

[DISCUSSION DRAFT]

119TH CONGRESS
1ST SESSION

H. R. ____

To amend title 17, United States Code, to provide for blocking orders relating to specifically identified infringing foreign websites or online services, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Ms. LOFGREN introduced the following bill; which was referred to the Committee on

A BILL

To amend title 17, United States Code, to provide for blocking orders relating to specifically identified infringing foreign websites or online services, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Foreign Anti-Digital Piracy Act” or “FADPA.”

SEC. 2. BLOCKING ORDERS RELATING TO SPECIFICALLY IDENTIFIED INFRINGING FOREIGN WEBSITES OR ONLINE SERVICES.

(a) IN GENERAL.—Chapter 5 of title 17, United States Code, is amended by inserting after section 502 the following:

“§ 502A. Blocking orders relating to specifically identified infringing foreign websites or online services.

“(a) PRELIMINARY ORDER.—

“(1) PETITION.—A covered person may file a petition in a United States District Court for the issuance of a preliminary order declaring that—

“(A) with respect to the transmission of work protected under section 106 through a foreign website or online service—

“(i) the transmission of such work likely infringes the exclusive right of the covered person under section 106 to reproduce, distribute, publicly perform, or publicly display such work; and

“(ii) the covered person is likely to suffer irreparable harm as a result of such infringement; or

“(B) with respect to the imminent transmission of a live event on or through a foreign website or online service—

“(i) the transmission will likely infringe the exclusive right of the covered person under section 106 to reproduce, distribute, publicly perform, or publicly display such work; and

“(ii) the covered person will likely suffer irreparable harm as a result of such infringement.

“(2) ISSUANCE.—The court shall issue the order described in paragraph (1) if the court finds the following:

“(A) The petitioner includes in the petition, the internet protocol address, a domain name, or other similar online

identifier of the foreign website or online service identified in the petition.

“(B) The petitioner attempted to serve the operator of the foreign website or online service identified in the petition with notice of the action and the petition in accordance with Rule 4 of the Federal Rules of Civil Procedure.

“(C) With respect to each service provider the petitioner has identified through a reasonably diligent investigation as providing a service with respect to the foreign website or online service identified in the petition, the petitioner provided notice of the infringing activity to—

“(i) the agent of service provider designated pursuant to section 512(c)(2) to receive notifications of claimed infringement; or

“(ii) if the service provider does not have such an agent, in accordance with Rule 4 of the Federal Rules of Civil Procedure.

“(D) The petitioner certifies in the petition that after conducting a reasonably diligent investigation based on publicly available information the petitioner—

“(i) determines that the operator of the foreign website or online service identified in the petition is physically located outside of the United States; or

“(ii) cannot determine that the operator of the foreign website or online service is physically located within the United States.

“(E) The foreign website or online service identified in the petition—

“(i) is primarily designed or primarily provided for the purpose of infringing copyright;

“(ii) has no commercially significant purpose or use other than infringing copyright; or

“(iii) is intentionally marketed by or at the direction of the operator of the foreign website or online service to promote the use of the website or online service in the infringement of copyright.

“(F) Upon penalty of perjury, the Petitioner has attested—

“(i) to the best of the knowledge of the petitioner, to the accuracy of the assertions of the petitioner regarding the foreign website or online service identified in the petition, or the operator thereof; and

“(ii) that the petition was filed with a substantial connection to enforcing the exclusive rights of the petition under this title, including to protect economic interests derived from such rights.

“(3) NON-ISSUANCE OF PRELIMINARY ORDER.—A court may not issue the order described under paragraph (1) if the court finds that—

“(A) the infringement of the petitioner’s exclusive right by the foreign website or online service has ceased entirely; and

“(B) there is not a reasonable possibility that such infringing activity will resume.

“(4) CONTESTING THE PRELIMINARY ORDER.—Not later than 30 days after a petition described under paragraph (1) is filed, the operator of the foreign website or online service identified in such petition may appear and contest the issuance of the order concerned.

“(5) APPOINTMENT OF MASTER TO ASSIST COURT.—

“(A) APPOINTMENT.—If the operator of a foreign website or online service identified in a petition filed under paragraph (1) does not appear and contest the issuance of the preliminary order pursuant to paragraph (4), the Court may, in its discretion, appoint a master pursuant to Rule 53 of the Federal Rules of Civil Procedure to assist in determining whether the criteria in paragraph (2) have been satisfied for the purpose of issuing such order.

“(B) AUTHORITIES.—The master may gather and review publicly available information relating to whether the criteria in paragraph (2) have been satisfied.

“(C) NO EFFECT ON PROCEEDINGS.—The appointment of a master shall not unduly delay the proceedings or impose excessive costs on the court or the petitioner.

“(6) TIME FOR ISSUING PETITION.—The court shall determine whether to issue an order on the basis of a petition filed under paragraph (1), or deny such order—

“(A) following the timely filing of an opposition and a 14 day period for reply;

“(B) after the period for filing an opposition has expired; or

“(C) in the case that the petitioner is alleging that irreparable harm will likely occur as a result of the imminent transmission of a live event or ongoing unauthorized transmission of a live event is occurring, on an expedited basis that effectively addresses the imminent or continuing harm identified in the petition.

“(7) IMMINENT TRANSMISSION OF A LIVE EVENT.—In the case that the petitioner is alleging that irreparable harm will likely occur as a result of the imminent transmission of a live event by a foreign website or online service or ongoing unauthorized transmission of a live event is occurring by a foreign website or online service, the court may

issue an order under this subsection on an ex parte basis with respect to the transmission.

“(b) BLOCKING ORDERS TO PREVENT ACCESS TO FOREIGN WEBSITE OR ONLINE SERVICE.—

“(1) IN GENERAL.—

“(A) MOTION.—At any time after a court has issued an order pursuant to subsection (a), the petitioner may move for an order directing each service provider that received notice of the order under subsection (a) to take reasonable and technically feasible measures to prevent users of the service provided by the service provider from accessing the foreign website or online service identified in the order.

“(B) NOTICE.—The petitioner shall serve both the applicable order and motion on each such service provider.

“(C) OTHER COURTS.—If the court that issues the order pursuant to subsection (a) does not have jurisdiction over a service provider, the petitioner may institute a miscellaneous action and file the motion described under subparagraph (A) with any court of the United States that has jurisdiction over such service provider.

“(2) ISSUANCE OF ORDER.—

“(A) COURT DETERMINATION BEFORE GRANTING ORDER.—The court may not issue an order under paragraph (1) unless the court determines that implementation of the order will not—

“(i) interfere with user access to non-infringing material on another website or online service;

“(ii) significantly burden the service provider, including the operation of the system or network of the service provider; or

“(iii) disserve the public interest.

“(B) TERMS AND CONDITIONS OF ORDER.—Any order under subsection (b)(1) shall—

“(i) require the service provider to comply with the order—

“(I) with respect to an order that does not relate to the imminent public performance of a live event—

“(aa) not later than 15 days after the order is issued; or

“(bb) not later than 20 days after the order is issued if the court finds good cause has been shown for such an extension; and

“(II) with respect to an order that relates to the imminent public performance of a live event, by a date after the order is issued—

“(aa) that takes into account—

“(AA) the imminent nature of the infringement;

“(BB) the capabilities of the service provider; and

“(CC) what is technically feasible for the service provider; and

“(bb) that is not later than 7 days after the order is issued; and

“(ii) expire with respect to a service provider—

“(I) except as provided in subclauses (II) and (III), 12 months after the service provider is served under subsection (b)(1), unless the expiration date

is extended by the issuing court pursuant to paragraph (6);

“(II) if the order relates to the public performance of one live event, 48 hours after the conclusion of the public performance of the live event; or

“(III) if the order relates to the public performance of more than one live event, 48 hours after the conclusion of the public performance of the final live event covered in the order.

“(C) LIMITATION.—An order issued under this subsection may not—

“(i) prescribe any specific technical measures to be used or other actions to be taken by a service provider to comply with such order; or

“(ii) require a service provider to take an action that would prevent a user of the service provided by the service provider from using a virtual private network.

“(3) AMENDING ORDER TO ADD ADDITIONAL SERVICE PROVIDERS.—

“(A) MOTION.—At any time after the issuance of an order under this subsection, the petitioner may move to amend the order to apply to one or more additional service providers—

“(i) over which the court has jurisdiction; and

“(ii) that the petitioner has identified through a reasonably diligent investigation as providing a service with respect to the foreign website or online service identified in the petition, the petitioner provided notice of the infringing activity to

“(I) the agent of service provider designated pursuant to section 512(c)(2) to receive notifications of claimed infringement; or

“(II) if the service provider does not have such an agent, in accordance with Rule 4 of the Federal Rules of Civil Procedure.

“(B) CONTENTS OF MOTION.—The motion to amend shall—

“(i) explain why each service provider named in the motion was not included in the order initially; and

“(ii) be served on each service provider named in the motion.

“(C) OPPOSITION TO MOTION.—Any service provider served with a motion to amend under subparagraph (B) may appear and oppose the motion not later than 20 days after the date on which such service provider was served such motion.

“(D) REVIEW OF MOTION.—The Court may not amend the order to apply to an additional service provider unless the court makes the determination described under paragraph (2)(A) with respect to such service provider.

“(E) EXPIRATION OF ORDER.—The order shall expire with respect to any additional service providers included in the order pursuant to this paragraph on which the order expires for the last service provider described under paragraph (2) is served pursuant to subsection (b)(1).

“(4) AMENDING ORDER TO ADD ADDITIONAL DOMAIN NAMES OR INTERNET PROTOCOL ADDRESSES.— Unless otherwise determined by a court when granting the order, a court may, upon motion by the petitioner, amend such order to include additional domain names or internet protocol addresses if it determines that the

foreign website or online service that is the subject of the order—

“(A) remains accessible or has been reconstituted at a different domain name or internet protocol address than those included in the petition filed under subsection (a), rendering the initial order ineffective; or

“(B) has engaged in circumvention techniques that render the initial order ineffective.

“(5) IMPLEMENTATION OF THE ORDER.—

“(A) REVIEW.—In determining whether a service provider has complied with an order under this subsection, the court shall limit its review to determining whether the measures used, or actions taken or not taken by the service provider to implement such order were unreasonable or taken in bad faith to avoid complying with the order.

“(B) MODIFICATION.—If a service provider, in the course of implementing an order issued under this subsection, prevents a user of the service provided by the service provider from accessing a website or online service other than the foreign website or online service identified in the order, the operator of such other website or online service may file a motion with the court to modify the order so the user may access the other website or online service.

“(C) TEMPORARY SUSPENSION OF IMPLEMENTATION.—A service provider subject to an order issued under this subsection shall not be in violation of such order if the service temporarily removes any measures put in place to prevent access to a foreign website or online service—

“(i) when reasonably necessary to correct or investigate whether the implementation of the order by the service provider is preventing access to a website or online service other than the foreign online website or online service identified in the order; or

“(ii) to maintain the integrity or quality of the network or operations of the service provider.

“(D) COST.—Upon a motion by a service provider served with an order issued under subsection (c) that includes a detailed list of reasonable marginal costs and expenses (except for capital expenditures, costs and expenses incurred with respect to infrastructure, and attorney fees) directly incurred by the service provider to implement and comply with the order, the court that issued such order may require the petitioner to pay such costs and expenses.

“(6) EXTENSION OF ORDER.—

“(A) IN GENERAL.—At any time prior to the expiration of an order not related to the public performance of a live event issued under this subsection, or any extension thereof, the petitioner may move to extend such order for an additional period not exceeding 12 months.

“(B) GRANT.—The court shall grant the motion under subparagraph (A) if the court finds that during the period of such order—

“(i) the operator of the foreign website or online service has not ceased transmitting such work that is the subject of the motion;

“(ii) the transmission of such work likely infringes the exclusive of right of the covered person under section 106 to reproduce, distribute, publicly perform, or publicly display such work; and

“(iii) the petitioner is likely to suffer irreparable harm as a result of such infringement.

“(7) TRANSPARENCY OF ORDERS.—

“(A) AVAILABILITY THROUGH PUBLICLY ACCESSIBLE WEBSITE.—With respect to an order issued under this subsection by a court, the court that issued such order shall make available through a publicly accessible website and without undue delay after the issuance of the order (or any amendment to such order)—

“(i) the order;

“(ii) the name of the petitioner;

“(iii) each foreign website or online service identified in the order, including the domain names and internet protocol addresses of each such website or online service;

“(iv) the date on which the order was issued;

“(v) the duration of the order, including the expiration date; and

“(vi) a summary of the findings of the court under subsection (a)(2) with respect to the order.

“(B) LIMITATION. —If the court determines that disclosure of certain information would render the order ineffective, pose a significant risk to national security, personal safety, or an ongoing law enforcement investigation, the court may order that such information be redacted from the publicly available documents.

“(8) SERVICE PROVIDER IMMUNITY.—

“(A) IN GENERAL.—In the case that the court that issues an order under this section determines in accordance with paragraph (5)(A) that a service provider that is in

compliance with such order, the service provider may not be held liable for the following:

“(i) Any injury alleged by a foreign website or online service, or the users of such website or online service, to have occurred as a result of measures or other actions taken to implement such order with respect to such website or online service.

“(ii) Any injury alleged by a foreign website or online service, or the users of such website or online service, to have occurred as a result of measures or other actions taken or not taken in good faith by such service provider to implement such order with respect to such website or online service based on information provided to such service provider under this subsection.

“(iii) Any injury alleged by an operator of a foreign website or online service identified in the order resulting from actions taken or not taken in good faith by such service provider to implement such order, regardless of any subsequent determination that such specific website or service was inaccurately identified in such order and does not meet the criteria described in subsection (a)(2).

“(iv) With respect to the foreign website or online service that is the subject of such order, a claim of copyright infringement against such service provider initiated on or after the date of enactment of FADPA by the copyright owner that obtained such order, to the extent such claim is based on the role of such service provider in providing access to such website or online service before the date of the enactment of FADPA.

“(B) INADMISSIBILITY.—The issuance of an order under this subsection that identifies a service provider, or a finding that a service provider has complied with an order issued under this subsection, may not be admitted into evidence to support an allegation that such service provider

has engaged in infringement of copyright in any action brought by any party in United States District Court.

“(C) RULE OF CONSTRUCTION.—Nothing in this paragraph may be construed as limiting the authority of the court to—

“(i) determine whether a service provider is in compliance with an order issued pursuant to this subsection; or

“(ii) to compel compliance with such order.

“(c) RELATIONSHIP TO SECTION 512(A) IMMUNITY.—A service provider identified in an order under this section may not lose liability protection under section 512(a) on the basis of such identification.

“(d) RULE OF CONSTRUCTION.—Except as explicitly provided in this section, nothing in this section may be construed as affecting the interpretation or application of any provision of section 512;

“(e) DEFINITIONS.—In this section:

“(1) COVERED PERSON.—The term ‘covered person’ means a copyright owner or an exclusive licensee of a copyright owner.

“(2) BROADBAND PROVIDER.—The term ‘broadband provider’ means a provider of broadband internet access service, as defined in section 8.1(b) of title 47, Code of Federal Regulations (or any successor regulation)—

“(A) that provides such service to 100,000 or more subscribers; and

“(B) is subject to or consents to the jurisdiction of the court.

“(3) FOREIGN WEBSITE OR ONLINE SERVICE.—The term ‘foreign website or online service’ means a website or online service operated by a foreign person.

“(4) FOREIGN PERSON.—The term ‘foreign person’ means an individual—

“(A) physically located outside of the United States; or

“(B) whose physical location cannot be determined to be within the United States.

“(5) LIVE EVENT.—The term ‘live event’ means an event that is performed publicly (such as a concert, sporting event, or award show)

“(6) PUBLIC DOMAIN NAME RESOLUTION SERVICES.—The term ‘public domain name resolution services’ means domain name resolution services that are accessible to the general public.

“(7) SERVICE PROVIDER.—The term ‘service provider’—

“(A) means—

“(i) a broadband provider, and

“(ii) a provider of public domain name resolution services that has an annual revenue of over \$100 million and

“(B) does not include—

“(i) Service providers that provide domain name system resolution functions or services exclusively through encrypted DNS protocols; or

“(ii) Service providers that exclusively provide virtual private network (VPN) services, or similar

services that encrypt and route user traffic through intermediary servers; or

“(iii) an operator of a premises, such as a coffee shop, bookstore, airline, private end-user network, library, or university, that acquires broadband internet access service from a provider or entity described under subparagraph (A) to enable patrons of the premises to access broadband internet service from the premises.

“(8) TRANSMISSION OF A LIVE EVENT.—The term ‘transmission of a live event’ means the digital transmission of a live event—

“(A) simultaneously or nearly simultaneously with the live occurrence or public performance of the event; and

“(B) for a commercial purpose.

“(i) ‘digital transmission’ includes, but is not limited to, transmission by satellite broadcasting.

“(9) VIRTUAL PRIVATE NETWORK.—The term ‘virtual private network’ means a service that establishes an encrypted connection between a device and a remote server that—

“(A) routes the internet traffic of the user of such device through the remote server; and

“(B) masks the internet protocol address of such user.

“(10) WEBSITE OR ONLINE SERVICE.—The term ‘website or online service’ means a website or uniquely identifiable online location that is—

“(A) accessible to the public within the United States; and

“(B) identifiable by a single internet protocol address, a domain name, or other similar online identifier.”.

(b) EFFECTIVE DATE.—This Act, and the amendment made by subsection (a), shall take effect on the date that is six months after the date of the enactment of this Act.
