

**Before the
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE
Washington, DC 20508**

In the Matter of)	
)	
2020 Review of)	Docket No. USTR-2020-0035
Notorious Markets for)	
Counterfeiting and Piracy)	

Comments of the Internet Infrastructure Coalition

Pursuant to the request for comments published by the Office of the United States Trade Representative (USTR) in the Federal Register at 85 Fed. Reg. 62,006 (Oct. 1, 2020), the Internet Infrastructure Coalition (i2Coalition) submits the following comments concerning the 2020 Review of Notorious Markets for Counterfeiting and Piracy. i2Coalition is made up mainly of small to medium sized businesses which are cloud providers, data centers, web hosting companies, registrars, registries and other foundational Internet enterprises.

I. Introduction

The i2Coalition appreciates this opportunity to renew our recommendations on USTR’s process for reviewing online markets, and to provide further clarity about the role of the Internet’s infrastructure in this analysis. Our industry believes strongly that a robust intellectual property protection framework with elements supporting technological and commercial innovation is critical to the expansion of American global digital trade and the export of Internet-enabled goods and services. Our member companies include rights holders who value and depend upon intellectual property protection, and who have invested significant resources to develop and implement tools to combat online piracy.

As such, the i2Coalition’s views clearly align with the USTR’s intent to hold intellectual property rights violators accountable as part of an overarching strategy of protecting and advancing innovation in the United States. Through our recommendations i2Coalition offers the commercial and policy perspectives of the Internet’s technical intermediaries who provide the digital tools that drive the vast majority of that innovation.

Having discussed these issues with the USTR policy staff in previous review cycles, the i2Coalition wishes to thank and commend the USTR for the progress made since the beginning of our engagement regarding the specific assessment of these issues in global digital markets. The i2Coalition welcomes continuing opportunities to offer our perspectives to USTR as your work progresses.

II. Neutral Intermediaries Are Not Notorious Markets

The i2Coalition appreciates USTR's work in recent years to shift the focus of how its list is constructed away from naming companies and organizations that provide and operate generic third-party, digital technologies, while remaining focused on the identification of explicit types of online, e-commerce platforms. Still, the list remains predicated on a broad depiction of intermediaries that does not always align with the liability norms found in the U.S. Therefore, as we have urged in prior review cycles, we encourage USTR to ensure that notorious markets not be confused with neutral intermediaries such as Internet infrastructure providers. The neutral intermediaries represented within the Internet infrastructure industry process millions of transactions every day, all at the direction of their users, and are not, in any sense of the word, independent "marketplaces." Nor should there be a suggestion that all providers have the ability and obligation to remove infringing content in the exact same manner as providers who directly manage content, which erodes the value and meaning of this process.

As a clear example, DNS and cybersecurity service providers, such as i2Coalition member company Cloudflare, route viewers through a globally distributed network. Their technology creates the pathway between a series of numbers and signals and the "web" as the average consumer understands and describes it. By their nature, these businesses have limited access to the content information they transmit; they lack the capacity to access it or make qualitative analyses or judgments about it. Moreover, because they are neutral third party intermediaries, those functions are not part of their proper role.

Over the years in this proceeding, and in other fora, the i2Coalition and some of its member companies have made substantial efforts to deepen USTR's understanding of these operational distinctions. We have also sought to encourage associations and special interest groups representing intellectual property interests in other sectors to avoid using the notorious market process to call out neutral intermediaries in their own comments, to avoid the creation of an erroneous impression that Internet transmissions performed by intermediaries, if coupled at all with practices with which those other industries disagree, constitute a "notorious market."

III. Further Work On Defining Notorious Markets Online Is Necessary

Generally, notorious markets are defined as "online and physical markets" where large-scale intellectual property infringement takes place. Technology and what constitutes copyright and other intellectual property infringement have changed dramatically since the 1990s, which was the last time that notorious market definitions were meaningfully updated. Global digital businesses, including Internet intermediaries, would benefit from Congress revisiting and rewriting this definition in a clear way that accurately accounts for how Internet technologies function today in enabling global e-commerce. In the meantime i2Coalition believes that it is

vital that USTR's assessments of what constitutes a "notorious market" reflect technological changes that have transpired since it first began these reviews.

When international trade frameworks and policies change and new enforcement methods take effect, which has happened frequently in the recent past, what exactly needs to be enforced is not evident to all stakeholders. This lack of clarity in the past few years has tended to result in numerous parties filing comments with USTR as part of this process alleging infringement, and proffering submissions to the notorious markets list either erroneously or in a manner intentionally meant to mischaracterize those who are responsible for the alleged violations. We are concerned that this same dynamic may occur during this year's comment periods. Providing a precise, well-informed conception of a notorious market in the digital space (beyond the phrase "e-commerce platforms and other third-party intermediaries") as an element for more effective enforcement of our IP laws is neither straightforward nor easy work. It takes good faith participation from a variety of stakeholders.

The goal of the Notorious Markets Report is to identify the creation and operation of businesses whose primary focus is profiting off the infringement of intellectual property. The i2Coalition supports that goal. Indeed, USTR's initial focus on that goal has resulted in great gains in awareness of intellectual property infringement and identification of bad actors. Nonetheless, the effort we have seen in the past by some commenters to shift the focus of the Notorious Markets Report process from solely identifying the bad businesses directly and intentionally engaged in these acts, to conflating intellectual property infringement with the neutral and legal operations of Internet intermediary businesses that support the U.S. digital economy and advance global digital trade is erroneous: the Internet infrastructure industry supports a digital economy that employs 5.9 million Americans and adds \$1.2 trillion to the U.S. economy¹. The i2Coalition appreciates the opportunity to underscore again this same key point as you move forward into your report generation for the coming year.

IV. Conclusion

The USTR has made meaningful progress towards more concrete differentiation of online markets in its most recent review cycle. The i2Coalition believes that the spirit and letter of the relevant IP laws are best advanced by ensuring that enforcement resources focus on the true and direct bad actors in notorious markets, and that enforcers not diminish the utility of the report by sweeping in neutral, third party Internet infrastructure providers.

It is critical that USTR and stakeholders recognize and respect the original purpose of the Review of Notorious Markets for Counterfeiting and Piracy, and the successes that the process has engendered. USTR should continue to recognize the concerns of neutral intermediaries such as Internet infrastructure providers, who hold intellectual property and value its protection, and continue to develop and implement methods of thwarting online piracy. The i2Coalition

¹ UNCTAD Digital Economy Report 2019
https://unctad.org/system/files/official-document/der2019_en.pdf

appreciates and looks forward to opportunities for continued engagement with USTR on this matter. We note again the positive steps USTR has taken in response to our voiced concerns and continue to urge USTR, in reviewing and distinguishing the entities operating in online markets, to promote innovation-enabling approaches that properly reflect the current state of Internet technologies in the digital age.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'CD', with a stylized flourish.

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