

Daniel Lee

Asst. U.S. Trade Representative for Innovation & Intellectual Property
Office of the U.S. Trade Representative
600 17th Street, NW Washington, DC 20508

Subject: 2020 Special 301 Out-of-Cycle Review of Notorious Markets:
Request for Public Comments (Docket No. USTR-2020-0035)

Dear Mr. Lee:

Both as a private individual who is familiar with internet culture and how the aforementioned “notorious” marketplaces tend to operate as well as a former criminal defense practitioner with experience in federal and state court, it strikes me that it seems that it has not been mentioned so far that the very notice and commentary procedure here has become a legitimizer and an aggregator for services that, in the underground marketplace, usually lack such centralized and trustworthy aggregators. I’m familiar with the APA and see the notice and commentary process as very important in a field of law already short on judicial review and carried out by unelected officials under the executive branch, but rather, I would like to emphasize that the way criminal organizations and underground markets operate usually suffers from reliable advertising space and exposure, while this proposed rule and all that came before it provides exactly that.

In this submission, which should be considered as additional information relevant to the review itself and the appropriateness of the regulation heretofore have existed for years until this point, and not a submission of any particular market or platform. The purpose of this comment is to highlight the nature of this very organization and this regulation as a facilitator of the traffic it purportedly is attempting to enjoin.

- a) **By giving it an official seal of notoriety, the presence of this regulation effectively becomes advertising and an unwitting endorser of the services or product**

For as long as there had been states attempting to control commerce, underground markets have existed in accordance to the natural flows of supply and demand. Particularly when the control mechanism in question is prohibition, it only serves to create a more lucrative field as the vendors assume added risk and attempt to maximize profit by trading in ever more potent or more brazen efforts at dissemination. This potency issue has been long observed in other illicit markets (Thornton, 1998). Similar sort of behavior have also been observed in piracy with enforcing simply driving up cost in an opaque marketplace served by less scrupulous advertiser revenue and “pay-per-download” and referral schemes as sources of income. (Lauinger, Kirida, & Michiardi, 2012) These platforms serve as a marketplace of sorts already, but just as those sharing the content are incentivized to spread these files as widely as possible for revenue, there’s also competition between the platforms in terms of attracting users and subscribers as well as advertisers. It must be noted that these are still business operations, as earlier waves of enforcement had long since obliterated the actual free and open access aspect of the piracy field, requiring only those who are willing to trade the assumption of risk for a profit to join the marketplace. (Thomson, Mahanti, & Gong, 2018)

This creates immense competition in the marketplace as there’s a limited amount of supply but a theoretically infinite number of suppliers, as digital files are easily copied. In order to attract consistent traffic financial incentives from the marketplaces serve as some impetus, but does not explain the entirety of each platform’s popularity, and studies have shown that in spite of a supply-driven model most suppliers earn very little, because trust in the marketplaces and the opaque nature of the scene writ large makes the suppliers unable to discern which platforms are trustworthy in terms of longevity, payout, and reliability. That, however, is where the USTR comes in.

Each year the existence of such market lists are reported as news websites that aggregate tech-related news. The open nature of the submissions of course creates a frame of reference that isn’t present

when there's no formal index service, no tout that isn't a shill, so to speak, and no way of knowing truly what infrastructure is under the services. The numbers are conveniently given in most of the reports, and the more exaggerated, the more advertising it represents. Sites like Rapidgator.com are mentioned year after year and continues to rank on top of traffic rankings on services such as Alexa and Semweb and actual full-scale takedowns of piracy related sites, while real, are comparatively rare, with new sites taking their place and getting to the top of the list year after year again. At best these lists have had little to no effect for taxpayer money going to serve private industry that, because they are rarely the actual creators of the IP anyway, are also rent-seekers that provide little additional value, at worst they have actually promoted the very sites they purport to attempt to take down.

B) American law is and cannot be adequate in itself to actually serve as an effective mechanism for enforcement, rendering this regulation futile

IP laws exist in just about every country, while the days of American extraterritorial enforcement of its own laws are long relics of the imperialistic era that is best left in the dustbin of history regardless. Particular at a time when decades of American bellicosity and more recently, the president's personal ignorance of protocol and restraint have disincentivized even allied nations from cooperating to enforce laws on behalf of American companies, nevertheless countries not considered American allies such as Russia or China. Contrary to what many companies seemed to think, piracy sites overseas do get taken down, just not under American law, much as French law cannot govern the actions of American law enforcement without consent and passing constitutional muster. This is effectively both an advertising campaign for black marketeers at the taxpayer's expense, except the taxpayer is paying twice – once for the ads and once for the hapless efforts at enforcing the unenforceable, investigating the unprosecutable, bellicosity without teeth. At a time when COVID and years of trade war have decimated the American economy it seems particularly absurd for the American taxpayer to take up such

frivolous expenditures particularly when the companies in question can easily submit legally compliant requests overseas instead. Realistically, the policy cannot accomplish any of its purported goals, and only represent a waste of resources, a show of performative theater at a time when no one is in the mood.

My experiences working with those accused of being involved in “criminal organizations” , which are defined strictly for the sake of being actually able to create moral panics for political show, reinforce these patterns. Drug dealers frequently make little and are essentially stuck by virtue of regulation and punitive punishment to both continue their practice and to aggressively fight for turf. This is a milder version of that, but as it’s taxpayer funded, even more insidious. There are many regulations in the CFR that are frankly ridiculous, but this official endorsement of two rent-seeking parties with taxpayer money certainly tops the list. As you have deference from the courts to make and interpret rules in regards to such performative shows, at a time of national crisis, it should not be too much to ask to stop what amounts to fraud, waste, and abuse.

Sincerely,

Jim Zhouⁱ, J.D.
Concerned taxpayer
Las Vegas, Nevada

Bibliography

- Lauinger, T., Kirda, E., & Michiardi, P. (2012). Paying for Piracy? An Analysis of One-Click Hosters’ Controversial Reward Schemes. *Research in Attacks, Intrusions, and Defenses. RAID 2012*. . 7462. Springer.
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