

December 14, 2011

The Honorable Ron Wyden
221 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Wyden:

On behalf of the Association for Competitive Technology's (ACT) 4,000 small business software developers, I write today to commend your efforts to prevent foreign rogue websites from selling deadly counterfeit pharmaceuticals, unsafe toys, and pirated content. The draft currently circulating of the Online Protection and Enforcement of Digital Trade Act (OPEDTA) creates a novel approach to this problem that also mitigates many of the potential negative unintended effects on technology startups and software developers. However, the first version of OPEDTA contains serious flaws that must be corrected in order to produce viable, effective rogue websites legislation.

To ensure that OPEDTA effectively deals with the foreign rogue website problem while preserving the future of the internet, innovation, and free speech, ACT believes OPEDTA must include the following changes:

Expand Alternatives to Seizures: OPEDTA would still require seizures, rather than more targeted notices, when foreign rogue sites use U.S. registries. Seizures should be a failsafe solution rather than a first stop because they can needlessly politicize one of the core technologies of the internet and can encourage more of this business to move off-shore.

Remove "Safe Harbor" for Foreign Criminals: Even a criminal racketeering enterprise operating a foreign rogue website that targets U.S. markets primarily through willful, criminal infringement would be immune from OPEDTA if it has a "practice" of responding to takedown notices. We all know that notorious pirate sites like Rapidshare and Megaupload endanger U.S. consumers and creators regardless of their alleged practice of responding to takedown notices, so this should NOT be the equivalent of a Get-Out-Of-Jail-Free card. Smaller manufacturers and IP holders simply cannot churn out takedown notices fast enough to keep up with mass counterfeiting and piracy of their products that is happening on these sites.

Improve Definition of Rogue Websites to Make it Enforceable: OPEDTA potentially affects only sites dedicated to mass *criminal* counterfeiting or piracy—only sites "primarily use[d]... to *willfully* engage in infringing activity [emphasis ours]." But such sites would be just as dangerous to U.S. creators and consumers if they were primarily used to engage in infringing activity that was merely knowing or reckless.

ITC Orders Should Authorize DMCA Injunctive Relief: Even if they comply with all DMCA "safe-harbor" requirements, ISPs and Google can still be ordered to "block access" to specified foreign rogue websites under 512(j)(1)(B)(ii). Any ITC order should entitle at least the Attorney General to 512(j)(1)(B)(ii) relief against non-authoritative DNS operators and search-engine operators.

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Eliminate Adwords for Foreign Rogue Sites: Even after a final judgment establishes that a foreign rogue website is “dedicated to infringing activities” targeting U.S. markets, OPEDTA would let that website profit from the use of Google Adwords and other advertising networks. OPEDTA would also allow ad networks to serve advertisements to such sites by meeting a simple requirement to indirectly share the resulting revenues. Neither means of promoting piracy and counterfeiting should be acceptable.

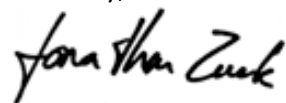
ITC Resources and Expertise Need To Be Massively Expanded: OPEDTA is now an unfunded mandate; it imposes sweeping new duties upon the ITC but provides no additional funding to enable the ITC to perform those new duties well. That must be corrected before OPEDTA can be considered a serious proposal. At the same time, efforts to create new funding should not create barriers to smaller manufacturers and IP holders from accessing the ITC. Additionally, here are a few additional ways that the proposal can be streamlined to save time and cost:

ITC Need Not Waste Resources on Operators Who Target the U.S., But Hide from It: OPEDTA would force U.S. creators and taxpayers to incur the expense of a full ITC investigation even when the operators of a website targeting U.S. markets refuse to appear, consent to U.S. jurisdiction, and defend their conduct. OPEDTA should confirm that ITC can grant default judgments in such cases and that operators unwilling to defend themselves can use inexpensive geo-targeting technologies to avoid U.S. markets.

Private Parties Should Be Entitled to Enforce ITC Orders: OPEDTA makes valid, uncontested orders unenforceable against intermediaries unless the Attorney General brings an enforcement action. This creates a needless bottleneck and wastes public funds. Private parties harmed by counterfeiting and piracy must be able to enforce ITC orders.

The Association for Competitive Technology and the thousands of companies we represent look forward to working with your office to find focused and effective solutions to the problem of online piracy while protecting free speech and innovation.

Sincerely,



Jonathan Zuck
President

cc: The Honorable Darrell Issa