

Fighting the Unauthorized Trade of Digital Goods While Protecting Internet Security, Commerce and Speech

Draft framework for discussion, authored by: U.S. Senators Cantwell, Moran, Warner and Wyden and U.S. Representatives Chaffetz, Campbell, Doggett, Eshoo, Issa and Lofgren

BACKGROUND

While the Internet has been revolutionary when it comes to uniting communities, promoting ideas and creating boundless opportunities for innovation and commerce, the Internet has also created new avenues for foreign counterfeiters and others operating outside the United States to sell unauthorized goods on the American market. This is harmful to the legitimate rights holders operating and employing Americans here at home.

Downloading a movie from a foreign-registered site, for example, is much like importing a good from a foreign company; however U.S. trade laws – put in place to oversee the flow of goods and services into the United States – have failed to keep up with the digital economy. A 21st Century trade policy will combat the import of infringing digital goods and counterfeit merchandise while ensuring the continued free flow of legitimate commerce and speech online.

We found that using trade laws to address the flow of infringing digital goods into the United States makes it possible to avoid many of the pitfalls that would arise from other legislative proposals currently being advanced to combat online infringement. Namely by putting the regulatory power in the hands of the International Trade Commission – versus a diversity of magistrate judges not versed in Internet and trade policy – will ensure a transparent process in which import policy is fairly and consistently applied and all interests are taken into account. When infringement is addressed only from a narrow judicial perspective, important issues pertaining to cybersecurity and the promotion of online innovation, commerce and speech get neglected. By approaching digital good infringement as a matter of regulating international commerce, we are able to take all of these factors into account.

PROPOSAL

This proposal updates import laws to respond to the challenges posed by the digital economy, so that illegal digital imports and digitally-facilitated imports of counterfeit goods are deterred. This proposal would enable a U.S. rightsholder to petition the International Trade Commission (ITC) to launch an investigation into the imports in question.

Congress established the independent International Trade Commission (ITC) as an arbiter of whether imports violate U.S. intellectual property rights and should or should not be allowed into the U.S. Under current law, rightsholders can petition the ITC to investigate whether

certain imports violate U.S. trademarks and copyrights. The ITC is authorized to not only investigate these issues but to initiate actions to prevent the imports in question from entering into the U.S.

Under our proposal, the ITC would be authorized to initiate an investigation at a rightsholder's request and issue a cease-and-desist order against foreign websites that provide illegal digital imports and/ or facilitate the importation of counterfeit goods. In order to issue such an order, the ITC would need to find that the foreign website is "*primarily*" and "*willfully*" engaging in infringement of U.S. copyrights or willfully enabling imports of counterfeit merchandise. This standard comports with existing copyright and trademark law. An ITC cease-and-desist order would, under this proposal, compel financial transaction providers and Internet advertising services to cease providing financial and advertising services to the foreign website.

The procedures the ITC would use throughout an investigation under this proposal are similar to those the agency currently employs. The public would be notified of the investigation and respondents would have a right to be heard, as well other interested parties. Final ITC determinations could be appealed in U.S. court.

Additionally, this proposal would enable the ITC to boost its capacity to carry out this proposal, to issue expedited cease-and-desist orders when the urgent need for speed is demonstrated, and to prescribe sanctions for those that may try to abuse their rights under this proposal. The proposal would empower the ITC to issue temporary and preliminary cease-and-desist orders, when immediate action is necessary to prevent imminent harm to rightsholders.

Finally, this plan provides appropriate immunity for those entities that are complying with the ITC orders, including financial transaction providers and Internet advertising services that voluntarily refuse to provide services to foreign websites that endanger public health by supplying illicit prescription drugs.

We intend to make public a draft of the legislative text of this proposal in order to enable the public to provide us with feedback and counsel before the proposal is formally introduced in the House and the Senate.