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# Notorious Markets and Internet Infrastructure Providers

The Office of the United States Trade Representative releases an annual Notorious Markets List which highlights online and physical markets that engage in and facilitate copyright piracy and trademark counterfeiting. We would like to specify how this term relates to the Internet Infrastructure industry that supports a digital economy that employs 5.9 million Americans and adds \$1.2 trillion to the economy.

## *What are Internet infrastructure providers and can they be notorious markets?*

Internet Infrastructure providers (including members of the Internet Infrastructure Coalition or “i2Coalition”) are not publishers, content creators, nor users of generated content. These companies are intermediaries or “interactive computer services” within the meaning of U.S. law. As interactive computer services, these companies process millions of transactions a day, all at the direction of their users. They are not, in any sense “markets” or “marketplaces”.

Notorious markets should not be confused with neutral intermediaries such as Internet Infrastructure providers.

For example, DNS services route viewers through a globally distributed network. They are the pathway between a series of numbers and signals and the ‘web’ as the average consumer would describe. The nature of these kinds of businesses is that they have limited access to content information. There are intermediaries between various segments of the Internet as a whole. They are not markets. Yet, these kinds of companies may be erroneously listed in the USTR notorious markets report.

Again, intermediaries are not notorious markets.

## *What is a “notorious market” and should we adjust our thinking about them?*

Generally, notorious markets are defined as “websites and physical markets” where large-scale intellectual property infringement takes place. A legal definition meant to illustrate Congressional intent isn’t present anywhere; it’s



The i2Coalition is the voice for businesses that build the Internet. This includes cloud providers, data centers, domain registrars, registries, and other foundational Internet enterprises.

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<sup>1</sup> See [https://www.trade.gov/mas/ian/tradedisputes-enforcement/tg\\_ian\\_002102.asp](https://www.trade.gov/mas/ian/tradedisputes-enforcement/tg_ian_002102.asp)

<sup>2</sup> See <https://www.ustr.gov/issue-areas/intellectual-property/special301>

<sup>3</sup> See <https://www.archives.gov/files/federal-register/executive-orders/pdf/12901.pdf> and its 1995 update as references to but not complete updates to how we think of markets and the 2018 updated bill with no definitional changes, <http://legcounsel.house.gov/Comps/93-618.pdf> (Last visited 8/29/2019).

nowhere in the statutory language of the 1974 Trade Act, the explanations of Special 301 proceedings on the International Trade Administration (ITA) website,<sup>1</sup> or on the U.S. Trade Representatives (USTR) website<sup>2</sup>. Additionally, the notorious markets definitions have not been updated since the 1990's<sup>3</sup> when the main focus was copyright infringement and new technologies like Napster. Since then, technology and what constitutes copyright infringement has changed dramatically.

While recent updates to the law have noted new ways to do enforcement, what exactly needs to be enforced is not evident to all stakeholders. It is in this lack of clarity where many who submit to the notorious markets either by mistake or intentionally mischaracterize the concept of notorious markets for the purposes of identifying intellectual property infringement. Helping to clear up the current notion of a notorious market and how to effectively enforce the law is neither straightforward nor easy work. It takes participation from a variety of stakeholders.

***The current Special 301 Report can be improved with wider Internet community participation.***

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The USTR Special 301 Report is an important annual assessment of intellectual property protections worldwide.

A notable trend in current submissions has been the use of the Special 301 process by some groups to address issues that are better suited for resolution before the copyright, patent office or district courts. Since at least 2012, organizations such as the Alliance for Safe Online Pharmacies and the International Intellectual Property Alliance have presented submissions suggesting IP and infringement protections that would be harmful to the Internet infrastructure and therefore the Internet itself. Rather than go after bad actors, these solutions endanger the wider economic impact the Internet has to U.S. business and innovators who rely upon it.

We believe that many of the current submissions - like the example described above - vilify specific technologies, not the marketplaces themselves. We believe that the spirit and letter of the relevant IP laws are better upheld by going after true notorious markets, not throwing the baby out with the bathwater by going after Internet infrastructure providers.

As the voice of the those providing foundational internet technologies, we have stood up for the Internet infrastructure industry on this issue through written submissions and advocacy before the USTR.

