



September 16, 2015

The Honorable Michael Froman
United States Trade Representative
6007 17th Street, NW
Washington, DC 20508

Dear Ambassador Froman,

2015 Special 301 Out-of-Cycle Review of Notorious Markets

Thank you for the opportunity to submit this comment to Docket Number USTR–2015–0016 regarding the 2015 Special 301 Out-of-Cycle Review of Notorious Markets.

The Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, the Electronic Frontier Foundation champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. We work to ensure that rights and freedoms are enhanced and protected as our use of technology grows.

Upon the release of the 2014 Notorious Markets List in March this year, we were surprised and disturbed to find that domain registrars were included for the first time, equating them with trademark and/or copyright infringers (“pirates and counterfeiters”, in your terminology).

We subsequently wrote an article¹ explaining in our view why their inclusion was inappropriate, damaging, and out of line with broader U.S. policy which treats domain registrars as intermediaries deserving of protection from regulation of their users' speech.

Below we summarize some of the arguments that we gave then, and that we would reiterate now, in objection to the inclusion of domain registrars in any future Notorious Markets List.

1. Registrars' Duty to Police Unlawful Content Is Exaggerated

The 2014 Notorious Markets List falsely suggests that domain registrars are obliged to take action in response to a third party's complaints about the behavior of a domain name user or the contents of a website or other service, under the terms of its accreditation agreement with ICANN. This is not the case, as ICANN itself has since made clear, writing:

¹ “Hollywood Asks Domain Registrars to Censor the Web for Intellectual Property Infringement”, available at <https://www.eff.org/deeplinks/2015/03/hollywood-asks-domain-registrars-censor-web-copyright-infringement>.

ICANN is not a global regulator of Internet content, nor should the 2013 Registry Accreditation Agreement (RAA) be interpreted in such a way as to put us in that role. . . . Though the appropriate interpretation of 2013 RAA is the subject of debate, there are clear-cut boundaries between ICANN enforcing its contracts and the enforcement of laws and regulations by the institutions mentioned earlier. A blanket rule requiring suspension of any domain name alleged to be involved in illegal activity goes beyond ICANN's remit and would inevitably put ICANN in the position of interpreting and enforcing laws regulating website content. At worst, it would put ICANN squarely in the position of censoring, or requiring others to censor, Internet content.²

The 2013 RAA requires merely that registrars receive and investigate reports of abuse of domain names from national authorities, but leaves them with discretion as to what steps, if any, are necessary and appropriate for it to take in response. For registrars to take the extreme step of canceling or suspending a domain name based on content of a website or other service referenced by that domain name is far outside their legitimacy and competence, and it is difficult to conceive of any circumstance in which that would be appropriate.

2. Any Order to Cancel or Suspend a Domain Should Go Through Legal Channels

Rather than suspending or canceling a domain name on its own initiative, the appropriate action for a registrar who receives a complaint about website content on a domain for which it is the registrar of record is to comply with any court order that it subsequently receives, that is issued from a court with jurisdiction over that registrar, requiring it to suspend, delete, or transfer the domain.

In this context, we note that the registrar explicitly called out in the 2014 Notorious Markets List, Tucows, is Canadian. Canada is hardly such a lawless or corrupt country that accessing its court system would pose any particular obstacle for an aggrieved party. There is no allegation that Tucows has failed to comply with any Canadian court orders against it.

Even if Tucows were resident within the United States, a domain registrar is not a party that bears any legal responsibility for content hosted at its customer's domain. Section 230 of the Communications Decency Act clearly establishes that Internet intermediaries are not liable for many types of content uploaded by their users.

Section 512 of the Digital Millennium Copyright Act creates a somewhat broader liability of intermediaries for copyright content outside of the safe harbor that the section creates, but a domain registrar does not host the content that is found by accessing an Internet domain name, and therefore section 512 is inapplicable to such content. A section 512 notice must, instead, be directed to the party that hosts the content.

Even in circumstances where specific statutory protections against liability do not apply, we believe that under applicable U.S. precedent, a domain name registrar will almost never be legally responsible for copyright or trademark infringement occurring within a website or service to which a domain name refers.

² "ICANN Is Not the Internet Content Police", available at <https://www.icann.org/news/blog/icann-is-not-the-internet-content-police>.

Therefore there is no justification whatsoever, even under United States law, for expecting a domain name registrar to act extra-judicially in censoring content that is referenced by a domain name for which it is the registrar of record.

3. Arbitrary Requests for Removal of Domains Could Impact U.S. Companies And Free Speech

Finally, we find it highly rash for the USTR to be calling for foreign domain name registrars to honor extra-judicial demands for the removal of domains, because it is obvious how such demands could backfire spectacularly against U.S. Internet companies, at the behest of foreign governments and special interests seeking to censor U.S. speech.

Should a precedent be established for the extra-judicial removal of domains that host allegedly trademark- or copyright-infringing content, this opens the door to demands from far and wide for the extra-judicial removal of domains hosting constitutionally protected speech from LGBT communities, nationalists, political dissidents, artists, journalists, and others.

There is good reason why U.S. law requires an exceptionally strong legal justification and a fair process for the suppression of speech. It is astonishing that the USTR would seek to undermine those protections by encouraging domain registrars to act extra-judicially in the execution of the private censorship demands of third parties.

We strongly assert the importance of protecting domain name registrars from such pressures, and we urge you to step back from the ill-advised inclusion of these important Internet intermediaries in the Notorious Markets List.

Yours faithfully,

ELECTRONIC FRONTIER FOUNDATION
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