

Before the
Office of the United States Trade Representative
Washington, DC

In re

2015 Special 301 Out-of-Cycle Review of
Notorious Markets: Request for Public
Comments

Docket No. USTR-2015-0016

**REBUTTAL COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the request for comments issued by the Office of the United States Trade Representative (USTR) and published in the Federal Register at 80 Fed. Reg. 54,651 (Sept. 10, 2015), the Computer & Communications Industry Association (CCIA)¹ submits the following rebuttal comments for consideration as the USTR composes its 2015 Out-of-Cycle Review of Notorious Markets.

CCIA is deeply concerned with comments² requesting that domain registrars be branded as “notorious markets” and included on USTR’s list of notorious markets, following the 2014 list’s discussion of domain registrars, including Canadian registrar Tucows.³ Domain registrars are not notorious markets. As EFF’s comments explained,⁴ domain registrars are intermediaries that are protected by U.S. law that limits their liability, codified in 17 U.S.C. § 512 and 47 U.S.C. § 230. These two laws form the foundation of the thriving U.S. Internet economy.

¹ CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. CCIA members employ more than 600,000 workers and generate annual revenues in excess of \$465 billion. A list of CCIA members is available at <https://www.cciainet.org/members>.

² Motion Picture Association of America, Inc. (MPAA) Comments, USTR-2015-0016-0007, at 11-12; Alliance for Safe Online Pharmacies (ASOP Global) Comments, USTR-2015-0016-0004, at 1-3; Recording Industry Association of America (RIAA) Comments, USTR-2015-0016-0015, at 2; International Intellectual Property Alliance (IIPA) Comments, USTR-2015-0016-0006, at 2; Association of American Publishers (AAP) Comments, USTR-2015-0016-0005, at 2.

³ United States Trade Representative, *2014 Out-of-Cycle Review of Notorious Markets* (Mar. 2015), at 10-12, 16.

⁴ Electronic Frontier Foundation (EFF) Comments, USTR-2015-0016-0002, at 2-3.

Congress granted online intermediaries broad immunity from liability for all claims arising from user actions except federal criminal and intellectual property infringement claims under Section 230 of the Communications Decency Act.⁵ Congress also restricted the remedies for copyright infringement available against providers of online services, allocating mutual burdens and benefits to rightsholders and online service providers, under Section 512 of the Digital Millennium Copyright Act.⁶ Despite consistently unambiguous interpretation of U.S. intermediary liability law, certain rightsholder constituencies have increasingly sought to shift more of the burden of intellectual property enforcement to Internet service providers and other online intermediaries. Not only is this counter to what Congress intended when drafting Section 230 and Section 512,⁷ but Congress recently resoundingly rejected this tactic when it abandoned the Stop Online Piracy Act (SOPA) and PROTECT IP Act (PIPA).

CCIA cautions against heeding ongoing calls for infrastructure regulation as a content protection strategy. Such calls are attempts to revive SOPA and PIPA. Proposals to interfere with crucial Internet infrastructure like the domain name system (DNS) were rejected along with SOPA and PIPA, but these poorly-conceived suggestions and attempts to obtain site-blocking

⁵ See 47 U.S.C. §§ 230(c)(1); (e)(1)-(2). See also, e.g., *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008), cert. denied, 555 U.S. 1031 (2008) (citing 47 U.S.C. § 230(c)(1)) (“Congress provided broad immunity under the CDA to Web-based service providers for all claims stemming from their publication of information created by third parties.”).

⁶ See 17 U.S.C. §§ 512(a)-(d). See also, e.g., *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007) (The task of “identifying the potentially infringing material and adequately documenting infringement” falls “squarely on the owners of copyright.”).

⁷ Section 230 explicitly states that “[i]t is the policy of the United States” not only “to promote the continued development of the Internet and other interactive computer services and other interactive media,” 47 U.S.C. § 230(b)(1), but also “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation,” § 230(b)(2). And in enacting Section 512, Congress was “loath to permit the specter of liability to chill innovation that could also serve substantial socially beneficial functions,” *UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F.3d 1006, 1014 (9th Cir. 2013), and therefore adopted limitations on secondary liability for copyright infringement in order to “ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand,” S. REP. NO. 105-190, at 20 (1998), and to provide “greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities,” *id.* at 8.

authority continue to surface in other venues and with other stakeholders.⁸ USTR is one of the policymakers increasingly hearing these pleas, as evidenced by this round of comments.

USTR's inclusion of domain registrars in the 2014 notorious markets list at the request of rightsholders relies on a misinterpretation of the requirements of the Registrar Accreditation Agreement (RAA) that governs the relationship between ICANN and registrars. The RAA does not mandate any specific action that registrars must take when notified of alleged abuse or illegal activity.⁹ Although some rightsholders have argued that ICANN should deputize registrars as copyright enforcement agents,¹⁰ USTR should not be giving credence, either directly or implicitly, to these misinterpretations of the RAA and the proper role of registrars. Interpretation of private contractual agreements such as the RAA is not primarily a trade issue, and USTR should not seek to substitute its judgment for ICANN's own consideration of these issues.¹¹

CCIA is also concerned by comments targeting online services that provide content delivery and routing services for other websites.¹² There are countless lawful reasons for the use of such services, ranging from site performance and reliability to anonymity. For example, users might want to avoid detection of their IP address to mask their location and protect their privacy, in order to enable online expression including political dissent, activism, and journalism.¹³

⁸ Ali Sternburg, *Why is the Media Talking About SOPA Again: An Explainer*, DISRUPTIVE COMPETITION PROJECT, Aug. 19, 2015, <http://www.project-disco.org/intellectual-property/081915-why-is-the-media-talking-about-sopa-again-an-explainer>.

⁹ ICANN, *2013 Registrar Accreditation Agreement*, <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en> (last accessed Oct. 12, 2015).

¹⁰ David Post, *ICANN, copyright infringement, and 'the public interest'*, WASH. POST, Mar. 9, 2015, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/09/icann-copyright-infringement-and-the-public-interest/>.

¹¹ See, e.g., Allen R. Grogan, *ICANN Is Not the Internet Content Police*, ICANN BLOG, June 12, 2015, <https://www.icann.org/news/blog/icann-is-not-the-internet-content-police>.

¹² RIAA Comments, USTR-2015-0016-0015, at 2, 13.

¹³ Amy Schatz, *Internet Security Firm Offers Free Protection to Political, Artistic Sites That Get Attacked*, RE/CODE, June 12, 2014, <http://recode.net/2014/06/12/internet-security-firm-offers-free-protection-to-political-artistic-sites-that-get-attacked/>.

Rightsholders have a wide variety of tools to reduce intellectual property infringement. USTR should not allow intellectual property enforcement efforts to interfere with fundamental Internet infrastructure, or undermine the intermediary liability limitations that the U.S. Internet economy is built on. Domain registrars, and other third party online intermediaries, do not belong on USTR's notorious markets list.

Respectfully submitted,

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