

Rogue Websites and the ITC: New Proposed Anti-Piracy Legislation

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OPEN – Online Protection and Enforcement of Digital Trade Act

The Congressional debate over how best to police online piracy and digital infringement continues. On December 8, 2011, a bi-partisan group of Congressional leaders led by Senator Ron Wyden (D-OR) and Congressman Darrell Issa (R-CA) released new proposed legislation that would empower the United States International Trade Commission (ITC) to investigate and take action against rogue websites and other online digital infringers. The proposed legislation, called the Online Protection and Enforcement of Digital Trade Act, or “OPEN”, is touted as an alternative to both current digital piracy proposals, the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA), both of which have come under attack as being overbroad and internet intrusive.

The International Trade Commission – A Potential Online Enforcement Mechanism

OPEN would amend Section 337 of the Tariff Act of 1930 by adding Section 337A, empowering the ITC to commence investigations against unfair digital imports and take appropriate actions against rogue websites engaged in such activities.

Section 337 has long been used to protect companies with a significant domestic interest, and the general public, from unfair acts such as patent, trademark and copyright infringement. Once a Section 337 violation is proven, the ITC can exclude from entry into the US any infringing articles. The ITC has determined in past cases that its jurisdiction under Section 337 includes “imports” of electronic data. OPEN would further confirm the ITC’s powers to exclude unfair “digital” importations.

OPEN’s proposed Section 337A would allow an aggrieved rights owner to seek an investigation against foreign based digital infringers. The ITC may also do so on its own. Once the ITC opens an investigation, the complainant (rights holder), respondent (alleged digital infringer) and any third-party stakeholder can participate in a public administrative proceeding in which evidence is presented. Should a violation be found, the ITC can issue a “Cease and Desist” order against the infringer(s). Similar orders can be issued to entities that provide advertising and financial transaction services to the infringing sites and businesses – thus stopping the flow of money to these rogue sites.

OPEN – Key Provisions

While OPEN was just announced and will likely be heavily debated and amended, some other key elements of OPEN are below:

- Investigations directed to:
 - Websites with a non-domestic domain name (foreign based sites)
 - Websites with a primary purpose of selling counterfeits and infringements
 - Websites directed to US customers
- Provides liability exemptions for:

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- Websites with established take-down mechanisms
- DMCA exclusions
- Fair use
- Designed to deter importation of unauthorized products by blocking financial operations and preventing payment companies such as Visa, MasterCard and PayPal from working with rogue sites
- Provides for the issuance of temporary and preliminary Cease and Desist Orders, in addition to permanent Cease and Desist Orders
- ITC can impose fees on rights holders to defray costs of the investigation
- Provides immunity for financial transaction providers and internet advertising services for compliance with Cease and Desist Order
- Section 337A Orders and actions would be inadmissible in civil actions

A copy of the current proposed OPEN legislation can be accessed [here](#).

For More Information:

Steptoe will be monitoring all developments with OPEN, as well as SOPA, PIPA and other proposed legislation directed to online piracy. To learn more about the latest Congressional developments concerning online piracy, online brand protection strategies, or Steptoe's ITC Section 337 practice, please contact Michael Allan (202.429.6749 or mallan@steptoe.com) or Charles Schill (202.429.8162 or cschill@steptoe.com)