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Daniel Lee
Assistant U.S. Trade Representative for Innovation and Intellectual Property
Office of the United States Trade Representative
600 17th St., N.W.
Washington, D.C. 20508

Re: 2023 Review of Notorious Markets for Counterfeiting and Piracy: Comment Request, 88 Fed. Reg. 58055, pp. 58055 - 58057 (August 24, 2023)

Dear Mr. Lee,

We are writing to respond to the above-referenced Federal Register Notice inviting comments on online and physical notorious markets that exist outside the United States. As the U.S. association that represents companies that publish interactive games for video game consoles, handheld devices, personal computers, and the Internet, the Entertainment Software Association (ESA) regards the review of notorious markets as an important opportunity to shed light on markets that facilitate mass infringement or counterfeiting of industry products and services and that remain either sheltered from, or impervious to, the deterrent effects of enforcement actions.

Notorious Online Markets

Hyperlinking Websites (“Linking Sites” or “Link Sites”): These sites provide hyperlinks (“links”) to infringing copies of complete versions of copyright protected video games stored on third-party hosting sites known as “cyberlockers” (described below). The links are typically organized by content category (*i.e.*, “Games” sections) and/or are supported by a search functionality that enables visitors to find content. These sites typically generate revenue from user donations and/or online advertisements. The following link sites are notable due to their heavy traffic, high volume of infringing video game file links that are indexed, and non-responsiveness to rights holder notices.¹

nsw2u.com (Global Rank: 7,959). This website indexes, manages, and organizes links to unauthorized copies of ESA member copyright protected content hosted on third-party platforms. In September 2023, the website offered over 10,000 posts with links to game downloads for the Nintendo Switch, including the most recent ESA member video game releases. Many high-profile releases are also made available on the site before their official release. To counter anti-piracy enforcement actions, the website utilizes multiple alternative domains including .com and .org. The

¹ The figures that follow are based upon research conducted in September 2023 in anticipation of this filing.

website also links to game-2u.com, ps4pkg.com, and BigNGame.com, which makes available pirate games for various other gaming platforms. The website does not respond to ESA take down notices and uses a U.S.-based content delivery network (“CDN”)² in addition to privacy registration services to conceal the identity of its owners and administrators.

Game3rb.com (Global Rank: 15,773). This site is dedicated entirely to the distribution of pirated copies of video games. In August 2023, nearly 1300 links to infringing copies of ESA member content were available on the site. This site also utilizes the same U.S.-based CDN as above-mentioned sites.

Hosting Websites (“Cyberlockers”): Cyberlockers host the infringing content on cloud storage platforms and are accessible through links indexed on linking sites. Users visit linking sites to find content on cyberlockers because cyberlockers generally do not support native search functionality. The following sites are notable for the substantial volume of infringing game files that they host and the platforms’ limited response rates to notices of infringement.

1fichier.com (Global Rank: 1.674). This cyberlocker platform is a piracy haven for uploaders to disseminate unauthorized copies of the latest video game titles. 1fichier hosted over 2,130 unauthorized copies of copyright protected ESA member video game titles (as of August 2023) and has a 23.85% response rate to ESA’s take down notices. 1fichier’s extremely low compliance rate for the removal of infringing content attracts more unauthorized uploaders to the platform since the content remains active on the platform for longer periods of time. Linking websites that index and manage the links to content hosted on 1fichier also benefit from the platform’s low compliance rate as these websites derive greater advertising revenue from users clicking on the links to pirate content hosted on 1fichier.

The French based company operating the 1fichier.com website has been sentenced by both civil and criminal courts³ in France in two separate cases in 2021 for violations of intellectual property rights. The site was held civilly liable for refusing to remove unauthorized copies of games on its platform and ordered to pay approximately USD 1.1 million in compensation. In April 2023, the Paris Court of Appeals confirmed that 1fichier.com is liable for failing to remove or block access to unauthorized copies of games stored on the platform. The Court ordered the company to pay a total sum of EUR 442,750 in compensation and EUR 25,000 in legal costs. The decision has been appealed to the Court of Cassation, France’s highest Court. 1fichier.com was also convicted in criminal court for multiple counts of copyright infringement and fined approximately USD 1.5 million. Appeal on the criminal conviction is still pending, with a decision to be expected soon.

² A content delivery network (also known as a content distribution network) (“CDN”) is a service that provides a system of proxy servers and data centers, often global in scope, for resiliency services and DDOS protection for websites. CDNs enter into service agreements with websites to effectively ensure that the content of those sites is always available and that site visitors enjoy an optimal user experience. Among other functions, CDNs cache copies of web pages to ensure the availability of site content in the event of web server malfunction. While CDNs are used by legitimate services, infringers may make specific use of these services both to hide true hosting information (*i.e.*, public registries reference only the CDN, and not the actual host cached by the CDN) and to speed the transmission of large files, such as infringing copies of video games. Approximately half of the websites referenced in this document have a business relationship with a single U.S.-based CDN. Therefore, it is important that all U.S.-based CDNs join ISPs, search engines, payment processors, and advertising services that have successfully collaborated with rights holders in recent years to develop reasonable, voluntary measures to prevent sites focused on copyright infringement from using their services.

³ The civil case can be found here: <https://www.courdecassation.fr/en/decision/6438f31fa942a604f5e9375b>. The criminal case is not publicly available.

megaup.net (Global Rank: 5,746). This cyberlocker platform is hosted in Russia, and its domain registration details are privacy protected since August 2015. Megaup keeps growing in the video game piracy community as a reliable host of infringing files and, therefore, its share in the cyberlocker market has increased. In fact, there was a 135% increase in successful downloads of one ESA member company's titles from 2022 to 2023. Megaup hosts hundreds of unauthorized copies of copyright protected video game titles and only has a 33% response rate to ESA's takedown notices despite receiving numerous removal notices. There is also an extremely long time that passes before a small percentage of the notified links become inactive. Linking websites that index and manage the links to content hosted on Megaup also benefit from the platform's low compliance rate as these websites derive more traffic, and thus more advertising revenue, due to the durability of the Megaup links.

Torrent Indexing Websites: Torrent indexing sites provide links to torrent files that enable users to join peer-to-peer "swarms" to share infringing content, including illegal copies of video game software files. In contrast to the linking site/cyberlocker model, torrent indexing sites do not link to content hosted on a single server, but rather to torrent files that facilitate downloads from multiple peers in infringing swarms using the BitTorrent protocol. The BitTorrent protocol is one of the most common methods used to copy and distribute infringing video game content. The following sites are among the most popular sources for infringing copies of ESA member video games and are not responsive to notices.

1337x.to (Global Rank: 413) This notorious and very popular torrent indexing site that launched in 2014 impacts multiple content industries, including the video game industry. As of August 2023, this website features over 3,000 URLs that lead to torrents for ESA member video game titles. The site currently utilizes a U.S.-based CDN to conceal the identity of its owners and administrators.

Solidtorrents.to (Global Rank: 11,645) The site was launched in 2018 and impacts multiple content industries. In August 2023 alone, this torrent site had approximately 3,300 infringing URLs leading to illegal copies of ESA member titles. This site also utilizes the U.S.-based CDN mentioned above.

Unauthorized Digital Goods

Unauthorized sales of in-game digital items have become a growing concern for the video game industry. Closely related to these in-game items are software products (collectively known as "cheat software") that enable the unfair and rapid collection and aggregation of virtual goods, such as bots, hacks, and "cheats", or which otherwise tilt the scales in favor of one player over another. The rise of Unauthorized Digital Goods (UDGs) and cheat software have a negative impact on video game companies and consumers in the following ways: (1) sales of digitally-delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; (2) the unchecked sales of cheat software can threaten the integrity of game play, alienating and frustrating legitimate players; (3) video game publishers and developers are forced into a perpetual virtual "arms race" to update their products and security technology before the sellers can update theirs; and (4) sellers of unauthorized digital goods and cheat software divert revenue away from video game developers and publishers.

Cheats: The sites listed below provide "cheats", which (using software code) are ways to modify the game in order to allow an advantage for the player. Examples of cheats include: aimbots (which help a player aim in a first-person action game); trainers (which allow a player to turn on or off features to make the game

easier or more difficult); and one-button maneuvers that allow a player to complete a task in-game with a single click that normally would take extended gameplay (like “Instant Build,” “Always Run”). Cheats can infringe ESA member IP in instances where the cheat software code copies the underlying code of the game software. In addition, cheat software is specifically designed to defeat security measures meant to prevent unfair player advantages within the game. The sites referenced below generate revenue through sales transactions (where the site itself is the seller), as well as through advertisements. The following sites are notable due to their global popularity and the number of cheats available to purchase.

unknowncheats.me (Global Rank: 27,800) This site has allowed a self-reported 4.1 million users to submit, develop, and download cheats to this forum-based site since 2000. The site offers cheats and tutorials for 100+ titles as well as information and links to anti-cheat software and how to circumvent their protocols. It does not charge for cheats, instead relying on advertisements to generate revenue. All cheats are created by the community and the site encourages users to develop and distribute these illegal goods.

mpgh.net (Global Rank: 73,100). According to mpgh.net, the site offers “several hundred thousand” free cheats to over 6 million users, as well as tutorials and a marketplace where users can buy and sell cheats, accounts, and in-game items. The site generates revenue through advertisements and the offering of premium accounts that bypasses restrictions found on free accounts, thereby making them attractive to sellers.

Unauthorized Online Marketplaces: These sites provide a platform for users to list and sell (depending on the site’s focus) unauthorized digital items including in-game currency, in-game items, game accounts, and the unlicensed sale of potentially fraudulent game keys, which can provide access to features within a game or to the game itself. Each site organizes the listings by game and then usually by type of item. While some sites prefer an online market aesthetic, other sites use a forum-style format to keep listings organized. Users can set their own price for the product they are selling, and many designate power sellers with based on user ratings and user feedback. The owners of these sites generate revenue through transaction fees, advertisements, or the sale of their own currency, which users can then use to boost their profile. The following sites are notable due to their global popularity and the number of games available.

playerauctions.com (Global Rank: 34,300). This site provides a marketplace for users to sell in-game currency, digital items, digital cosmetics (skins), accounts, CD keys, and boosting⁴ for over 200 video game titles among over 2 million registered traders. The site charges transaction fees and purports to offer protection against fraudulent purchases. According to the website statistics firm, SemRush, playerauctions.com has an estimated 6.6 million visits per month.

G2G.com (Global Rank: 24,800). Over 2.7 million members can access listings that include in-game items, virtual currency, boosting, and digital accounts offered by other users of the site. The site charges a fee from 4.99% to 9.99% per successful transaction. According to Similar Web, the site had 8.7million visits in its most recent month.

Additional Trends

⁴ “Boosting” is a form of cheating whereby lower-skilled players will grant higher skilled players access to their accounts for the purpose of increasing their rank or obtaining difficult-to-acquire digital items.

As the video game industry continues to grow and develop by embracing new and emerging technologies to enhance player experiences, online video game piracy also continues to adapt tactics and methods for the persistent spread of illegal video game content. Within these additional trends that have a negative impact on the industry, there has been a significant rise in three main areas in the video game ecosystem: 1.) the use of malware in illegal game downloads; 2.) the prevalence of cryptocurrency for illicit game sharing; and 3.) scene release groups that use methods to allow for more widespread, faster illegal game downloads.

Malware

A growing trend in the online video game piracy space is the growing abundance of malicious software (“malware”), that is delivered through digital ads (“adware”). Distributors of pirated video games often lace their downloads with these various forms of malware in order to exploit users downloading ostensibly “free” games.

The malware seen in these games vary widely, but the most prevalent include 1.) cryptominers, which will use power from the device system to mine cryptocurrency for the malware owner, and 2.) adware, which exposes the game user to obtrusive pop-up adds after downloading the game.

Threat actors continue to install malware on mobile apps that are designed to look like innocuous gaming apps and are often designed to appeal to children. Major mobile app marketplace owners, such as Google and Apple, as well as independent security researchers, spend considerable effort to prevent these sorts of apps from appearing in their marketplaces, and are largely successful. However, downloads from less legitimate sites offering free, often pirated, mobile apps run considerable risk of containing malware.

Cryptocurrency

Another growing trend is the use of cryptocurrency in selling and purchasing illegal video games and video game related accessories. Cryptocurrency is a digital currency in which transactions are verified and records maintained by a decentralized financial system rather than by a centralized authority, such as a standard bank. With the growth of this oftentimes nonrestricted payment system, bad actors are using cryptocurrency as a way of purchasing or selling illicit products without using regulated financial institutions.

Many of the markets listed in this report accept cryptocurrency payments, though it is unclear what percentage of their earnings are from this form of payment.

Scene Release Groups

Another emerging threat to the online video game industry – and a critical piece of the video game piracy ecosystem – is colloquially referred to as the “warez scene” or “scene release groups.” Scene release groups facilitate commercial scale piracy by circumventing technological protection measures and “packaging” illegal downloads to be more easily accessed by the general public.

Especially critical to this illicit supply chain are highly skilled hackers – also known as “crackers” and “repackers.” The “crackers” are the individuals or groups who are responsible for removing the digital rights management (“DRM”) software that video game developers use to prevent piracy. This “cracking”

of these developers' DRM software is in direct violation of Section 1201 of the Digital Millennium Copyright Act (DMCA). These groups will then upload their cracks to online torrent trackers, which will then filter down to the general public and to individuals known as "repackers." These individuals will take pirated video game files and significantly compress them, resulting in smaller file sizes to be downloaded. These "repacked" files are very popular with individuals with slower internet speeds and/or data limits, as they will download faster and utilize less bandwidth. Information on the operations of these groups typically is found on piracy-focused websites and forums, such as cs.rin.ru.

Notorious Physical Markets⁵

Mexico⁶

In Mexico, hard goods piracy continues at large open-air markets and shopping complexes that remain the most significant sources of infringing video game-related products. Lately, consoles that resemble arcade controllers are pre-loaded with pirated copies of video games have become more common. It should be noted that a large volume of importations of counterfeit consoles with preloaded, illegal reproductions of video games has been identified in the ports of Manzanillo and Lazaro Cárdenas. These consoles are manufactured in and exported from China, and are sold in illegal markets, as well as in mainstream online marketplaces. Also, illegal circumvention devices remain of great concern across a range of industries, including the video game industry, and there persists a significant lack of enforcement to protect intellectual property rights in these locations. As infringing products are often stored in small storage lockers and other physical premises within these markets, ESA supports the use of enforcement measures, such as asset forfeiture, that target not only vendors, but also the owners of these storage locations who profit from the sale of counterfeit goods.

Plaza Meave (Mexico City). Plaza Meave is located in the historic center of Mexico City and is considered the main marketplace for video games and related items, both legal and illegal. In its three floors and more than 250 vendors, this market receives an approximate average of 70,000 visitors weekly. Despite the large number of vendors at this location, the number of stores selling

⁵ In light of changing trends in the video game industry, including increased reliance on digital distribution models as well as the proliferation of online infringement more generally, physical markets are becoming less of an enforcement priority for ESA's membership.

⁶ ESA notes that a complicating factor in combatting mass infringement in Mexico is the cumbersome requirement that each copy of an infringing game disc be accompanied in prosecution files by a copy of a legitimate original for comparative examination by *peritos* (experts). Under this system, when the comparison involves multiple copies of the same infringing video game, rights holders must submit an equal number of legitimate video game copies for the *peritos* to compare to the infringing copies. ESA encourages Mexican IP enforcement authorities to create a reference library of legitimate originals so that multiple copies of the same infringing video game can be compared to a single legitimate copy. Additionally, we recommend requesting that the prosecutors (*Ministerios Públicos*) and the *peritos* be able to conduct inspections of the online records of the U.S. Copyright Office (available at www.copyright.gov) in order to validate that video games are duly registered, according to existing case law, and that judges accord such inspections with the fullest probative weight permitted under Mexican procedural laws. Currently, prosecutors and judges require rights holders to submit certified copies of U.S. copyright registrations ("Additional Certificate") and have them apostilled by the U.S. State Department. The time and expense of obtaining Additional Certificates from the U.S. Copyright Office in person and then having the State Department apostille the documents could be easily alleviated by allowing the *peritos* to inspect and verify the online copyright registration records for video games maintained by the U.S. Copyright Office.

illegal video game circumvention and modification devices has decreased significantly since last year due to a number of recent police actions at this marketplace, targeting stores with illegal and counterfeit goods. In spite of this positive development, the four remaining stores selling illegal video game-related products are also now offering illegal “arcade boards” that are preloaded with thousands of illegal video game titles that span across ESA membership.

Tepito (Mexico City). Tepito is an open-air market, which is 80 square blocks in size in the middle of Mexico City. Despite the decrease in the sale of infringing physical goods due to the rise in electronic downloads, the Florida Street section in Tepito continues to be the main point of active trafficking of pirated copies of video games, modified consoles (*i.e.*, consoles with circumvention devices pre-installed), and circumvention devices. Tepito remains a dangerous spot in Mexico City, hindering enforcement efforts in the area. This location also now offers illegal arcade-style game boards that contain catalogs of more than 30,000 digital games, both Japanese and American versions, at a cost ranging from USD 150.00 to USD 225.00 depending on the chosen design of the boards.

Mercado San Juan de Dios (Guadalajara). Mercado San Juan de Dios is the largest marketplace in Latin America, and its notoriety attracts a significant number of visitors, domestic and foreign alike. In 2012, the San Juan de Dios market entered the list of the biggest piracy markets in the world, and despite the loss of some foot traffic related to the COVID-19 pandemic, the market has retained its position to date. There is a large section of the market where pirated copies of newly released video games and films are offered, comprising more than one-third of this market’s approximately 3,000 vendors.

Frikiplaza (Mexico City). Dedicated to specialized pop-culture paraphernalia, Frikiplaza consists of various floors stocked with pirated video games and other legitimate and illegitimate collectible items. It is well-known as a location where vendors will openly offer to “hack” video game consoles through the installation of circumvention software and video game console modification software. In addition, the selling of arcade and retro-inspired consoles preloaded with pirated copies of video games has recently become a growing problem at this market. This market continues to receive an approximate average of 20,000 visitors weekly.

La Cuchilla (Puebla). La Cuchilla, which is approximately 10 square blocks, contains an average of 120 warehouses and more than 150 stores. This is the biggest market for infringing goods in southeastern Mexico and, along with the Tepito market, is one of the largest centers where counterfeited goods are manufactured. Pirated copies of video games and circumvention devices are readily available at this market.

La Pulga Río (Monterrey). Located in downtown Monterrey in northeast Mexico, La Pulga Rio is the biggest market in the area with pirated merchandise, including video games and services, records, footwear, and clothing can be found. This marketplace has also gained online presence with its own website and a Facebook page, both of which offer deliveries of counterfeit and pirated goods.

Brazil

In Brazil, the purchase capacity impacted by the COVID-19 pandemic still affects the economy and keeps the workers and consumers into the informal workforce. These economic conditions

impacted the video game industry, causing an increase in illegal products and services at physical shops.

Galeria Pagé Centro (São Paulo). Also, known as “Galeria Pagé 25,” this multi-story shopping complex, located in the center of São Paulo, had a significant decrease in its monthly visitors so far in 2023 versus over a million monthly visitors in 2022, due in part to the stronger presence of online marketplaces for Chinese and other foreign products as well as growing competition with other shopping areas throughout the city. This shopping center focuses on offering electronic goods, toys, and fashion accessories, including video game products. Of the 170 vendors in the complex, approximately 40 shops offer electronics including video game-related products. Approximately 12 of those shops are offering infringing video game accessories and game titles, representing a decrease compared to 2022 with 20 identified booths. The average price for circumvention devices ranges from USD 8.00 to USD 100.00 and USD 300 for modified consoles.

Galeria Pagé Brás (São Paulo). This shopping complex rebuilt and opened in March 2022, in the central neighborhood of Brás, and has grown in popularity given the modernized facilities offered to the public and more spacious stores in four floors. It has grown from its initial 388 shops to a current 600 shops in the complex with 77 shops focused on electronics (from 28 in the past year), including game hardware, with another ten solely dedicated to video game products. A majority of those electronic products’ shop offer some version of retro game consoles pre-loaded with pirated game titles. This market has a strong online presence and a variety of marketing campaigns, making it a popular shopping destination.

Santa Efigênia (São Paulo). Covering eight blocks in downtown São Paulo, this popular market offers a wide variety of electronic goods typically at lower prices than regular shops. On the main street of Santa Efigenia, there are approximately 350 shops and outlets, with another 500 shops in the surrounding areas and galleries. Of these, it is estimated that over 100 shops are dedicated solely to offering video game-related products, which increased from 76 shops in 2022. These shops continue to offer infringing video game titles, game circumvention devices, console modification services, and modified video game consoles, often at lower prices than legitimate shops. Almost all shops/booths offering original (but) smuggled consoles also have retro games and modified devices with thousands of titles in one console. This is the most prolific video game illegal market in the country, with a high concentration of shops, latest technological piracy trends, and title releases.

Rua Uruguaiana (Rio de Janeiro). Remaining as one of the most infamous outlet areas to buy counterfeit goods in downtown Rio de Janeiro, Rua Uruguaiana has over 151 registered stores and booths in four warehouse buildings and many other unregistered street vendors. This marketplace has approximately 30 vendors offering video game products and services and includes infringing video games, game circumvention devices, and modified consoles. They have a low online footprint for e-commerce or marketing purposes.

Oiapoque Outlet (Belo Horizonte, state of Minas Gerais). Also known as ShoppingOi, this market is in downtown Belo Horizonte, with three floors of outlet shops dedicated to a wide variety of products, mostly illegal goods. Among the 900 active shops, 70 shops are actively selling video game-related products, including 15 shops selling illegal consoles pre-loaded with pirated video games with prices ranging from USD 13.00 to USD 40.00 on retro consoles with preloaded titles.

ESA would like to underscore our appreciation to the U.S. government officials who: (1) drive and administer the review of notorious markets; (2) implement and coordinate the use of policy tools that enhance intellectual property protection and enforcement domestically and overseas; and (3) encourage foreign government officials to investigate reports of piracy and counterfeiting and bring relevant enforcement actions. The resulting Notorious Markets List provides important insights that allow national and local policymakers, as well as law enforcement officials, in other countries to evaluate and fairly demand accountability from these markets and the services that support them, including through appropriate enforcement actions.

Should the Office of the United States Trade Representative have any questions or comments concerning ESA's response, please contact Jason Jeffreys at (202) 903-2353 or JJeffreys@theesa.com.

Sincerely,

A handwritten signature in black ink that reads "Jason Jeffreys". The signature is written in a cursive, flowing style.

Jason Jeffreys
Senior Counsel, Intellectual Property Protection
and Security