

FREQUENTLY ASKED QUESTIONS REGARDING THE ITC AND #OPEN ACT

Why is online infringement an international trade issue?

International trade laws exist to regulate the flow of goods and services across international borders. They are designed to open access to new markets by ensuring fair trade rules. They prevent trade wars by discouraging unfair trading practices such as dumping and subsidies and they are put in place to combat the traffic of illicit goods and services such as violations of intellectual property rights.

The Internet, however, has created new opportunities for foreign products to reach the U.S. market and while there is little difference between downloading a movie from a foreign website and importing a product from a foreign company, trade laws have yet to be updated to deal with the digital economy.

Establishing clear and transparent trade rules for commerce in digital format wouldn't just protect U.S. rights holders who are being harmed by foreign counterfeiters flooding the U.S. market with infringing digital content, but would help ensure that American exporters of digital goods and services have access and don't face retaliation in foreign online markets.

Why is it important to address online infringement as an international trade issue versus approaching it from a domestic law enforcement perspective -- why not handle this issue through the U.S. court system?

By approaching online infringement as an international trade issue, we are forced to consider not just ways to stop online infringement, but how the policies we enact impact things like cybersecurity, efforts to promote digital exports and international diplomacy. Moreover because norms established in the U.S. are likely to be advanced and replicated around the world, it is important that the U.S. carefully consider how the policies it adopts are translated and received by other countries. For example: "Will they result in retaliatory actions against U.S. goods and services?" or "Will they empower or discourage democratic movements?" These are important questions that policies that a domestic law enforcement approach is ill-equipped to consider.

Moreover, allowing I.P. law to be determined by a diversity of judges with various levels of I.P. experience and expertise would result in potentially conflicting rulings and inconsistent precedents. (It would also likely result in rights holders forum shopping for judges who would be most sympathetic to their cases.) Responsible trade and foreign policy would offer clear and consistent rules that the U.S. can use to advance global norms for the treatment of digital goods and services around the world.

Why is the International Trade Commission the best agency to handle cases of copyright and trademark infringement?

For well over 80 years, the independent International Trade Commission (ITC) has been the venue by which U.S. rightsholders have obtained relief from unfair imports, such as those that violate intellectual property rights. Under Section 337 of the Tariff Act of 1930 – which governs how the ITC investigates rightsholders’ request for relief – the agency already employs a transparent process that gives parties to the investigation, and third party interests, a chance to be heard. The ITC’s process and work is highly regarded as independent and free from political influence and the department already has a well recognized expertise in intellectual property and trade law that could be expanded to the import of digital goods.

The Commission already employs important safeguards to ensure that rightsholders do not abuse their right to request a Commission investigation and the Commission may self-initiate investigations. Keeping them in charge of determining whether unfair imports – like those that violate intellectual property rights – would ensure consistent enforcement of Intellectual Property rights and trade law.

How would the Online Protection and Enforcement of Digital Trade (OPEN) Act work?

The Open Act would enable holders of intellectual property to petition the ITC to launch an investigation into whether a foreign website's only real purpose is to engage in infringement of U.S. copyrights and trademarks. While complex and difficult issues would take time to resolve, investigations into simple and obvious cases, like the "worst-of-the-worst foreign rogue websites," could be handled in a matter of days. In either case, however, the process would create a transparent and adversarial system in which all parties – including interested parties concerned with issues such as free speech -- would have a chance to be heard.

If the ITC investigation finds that a foreign-registered website is "primarily" and "willfully" infringing on the IP rights of a U.S. rights holder, the commission would issue a cease and desist order that would compel payment processors (like Visa and Paypal) and online advertising providers to cease doing business with the foreign site in question. This would cut off financial incentives for this illegal activity and deter these unfair imports from reaching the U.S. market.

How does the OPEN Act define "infringement?"

In order to ensure that the legislation does not target sites whose operators are not intentionally hosting infringing material or are hosting parodies, mash-ups or other content that qualifies as "fair use" or are legitimate forums for discussion and free speech, the OPEN Act is appropriately focused only on foreign sites that are "primarily" and "willfully" engaged in infringement.

According to I.P legal experts, employing the word "primarily" ensures that the bill applies only to websites "dedicated to infringing activity" and excludes websites that may contain a small amount of infringing material. The word "willfully" is the current standard for intentional infringement subject to the highest remedies. Using this standard ensures that sites not intentionally hosting material, such as sites that enable user generated content, aren't swept up by the statute.

Websites that would otherwise qualify for the DMCA safe harbor – meaning the site has a practice of taking down infringing content when they know about it – would not be subject to any actions under this legislation.

How will the OPEN Act combat online infringement?

Because, the worst foreign rogue websites are engaging in infringing activity for profit, the OPEN Act seeks to close off their avenues for profiting from the sale of fake merchandise or content they don't own.

How will the OPEN Act ensure timely action for rights holders?

The draft proposal explicitly gives the ITC the ability, under certain circumstances, to quickly issue temporary measures to compel payment processors and online advertising providers to stop doing business with the foreign site in question. For example, if a website is established to take advantage of a fast-approaching weekend sporting event, this legislation intends to give the ITC the impetus and authority to take action against that site before the event.

Also, by clearly defining what constitutes infringement, the OPEN Act gives the ITC an easy to interpret scope and standard that can be swiftly interpreted and applied. This standard should ensure that commissioners and their staff aren't bogged down with complex questions and interpretation.

How would the OPEN Act deter the filing of frivolous or malicious petitions?

The advantage of putting the ITC in charge of these investigations is that the commission has a long history of mitigating these challenges as they apply to current IP investigations involving the import of physical merchandise. Furthermore, the OPEN Act authorizes the ITC to establish rules to prevent abuse of process. For example the ITC can impose sanctions on right holders who abuse their right to file petitions.

Is it true that the OPEN Act would cost more than other proposals being advanced to combat IP infringement?

While, yes, expanding the ITC's current IP investigative capacity to cover digital goods would likely require additional resources, there is no evidence to suggest that this would be more costly than expanding the capacity of the Justice Department and Federal Courts to handle these issues. However, by targeting only sites "primarily" and "willfully" engaging in IP infringement

and setting forward clear standards by which investigators can make their judgments, the OPEN Act should result in far fewer and shorter investigations than would occur under other legislation that would employ far broader standards with greater room for interpretation.

How does the OPEN Act differ from the Protect IP Act and the Stop Online Piracy Act?

The OPEN Act takes a much narrower and more targeted approach to combating online infringement than other proposed legislation by targeting only sites “primarily and willfully” engaging in infringement. By employing such a clear and targeted definition of infringement, the OPEN Act will ensure that only legitimate cases are pursued while giving ITC commissioners clear standards to follow in enforcing IP rules. Definitions advanced by other pieces of legislation employ broader standards that would require many website operators to employ lawyers to argue that it is not engaging in IP infringement. Such broad definitions could be used to discourage innovation and quash free speech.

While other legislation would employ a one-sided process in which judges would only hear from rights holders, by putting the ITC in charge of IP investigations, the OPEN Act would ensure an adversarial process in which all parties have an opportunity to be heard.

Unlike other legislation the OPEN Act does not interfere in the Domaine Name System or go after sites or search engines that simply link to websites that host infringing content. Rather the OPEN Act would combat online infringement simply by cutting off a foreign site’s ability to profit from the sale of fake merchandise or content they don’t own.