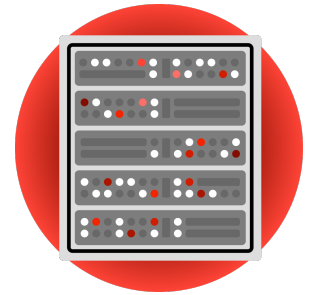


October 21st, 2016

Christine Peterson
Director for Intellectual Property and Innovation
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, D.C. 20508



Re: Request for public comment on the 2016 Special 301 Out of Cycle Review of Notorious Markets (Docket No. USTR-2016-2013).

Dear Ms. Peterson:

The Internet Infrastructure Coalition (i2Coalition) respectfully submits the following comments regarding the 2016 Special 301 Out of Cycle Review of Notorious Markets (Docket No. USTR-2016-2013), as requested by the U.S. Trade Representative (USTR) on August 25, 2016. The Special 301 Report, as well as the Notorious Markets List, was created to identify specific markets facilitating IP and copyright infringement. We strongly believe this position is consistent with Congress' intent in developing the laws which mandated the creation of the Report and List (Trade Act of 1974, Omnibus Trade and Competitiveness Act of 1988, Uruguay Round Agreements Act, and Trade Facilitation and Trade Enforcement Act of 2015).

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Most of the submissions honor Congress' intent. However, we have noticed a disturbing trend in submissions: using the Special 301 process to attempt to restrict technology innovation. Certain submissions favor an approach to intellectual property and infringement protections that would be harmful to the Internet infrastructure marketplace, and therefore to the Internet itself, as well as the global U.S. and global economies.

Contrary to the spirit and letter of the relevant laws, we believe that many of the current submissions vilify specific technologies, not the marketplaces themselves. This is contrary to the Special 301 process. Technologies themselves cannot be bad actors. Further, a number of submissions characterize technologies and those using the technologies using unnecessarily inflammatory language. Many of the companies in question make strenuous good-faith efforts to keep illegal activity off of their platforms. However, because of the natures of the technologies involved, their ability to do so is extremely limited.

The use of terms like “hides behind” or “creating obstacles to enforcement” in reference to the legitimate use of technology is inappropriate.¹ These statements clearly demonstrate a fundamental misunderstanding on the part of the organizations making those statements of the technology involved. The services identified are domain name services (DNS), which by definition translate domain names into IP addresses. DNS services help improve website efficiency, security, reliability, and analytics by routing website viewers through a globally distributed network. These services protect many millions of legitimate websites from bad actors. The use of the Special 301 process to target their technology, or use of hyperbolic language to describe them distracts from legitimate efforts to root out infringement.

Other submissions reflect an erroneous interpretation of the formal obligations of domain name registrars under the Registrar Accreditation Agreement (RAA). These interpretations have been repeatedly determined to be incorrect by both of the actual parties to the RAA, the registrars themselves, and the Internet Corporation for Assigned Names and Numbers (ICANN). In spite of these determinations, a number of submissions continue to argue to attempt to create implied third-party rights under the RAA.

Both the vilification of technology, and misconstruing of the RAA have one goal in common: forcing Internet infrastructure companies to act as intermediaries in intellectual property disputes. This is not the answer to intellectual property infringement, is not the purpose of the Special 301 process, and proposals to expand the use of these companies as intermediaries are misguided.

Many of the entities suggesting that the position of intellectual property owners be given special consideration by infrastructure providers have a vested interest in a particular interpretation of IP law, and IP claims are rarely so simple that intellectual property law can be applied in an automatic or easily systematized way. Asking for the suspension of the role of the judiciary in this process will chill free speech, place the interests of those who claim ownership of intellectual property ahead of those who may have legitimate disputes with the claimants, and impose costs on companies with few resources

¹ See RIAA 2016 Notorious Markets Submission and MPAA Notorious Markets 2016 Final

to resolve these disputes.

The simple fact is that most Internet infrastructure companies, such as registries and registrars, cannot easily recognize problematic or criminal behavior given their limited access to relevant information. These scenarios also put free speech at risk and drive up legal costs raising the bar for who can serve as an intermediary and who cannot. This creates a high cost of entry for a dynamic industry that currently has low barriers to entry. Instead of forcing Internet infrastructure providers to play a role for which they are clearly ill-equipped, infringement should be dealt with at the content level, not the infrastructure level

The approaches suggested by those who have used the Special 301 process to identify technology rather than markets leads to the mass website takedowns (also referred to as “cooperative take downs”) that significantly disrupt the marketplace. Expanding these systems will only exacerbate such problems. To date, there have been many examples of websites being taken down for erroneous or faulty reasons, with massive implications for free speech and the kind of free and open competition that drives innovation and growth.

The mass takedowns of dozens of websites in late 2010—including legitimate content sites like torrent-finder.com, OnSmash.com, Dajaz1.com, RapGodFathers.com, and rmx4u.com—are excellent examples of the flaws in a focus on intermediaries as a method of addressing allegations of infringement. The difficulties each of these entities had in securing their assets as a result of these flawed take downs, as well as the kind of damage they caused their small businesses should raise a red flag on the suggestions made by entities who seek mass takedowns.² Even in cases where mass takedowns do not occur, the landscape is littered with small entrepreneurs whose businesses are shattered by “accidental” takedowns.³ The Special 301 process rightly focuses on individual markets. Suggestions to employ mass takedowns and domain name suspensions ignore both the basis for this process, and the rubble that those processes have left in their

² See, ASOP Global Comments (USTR-2016-2013)

³ See, e.g. <https://www.techdirt.com/articles/20160118/07513633369/hollywood-helps-show-why-dmca-takedowns-are-dangerous-taking-down-links-to-mpaa-search-engine.shtml>; <http://motherboard.vice.com/read/the-mpaa-is-trying-and-failing-to-take-down-an-entire-subreddit>

wake.

Undermining the Internet infrastructure marketplace is not good for any of the stakeholders involved. The Internet infrastructure industry generates more than \$100 billion in annual revenue and is growing at a rate of nearly 20% per year.⁴ Creating regulatory and legal hurdles to the industry's progress will not only negatively impact the architecture and viability of the global Internet, it will also impact the overall economy, which is dependent on the continued growth of the Internet infrastructure industry. Maintaining a strong and growing Internet infrastructure is vital to creating an environment of innovation, both globally and domestically.

Founded in 2012 by a diverse group of Internet infrastructure companies, the i2Coalition supports and represents the organizations that build and maintain the infrastructure of the global Internet. Today, the i2Coalition is the leading voice for hosting companies, data centers, registrars and registries, software services providers, and related technology firms. We appreciate the opportunity to present these comments regarding notorious markets outside the United States.

Sincerely,

David Snead
Board and Policy Working Group Chair
Internet Infrastructure Coalition

⁴ See <http://www.gartner.com/newsroom/id/2352816>