

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

In the Matter of)
)
2021 Review of)
Notorious Markets for)
Counterfeiting and Piracy)

Comments of IP Justice

IP Justice is submitting the following rebuttal comments upon the request published by the Office of the United States Trade Representative (USTR) in the Federal Register at 86 FR 48,464 (Aug. 30, 2021). IP Justice is an international civil liberties organization based in the United States that promotes Internet freedom, innovation policy, and balanced intellectual property rights. IP Justice is also a participant at various international law and Internet policy venues that impact digital rights including the Internet Corporation for Assigned Names and Numbers (ICANN), the UN World Intellectual Property Organization (WIPO), World Trade Organization (WTO), and the UN Internet Governance Forum (IGF).

I. Introduction

IP Justice appreciates the opportunity to comment on the USTR Notorious Markets review process and would like to further the dialogue with USTR on clarifying the internet and technical service provider’s role in online markets. Positive policies from the USTR to expand global digital trade and the import/export of Internet-enabled goods and services have never been more critical for the US's robust economy, especially leading to the recovery from pandemic disruption. IP Justice believes that designating Internet service providers as a Notorious Market is counterproductive to the intent to hold intellectual property rights violators accountable. This annual review process applies to online and physical marketplaces, but should not be expanded to include internet intermediaries and other third parties who are not direct infringers of intellectual property.

IP Justice supports a balanced regime of intellectual property rights, including providing enough protection to incentivize the creation of new works destined to eventually pass into the public domain. Some of IP Justice’s projects and allies rely on the lawful authorization of copyright and trademark to access knowledge, reward

creators, and promote innovation. IP Justice will offer the policy and human rights aspects of why internet intermediaries and other service providers should not be designated as Notorious Markets. These technology infrastructure companies are, in fact, a part of the creative effort to combat global IP infringement and should receive support from the USTR.

IP Justice welcomes future engagement with the USTR offices and policy staff to assess Notorious Markets and assist the office in balancing intellectual property protection in the digital world while stimulating innovation and eCommerce. IP Justice again thanks the USTR for this invitation to comment and hopes to be a part of the USTR's continual progress.

II. Internet Service Providers Are Not Notorious Markets. Case Study-Snapchat

IP Justice acknowledges USTR's efforts in identifying explicit direct infringement by online and physical markets while steering away from listing generic, third-party internet intermediaries and technology providers. From the list of previous years, and this year, however, the published list and public comments continue to confuse neutral intermediaries such as Internet infrastructure providers as direct IP infringers. This year's public comments continue this misleading and harmful trend. Internet Service providers are a neutral, independent marketplace, like bazaars at the public square. These intermediaries process countless posts and transactions every day, considering all walks of life. The intermediaries only process the internet connections and platform services, they do not themselves profit from the commercial transaction of the trade of goods or services, they are certainly not responsible for IP infringement by third-party merchants. IP Justice strongly believes there is a significant difference between the parties directly managing the commercial content in trading products and the internet providers that simply maintain the technical infrastructure.

Here is an example to better understand the technology function and the limited obligations underlying internet intermediaries. This year, Alexander Neville Foundation & Victims of Illicit Drugs filed a public comment listing Snapchat as a notorious market facilitating counterfeit opioids. This misconception illustrates the prevalent misunderstanding of the platform's capacity to remove content. Drug dealers regularly post photos, menus, prices, and contact information on Snapchat; in a split second, Computer Vision on the user camera and the exact area Image processing allows the video data to be compressed into the size of a photo, allowing users to send ephemeral text messages. When a recipient receives a video message, the application stores the

video outside of the application's sandbox. Snapchat's job was to deliver the data between end-to-end receivers, regardless of the user identities and without regard to the data content.

Because of the FTC order in 2014, Snapchat cannot access or store any information they transmit. Requiring Snapchat to take down IP infringement content imposes the responsibility to store encryption data, review and analyze content that they have no access to, and track geolocation information. These unfair burdens run contrary to FTC Section 5 authority and impose inappropriate responsibilities on neutral third-party intermediaries.

IP Justice hopes to continue the dialogue with the USTR on these distinctions and wishes to transform many organizations' notions to distinguish between direct infringers and technology infrastructure providers. Particularly, IP Justice advocates that internet marketplaces that do not control the information shared and which lack the capacity to judge what is being shared should not be labeled a Notorious Market.

III. Unintended Consequences of current Notorious Markets Designation for Internet providers

a. The Notorious Markets designation for internet providers stifles free speech

We should protect third-party technical operators and infrastructure providers who are necessary to maintain a stable and interoperable Internet. Most importantly, protecting communication platforms is essential for freedom of speech. The Notorious Markets designation unfairly burdens platforms with content moderation authority and duties.

These internet providers often transmit public domain materials, which are not infringing, and should not be treated as notorious. All works protected by copyright will pass into the public domain at some point. We need to leave ample room in the law for marketplaces that provide public domain and other non-infringing materials. The public's freedom to engage in communication and exchange information about infringing materials is not infringement.

b. The Notorious Market designation harms competition

IP Justice supports the framing of this year's focus on types of online and physical markets of direct infringement, rather than arbitrarily naming specific businesses to criticize, a practice that is ripe for abuse. The robust US economy relies on a fair and competitive market. Allowing organizations and private entities to designate specific

businesses including internet platforms as Notorious Markets runs the risk of abusing the designation as an anticompetitive method to destroy competitors. Thus the Notorious Markets review process can be used as a tool to harm competition in this way.

c. The Notorious Market designation curtails innovation and facilitates IP infringement

We need to protect internet intermediaries from taking the blame of actual infringers in enforcement matters. Technology providers can become easy targets while actual infringers are elusive and remain at large. If internet providers are designated as Notorious Markets over information that they have no access to, companies will be disincentivized to innovate. No matter how advanced their products are, and how well-loved by users, they will be listed as a Notorious Market, due to the nature of the internet providers' role in providing essential services. One example is Amazon's IP Accelerator program and Utility Patent Neutral Evaluation. If Amazon continues to be listed as a Notorious Market, the company will be discouraged from continuously investing in innovations to counter infringement online, eventually hurting consumers.

The surge in the past few years' reports and the comments that resulted in designating technology operators as Notorious Markets have created the effect of diluting efforts to hold direct infringers accountable.

IV. Solutions

a. Cooperation with all stakeholders

IP Justice encourages the USTR to adopt best practices developed in consultation with civil society and industry to address any harms from marketplaces that provide infringing materials. IP Justice urges the USTR to work with those submitting comments to this report to narrow the definition of a Notorious Market. Additionally, IP Justice advocates narrowing the scope of submissions to identify direct infringers correctly and ensure Congress' intent in creating this process is met and reflected.

b. Recognize the concerns of neutral intermediaries

The USTR should recognize the Review of Notorious Markets for Counterfeiting and Piracy's original purpose, and reevaluate the successes that the process has engendered. IP Justice suggests that the USTR collaborate with third parties to become familiar with the concerns of neutral intermediaries such as Internet infrastructure providers, who

also hold intellectual property and value its protection. Those providers are often in a good position to advise on ways and means of thwarting direct infringement online without killing innovation or chilling online speech.

V. Conclusion

Notorious Markets are “online and physical markets” where large-scale intellectual property infringement takes place. The internet age does not change this definition; it only makes this definition more clear by eliciting internet platform providers’ help. The internet providers themselves are not infringers. At a time when digital commerce is more indispensable than ever, making millions of people’s lives more convenient and enjoyable, it is paramount for Congress to revisit definitions and laws clearly and accurately to enable digital eCommerce that countless Americans rely on today.

The USTR has made progress in differentiating online marketplace and actual direct infringers. IP Justice believes that IP protection will be best advanced by further clarification of the Notorious Market definition. IP Justice hopes the utility of the Notorious Market List report will be maximized by excluding neutral, third-party Internet infrastructure providers.

IP Justice appreciates the USTR’s effort and looks forward to future engagement with the USTR on this matter.

Respectfully submitted,

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October 15, 2021