7 cease and desist order for an additional 30
8 days if the chairperson of the Commission
9 (or the designee of the chairperson)—

10 “(I) determines that the petition
11 presents a more complicated case; and

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

18 “(G) BONDING REQUIREMENT.—

19 “(i) IN GENERAL.—For purposes of
20 discouraging the filing of frivolous peti-
21 tions under subparagraph (A) for the
22 issuance of a temporary or preliminary
23 cease and desist orders, the chairperson of
24 the Commission (or the designee of the
25 chairperson) may require a complainant

1 that files a petition under subparagraph
2 (A) to post a bond before issuing a tem-
3 porary or preliminary cease and desist
4 order.

5 “(ii) FORFEITURE OF BOND.—If,
6 after issuing a temporary or preliminary
7 cease and desist order under this para-
8 graph, the Commission determines that the
9 Internet site against which the order was
10 issued was not an Internet site dedicated
11 to infringing activity operated in violation
12 of subsection (b), the Commission may,
13 pursuant to such terms and conditions as
14 the Commission prescribes, require the for-
15 feiture of the bond posted by the complain-
16 ant under clause (i) and the provision of
17 the bond to the owner or the operator of
18 the Internet site.

19 “(H) APPLICABILITY OF ADMINISTRATIVE
20 PROCEDURE ACT.—The provisions of section
21 554 of title 5, United States Code, shall not
22 apply with respect to the issuance of prelimi-
23 nary or temporary cease and desist orders
24 under this paragraph.

1 “(3) MODIFICATION OR REVOCATION OF OR-
2 DERS.—

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

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

9 “(ii) the owner or operator of the
10 Internet site subject to the order;

11 “(iii) any domain name registrar or
12 registry that has registered or assigned the
13 domain name of the Internet site subject
14 to the order; or

15 “(iv) a financial transaction provider
16 or Internet advertising service on which a
17 copy of an order has been served pursuant
18 to paragraph (1) of subsection (g) requir-
19 ing the provider or service to take action
20 described in paragraph (2) of that sub-
21 section.

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

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

4 “(ii) the interests of justice require
5 that the order be modified, suspended, or
6 vacated.

7 “(C) CONSIDERATION.—In making a de-
8 termination under subparagraph (B), the Com-
9 mission may consider whether the domain name
10 of the Internet site subject to the order has ex-
11 pired or has been re-registered by a different
12 entity.

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

19 “(5) OPPORTUNITY TO BE HEARD FOR CERTAIN
20 ENTITIES.—Before the Commission issues an order
21 under this subsection or modifies, suspends, vacates,
22 or amends such an order under paragraph (3) or
23 (4), a financial transaction provider or Internet ad-
24 vertising service that intervened pursuant to sub-
25 section (d)(3) in an investigation or action relating

1 to the order shall have an opportunity to be heard
2 before the Commission with respect to whether the
3 Commission should issue the order and the scope of
4 relief available under the order or whether the Com-
5 mission should modify, suspend, vacate, or amend
6 the order, as the case may be.

7 “(6) EXPIRATION OF ORDERS WITH RESPECT
8 TO INTERNET SITE.—An order issued under this
9 subsection against an Internet site shall cease to
10 have any force or effect upon expiration of the reg-
11 istration of the domain name of the Internet site.

12 “(g) REQUIRED ACTIONS BASED ON COMMISSION
13 ORDERS.—

14 “(1) IN GENERAL.—If the Commission reason-
15 ably believes that a financial transaction provider or
16 an Internet advertising service identified in a com-
17 plaint pursuant to subsection (d)(3), or any amend-
18 ment to the complaint, supplies services to the Inter-
19 net site that is subject to the order issued under
20 subsection (f) with respect to the complaint—

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

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

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

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

12 “(A) MEASURES TO BE IMPLEMENTED BY
13 FINANCIAL TRANSACTION PROVIDERS.—

14 “(i) IN GENERAL.—Subject to clause
15 (ii), a financial transaction provider shall
16 take reasonable measures, as expeditiously
17 as reasonable, designed to prevent or pro-
18 hibit the completion of payment trans-
19 actions by the provider that involve cus-
20 tomers located in the United States and
21 the Internet site subject to the order
22 issued under subsection (f).

23 “(ii) LIMITATIONS ON MEASURES.—A
24 financial transaction provider may not be
25 required pursuant to clause (i)—

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

3 “(II) to modify services or facili-
4 ties of the provider to comply with the
5 order issued under subsection (f); or

6 “(III) to prevent or prohibit the
7 completion of a payment transaction
8 if the provider could not reasonably
9 determine in advance whether the en-
10 tity was using the Internet site sub-
11 ject to the order.

12 “(B) INTERNET ADVERTISING SERVICES.—

13 “(i) IN GENERAL.—Subject to clause
14 (ii), an Internet advertising service shall,
15 as expeditiously as reasonable, take tech-
16 nically feasible measures intended to cease
17 serving advertisements to the Internet site
18 subject to the order issued under sub-
19 section (f) in situations in which the serv-
20 ice would directly share revenues generated
21 by the advertisements with the operator of
22 the Internet site.

23 “(ii) LIMITATIONS ON MEASURES.—
24 An Internet advertising service may not be
25 required pursuant to clause (i)—

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

3 “(II) to modify the services or fa-
4 cilities of the service to comply with
5 the order issued under subsection (f);
6 or

7 “(III) to cease serving an adver-
8 tisement to an Internet site if the
9 service could not reasonably determine
10 before serving the advertisement that
11 the advertisement was being served to
12 the Internet site subject to the order.

13 “(3) COMMUNICATION WITH USERS.—A finan-
14 cial transaction provider or an Internet advertising
15 service required to implement measures described in
16 paragraph (2) shall determine how to communicate
17 with the users or customers of the provider or serv-
18 ice, as the case may be, with respect to those meas-
19 ures.

20 “(4) RULES OF CONSTRUCTION.—

21 “(A) LIMITATION ON OBLIGATIONS.—A fi-
22 nancial transaction provider or an Internet ad-
23 vertising service required to implement meas-
24 ures described in paragraph (2) shall not be re-
25 quired to take measures or actions in addition

1 to the measures described in paragraph (2) pur-
2 suant to this section or an order issued under
3 this section.

4 “(B) MANNER OF COMPLIANCE.—A finan-
5 cial transaction provider or an Internet adver-
6 tising service required to implement measures
7 described in paragraph (2) shall be in compli-
8 ance with this subsection if the provider or
9 service, as the case may be, implements the
10 measures described in that paragraph with re-
11 spect to accounts of the provider or service, as
12 the case may be, as of the date on which a copy
13 of an order is served under paragraph (1) or,
14 if applicable, the date on which the order is
15 modified or amended under paragraph (3) or
16 (4) of subsection (f).

17 “(5) ACTIONS PURSUANT TO COMMISSION
18 ORDER.—

19 “(A) IMMUNITY FROM CIVIL ACTIONS.—No
20 cause of action shall lie in any court against a
21 financial transaction provider or an Internet ad-
22 vertising service on which a copy of an order is
23 served under paragraph (1), or against any di-
24 rector, officer, employee, or agent thereof, other

1 than in an action pursuant to subsection (h),
2 for—

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

6 “(ii) any act, failure, or inability to
7 meet the obligations under this subsection
8 of the provider or service if the provider or
9 service, as the case may be, makes a good
10 faith effort to comply with such obliga-
11 tions.

12 “(B) IMMUNITY FROM LIABILITY.—A fi-
13 nancial transaction provider or an Internet ad-
14 vertising service on which a copy of an order is
15 served under paragraph (1), and any director,
16 officer, employee, or agent thereof, shall not be
17 liable to any person for any acts reasonably de-
18 signed to comply with this subsection or reason-
19 ably arising from the order, other than in an
20 action pursuant to subsection (h).

21 “(C) IMMUNITY FROM ACTIONS OF THIRD
22 PARTIES.—An action taken by a third party to
23 circumvent any measures implemented pursuant
24 to an order served on a financial transaction
25 provider or Internet advertising service under

1 paragraph (1) may not be used by any person
2 in any claim or cause of action against the pro-
3 vider or service, as the case may be, other than
4 in an action pursuant to subsection (h).

5 “(h) ENFORCEMENT OF ORDERS.—

6 “(1) IN GENERAL.—In order to compel compli-
7 ance with this section, the Attorney General may
8 bring an action for injunctive relief against any per-
9 son subject to an order issued under subsection (f)
10 or on which such an order is served under subsection
11 (g) that knowingly and willfully fails to comply with
12 the order.

13 “(2) RULE OF CONSTRUCTION.—The authority
14 granted to the Attorney General under paragraph
15 (1) shall be the sole legal remedy for enforcing the
16 obligations under subsection (g) of a financial trans-
17 action provider or Internet advertising service on
18 which an order is served under paragraph (1) of
19 that subsection.

20 “(3) AFFIRMATIVE DEFENSES.—A defendant in
21 an action commenced under paragraph (1) may es-
22 tablish an affirmative defense by showing that the
23 defendant does not have the technical means to com-
24 ply with this section without incurring an unreason-
25 able economic burden or that the order is incon-

1 sistent with this section. That showing shall serve as
2 a defense only to the extent of the inability of the
3 defendant to comply or to the extent of the incon-
4 sistency.

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

10 “(j) IMMUNITY FOR ENFORCEMENT OF ORDERS.—
11 No cause of action shall lie in any court, no person may
12 rely on any claim or cause of action, and no liability for
13 damages to any person shall be granted, against a finan-
14 cial transaction provider or Internet advertising service for
15 taking any action pursuant to subsection (g)(2) with re-
16 spect to an Internet site, or otherwise declining to serve
17 or terminating transactions with an Internet site, in the
18 reasonable belief based on credible evidence that—

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

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

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

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

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

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

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

19 “(B) INTERNET SITE THAT ENDANGERS
20 THE PUBLIC HEALTH.—The term ‘Internet site
21 that endangers the public health’ means an
22 Internet site that is primarily designed or oper-
23 ated for the purpose of, has only limited pur-
24 pose or use other than, or is marketed by its
25 operator or another person acting in concert

1 with that operator for use in offering, selling,
2 dispensing, or distributing any prescription
3 medication, and does so regularly without a
4 valid prescription.

5 “(C) PRESCRIPTION MEDICATION.—The
6 term ‘prescription medication’ means a drug
7 that is subject to section 503(b) of the Federal
8 Food, Drug, and Cosmetic Act (21 U.S.C.
9 353(b)).

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

14 “(I) SAVINGS CLAUSES.—

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

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

24 “(A) to enlarge or diminish vicarious or
25 contributory liability for any cause of action

1 available under title 17, United States Code, or
2 the Lanham Act, including any limitations on
3 liability under section 512 of such title 17; or

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

6 “(3) RULE OF CONSTRUCTION RELATING TO
7 LIMITATIONS, EXCEPTIONS, AND DEFENSES.—Noth-
8 ing in this section shall be construed to affect, limit,
9 or deny application of any limitation, exception, or
10 defense to copyright or trademark causes of action,
11 including fair use and other exceptions, limitations,
12 or defenses available to any person pursuant to any
13 other Federal or State law.

14 “(4) RULE OF CONSTRUCTION RELATING TO
15 CIVIL ACTIONS.—The issuance of an order and ac-
16 tions taken or not taken pursuant to this section
17 shall be inadmissible as evidence in any civil action
18 (other than an action under this section to enforce
19 compliance with subsection (b)) to establish that a
20 party who has received, or is otherwise made aware
21 of, such an order has knowledge regarding any in-
22 fringing activities relating to the Internet site sub-
23 ject to the order, including under section 512 of title
24 17, United States Code, in determining whether any

1 service provider had actual knowledge or should have
2 known of the infringing activity.”.

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

6 (1) in paragraph (1), by inserting “or section
7 337A” after “this section”; and

8 (2) in paragraph (2)—

9 (A) in subparagraph (A)—

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

12 (ii) in clause (iii), by striking “(g), a
13 cease and desist order issued pursuant to
14 subsection (f), or a consent order issued
15 pursuant to subsection (c)” and inserting
16 “(g) of this section, a cease and desist
17 order issued pursuant to subsection (f) of
18 this section or subsection (f) of section
19 337A, or a consent order issued pursuant
20 to subsection (e) of this section or sub-
21 section (d) of section 337A”; and

22 (iii) in clause (iv), by striking “(i), or
23 a consent order issued under this section”
24 and inserting “(i) of this section or sub-
25 section (f) of section 337A, or a consent

1 order issued under this section or sub-
 2 section (d) of section 337A”;

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

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

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

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

14 **“SEC. 337B. SECTION 337 JUDGES.**

15 “(a) IN GENERAL.—Notwithstanding section 556(b)
 16 of title 5, United States Code, the Commission may ap-
 17 point hearing officers, other than administrative law
 18 judges appointed under section 3105 of title 5, United
 19 States Code, to preside at the taking of evidence at hear-
 20 ings required by sections 337 and 337A and to make ini-
 21 tial and recommended decisions in accordance with sec-
 22 tions 554, 556, and 557 of such title in investigations
 23 under sections 337 and 337A. The hearing officers ap-
 24 pointed under this subsection shall be known as ‘section
 25 337 judges’.

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

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

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

18 “(e) REMOVAL.—A section 337 judge may be re-
19 moved only for good cause shown upon a hearing con-
20 ducted on the record by the Merit Systems Protection
21 Board. The failure of the Commission to adopt the initial
22 or recommended decision of a section 337 judge shall not
23 constitute good cause.

24 “(f) COMPETITIVE SERVICE.—Except as otherwise
25 provided, the laws, rules, and regulations applicable to po-

1 sitions in the competitive service apply to section 337
2 judges. Upon appointment, a section 337 judge shall be
3 paid in accordance with the pay rates provided for in sec-
4 tion 5372 of title 5, United States Code, commensurate
5 with the pay rate of an administrative law judge with simi-
6 lar time in service. Section 337 judges shall not be Senior
7 Executive Service positions (as defined in section 3132(a)
8 of title 5, United States Code).

9 “(g) PERFORMANCE EVALUATIONS.—Section 337
10 judges shall not receive performance evaluations and shall
11 not be compensated based on performance.”.

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

14 (a) **MERCHANDISE THAT INFRINGES TRADE-**
15 **MARKS.—**

16 (1) **IN GENERAL.—**Notwithstanding section
17 1905 of title 18, United States Code, if the Commis-
18 sioner responsible for U.S. Customs and Border
19 Protection suspects that merchandise is being im-
20 ported into the United States in violation of section
21 42 of the Lanham Act, and subject to any applicable
22 bonding requirements, the Secretary of Homeland
23 Security may, for purposes of determining whether
24 the merchandise is being imported in violation of

1 that section, share with the holder of the trademark
2 suspected of being infringed—

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

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

8 (2) LANHAM ACT DEFINED.—In this subsection,
9 the term “Lanham Act” means the Act entitled “An
10 Act to provide for the registration and protection of
11 trademarks used in commerce, to carry out the pro-
12 visions of certain international conventions, and for
13 other purposes”, approved July 5, 1946 (commonly
14 referred to as the “Trademark Act of 1946” or the
15 “Lanham Act”).

16 (b) MERCHANDISE THAT CIRCUMVENTS COPY-
17 RIGHTS.—

18 (1) IN GENERAL.—Notwithstanding section
19 1905 of title 18, United States Code, if the Commis-
20 sioner seizes merchandise that the Commissioner
21 suspects of being imported into the United States in
22 violation of subsection (a)(2) or (b) of section 1201
23 of title 17, United States Code, the Secretary of
24 Homeland Security may notify a copyright owner de-

1 scribed in paragraph (2) of the seizure of the mer-
2 chandise.

3 (2) COPYRIGHT OWNER DESCRIBED.—A copy-
4 right owner described in this paragraph is the owner
5 of a copyright under title 17, United States Code, if
6 merchandise seized on the suspicion of being im-
7 ported in violation of subsection (a)(2) or (b) of sec-
8 tion 1201 of title 17, United States Code—

9 (A) is primarily designed or produced for
10 the purpose of circumventing, has only limited
11 commercially significant purpose or use other
12 than to circumvent, or is marketed for use in
13 circumventing, a technological measure that ef-
14 fectively controls access to a work protected by
15 that copyright; or

16 (B) is primarily designed or produced for
17 the purpose of circumventing, has only limited
18 commercially significant purpose or use other
19 than to circumvent, or is marketed for use in
20 circumventing, protection afforded by a techno-
21 logical measure that effectively protects the
22 rights of the copyright owner in a work or a
23 portion of a work.

1 **SEC. 5. REGULATIONS.**

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

5 (1) to provide for procedures for receiving infor-
6 mation from the public about Internet sites dedi-
7 cated to infringing activity (as defined in section
8 337A(a) of the Tariff Act of 1930 (as added by sec-
9 tion 2 of this Act));

10 (2) to provide guidance to intellectual property
11 rights holders about—

12 (A) what information those rights holders
13 should provide to initiate an investigation pur-
14 suant to section 337A(e) of the Tariff Act of
15 1930 (as added by section 2 of this Act); and

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

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

20 (4) to provide appropriate resources and proce-
21 dures for case management and development to af-
22 fect timely disposition of investigations initiated
23 under that section.

24 **SEC. 6. STUDY AND REPORTS.**

25 The President shall—

26 (1) conduct a study on—

1 (A) the enforcement and effectiveness of
2 section 337A of the Tariff Act of 1930 (as
3 added by section 2 of this Act); and

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

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

○