

Before the
Office of the United States Trade Representative
Washington, D.C.

In re 2020 Review of Notorious Markets
for Counterfeiting and Piracy: Comment
Request

Docket No. USTR-2020-0035

**REPLY COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

Pursuant to the request for comments published by the Office of the United States Trade Representative (“USTR”) in the Federal Register at 85 Fed. Reg. 62,006 (Oct. 1, 2020), the Computer & Communications Industry Association (“CCIA”) submits the following Reply Comments for the 2020 Review of Notorious Markets for Counterfeiting and Piracy.¹

U.S. Internet services companies continue to devote significant resources to improving existing measures, as well as deploying new tools, to address counterfeits and infringement online. In addition to extensively collaborating and consulting with brand owners, these companies have created programs that encourage information sharing between all stakeholders to strengthen enforcement.

USTR created the Notorious Markets Report (“the Report”) to increase public awareness and guide trade enforcement actions with respect to *foreign* marketplaces that deal in infringing goods and help sustain global piracy and counterfeiting.² The Report has never been used to target U.S. companies, and the inclusion of U.S. Internet companies in the upcoming Report – conflating companies with robust anti-counterfeiting and anti-infringement practices with rogue offshore operators – would be inconsistent with the Report’s purpose and contrary to the underlying statutory authority for the Special 301 process. Therefore, USTR should reject the suggestion to include certain U.S. Internet companies in the 2020 Notorious Markets Report.³

¹ CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For nearly fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.cciagnet.org.

² See, e.g., 2010 Special 301 Out of Cycle Review of Notorious Markets: Request for Public Comment, 75 Fed. Reg. 60,844, 60,855 (Oct. 1, 2010) (emphasis added).

³ See Comments of AAFA, *In Re* 2020 Review of Notorious Markets for Counterfeiting and Piracy: Comment Request, filed Nov. 9, 2020, available at <https://beta.regulations.gov/comment/USTR-2020-0035-0002>.

These comments (1) discuss the purpose of the Notorious Market Report, in light of the statutory provisions that underlie the Special 301 process; and (2) outline practices used across different U.S. Internet and e-commerce platforms to address counterfeits and infringement online which makes their inclusion in the report lacking justification.

I. The Purpose of the Notorious Markets Report, Under the Auspices of the Special 301 Process, Is to Identify Bad Actors in Foreign Markets.

The Special 301 process is a tool to identify foreign countries that fail to provide adequate intellectual property protection and market access for those actors relying on intellectual property. Section 182 of the Trade Act of 1974, as amended (“the Act”), 19 U.S.C. § 2242, establishes the Special 301 process. Section 182(a) of the Act directs USTR to identify “foreign countries” that “(a) deny adequate and effective protection of intellectual property rights, or (b) deny fair and equitable market access to United States persons that rely upon intellectual property protection [emphasis added].” Subsection (d)(2) of the Act further states that a “foreign country denies adequate and effective protection of intellectual property rights if the foreign country denies adequate and effective means under the laws of the foreign country for persons who are not citizens or nationals of such foreign country to secure, exercise, and enforce rights relating to patents, process patents, registered trademarks, copyrights and mask works [emphasis added].” Further, subsection (h) of the Act directs USTR to compile the annual Special 301 report, and it specifically pertains solely to foreign countries and action plans developed with respect to such countries. Congress’ intention that the Special 301 process focus on “foreign countries” is unambiguous and clearly demonstrated in the statutory text and its underlying legislative history.

USTR currently conducts its Notorious Markets for Counterfeiting and Piracy Review as an Out-of-Cycle Review (“OCR”) under the Special 301 process, pursuant to the 2010 Joint Strategic Plan on Intellectual Property Enforcement.⁴ USTR has used OCRs to study countries to monitor their progress on intellectual property issues, and the results of the reviews may lead to status changes for the following year’s Special 301 report. Previously, USTR included

[hereinafter “AAFA Comments”]. See also Comments of TRACIT, In Re 2020 Review of Notorious Markets for Counterfeiting and Piracy: Comment Request, filed Nov. 9, 2020, available at <https://beta.regulations.gov/comment/USTR-2020-0035-0015> [hereinafter “TRACIT Comments”].

⁴ Executive Office of the President of the United States, 2010 Joint Strategic Plan on Intellectual Property Enforcement (June 2010), available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf [hereinafter “2010 Joint Strategic Plan on IP Enforcement”].

sections on “Notorious Markets” in the Special 301 Report itself (starting in 2006), which, again, only included foreign virtual and physical markets.⁵ USTR began treating the Notorious Markets as separate OCRs in 2010, with the first report issued in February 2011.

Per the 2010 Joint Strategic Plan on Intellectual Property Enforcement, the purpose of the Notorious Markets list is to identify “foreign” marketplaces. The Plan describes the process as follows:

Identify Foreign Pirate Websites as Part of the Special 301 Process

Included in USTR’s annual Special 301 report is the Notorious Markets list, a compilation of examples of Internet and physical markets that have been the subject of enforcement action or that may merit further investigation for possible intellectual property infringements. . . .”⁶

Similarly, USTR’s Federal Register Notices from 2010-2019 have consistently stated that the purpose of the “Notorious Markets” List is to identify foreign online and physical markets.⁷

It is clear that the Special 301 process in general and the Notorious Markets Report in particular are designed to focus on foreign countries and foreign platforms and that the requests

⁵ Office of the U.S. Trade Rep., 2006 Special 301 Report, *available at* https://ustr.gov/archive/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_uplod_file473_9336.pdf.

⁶ 2010 Joint Strategic Plan on IP Enforcement at 9.

⁷ 75 Fed. Reg. 60, 854 (Oct. 1, 2010) (“USTR is hereby requesting written submissions from the public identifying potential Internet and physical notorious markets that exist outside the United States.”); 76 Fed. Reg. 58,854 (Sep. 22, 2011) (“USTR is hereby requesting written submissions from the public identifying potential Internet and physical notorious markets that exist outside the United States and that may be included in the 2011 Notorious Markets List.”); 77 Fed. Reg. 48,583 (Aug. 14, 2012) (“USTR is hereby requesting written submissions from the public identifying potential Internet and physical notorious markets that exist outside the United States and that may be included in the 2012 Notorious Markets List.”); 78 Fed. Reg. 57,924 (Sep. 20, 2013) (“The Office of the United States Trade Representative (USTR) is hereby requesting written submissions from the public identifying potential Internet and physical notorious markets that exist outside the United States and that may be included in the 2013 Notorious Markets List.”); 79 Fed. Reg. 58, 026 (Sep. 26, 2014) (“The Office of the United States Trade Representative (USTR) requests written comments from the public identifying Internet and physical markets based outside the United States that should be included in the 2014 Notorious Markets List.”); 80 Fed. Reg. 54,651 (Sep. 10, 2015) (“The Office of the United States Trade Representative (USTR) requests written comments from the public identifying Internet and physical markets based outside the United States that should be included in the 2015 Notorious Markets List.”); 81 Fed. Reg. 58,545 (Aug. 25, 2016) (“The Office of the United States Trade Representative (USTR) requests written comments identifying Internet and physical markets based outside the United States that should be included in the 2016 Notorious Markets List.”); 82 Fed. Reg. 38,987 (Aug. 16, 2017) (“The Office of the United States Trade Representative (USTR) requests written comments that identify online and physical markets based outside the United States that should be included in the 2017 Notorious Markets List.”); 83 Fed. Reg. 40,821 (Aug. 16, 2018) (“The Office of the United States Trade Representative (USTR) requests written comments that identify online and physical markets based outside the United States that should be included in the 2018 Notorious Markets List.”); 84 Fed. Reg. 42,975 (Aug. 19, 2019) (“Conducted under the auspices of the Special 301 program, the Notorious Markets List identifies examples of online and physical markets based outside the United States that reportedly engage in and facilitate substantial copyright piracy or trademark counterfeiting.”).

of certain commenters to include U.S. companies in the Report are inappropriate.⁸ CCIA strongly disagrees with the Administration’s unprecedented decision in the 2019 Notorious Markets Report for USTR to use future review of Notorious Markets to address the issue of counterfeits on e-commerce platforms inside the United States.⁹

In addition to straying beyond the purposes of the Notorious Markets report, the targeting of U.S. companies would exceed USTR’s mandate. It is difficult to reconcile how an agency with a mandate that is narrowly focused on international trade, *see* 19 U.S.C. § 2171, could use its resources and authorities to examine and criticize U.S. companies’ business practices. CCIA is unaware of any previous examples of USTR having taken similar action with respect to the protection of intellectual property or any other subject matter. Further, USTR would compromise the effectiveness of the Notorious Markets report as a tool for identifying foreign markets of concern and for engagement with foreign trading partners if it were to focus in the Report on the practices of domestic U.S. companies.

II. U.S. Internet and E-Commerce Firms Devote Significant Resources and Partner with Brand Owners to Address Counterfeits.

The Internet has revolutionized the retail industry.¹⁰ The share of e-commerce to retail sales continues to rise each year.¹¹ Retailers are increasingly digital, and are able to utilize Internet services to connect users and firms to new customers around the world. The Internet also empowers small businesses to reach new markets and even individual users to sell or resell goods. These interactions are not possible without user trust in online services. Internet

⁸ *AAFA Comments* at 3-4, 7 (“AAFA believes a recommendation for Facebook, Inc.—including the Facebook and Instagram platforms—should be included in the 2020 Notorious Markets List for three reasons: (1) Volume of counterfeits available across Facebook and Instagram; (2) Lack of effective intellectual property tools; and (3) Increase in fraudulent ads.”); (“AAFA believes a recommendation for Amazon—including both its U.S. and foreign domains— should be included in the 2020 Notorious Markets List for four reasons: (1) Volume of counterfeits available across Amazon; (2) Insufficient seller vetting process; (3) Repeat offenders on the platform; and (4) Challenges with Amazon’s brand protection systems.”); *TRACIT Comments* at 2 (“To the extent that the USTR Notorious Markets List (NML) highlights prominent and illustrative examples of online and physical markets that reportedly engage in or facilitate substantial piracy or counterfeiting, we recommend that you consider including www.Facebook.com and www.Instagram.com.”).

⁹ Office of the U.S. Trade Rep. 2019 Review of Notorious Markets for Counterfeiting and Piracy, *available at* https://ustr.gov/sites/default/files/2019_Review_of_Notorious_Markets_for_Counterfeiting_and_Piracy.pdf at 15 (noting that future reviews of Notorious Markets would “address the issue of counterfeit and pirated goods with our trading partners and is considering seeking more information regarding ecommerce platforms, including those based in the United States.”).

¹⁰ *See* eBay Main Street, Global Trade At a Glance, <https://www.ebaymainstreet.com/issues/global-trade> (last visited Nov. 20, 2020).

¹¹ Mary Meeker, Internet Trends Report 2019, *available at* <https://www.bondcap.com/report/itr19/#view/20>.

companies across the spectrum devote significant resources to maintaining trust in online purchases. Combating counterfeit and pirated goods online is central to these efforts.

As CCIA has documented in related filings to the U.S. government,¹² Internet firms take the challenge of addressing the sale of counterfeit and pirated goods online seriously and invest heavily in programs to address this challenge and enforce company policies against counterfeits and pirated goods. Online services also engage with rightsholders and brand owners extensively and have established programs that encourage information sharing between stakeholders that allow online services to identify and remove counterfeit and pirated goods from their platforms. A collaborative approach that continues to bring together brand owners, online services, and policymakers will make these efforts most effective, as recognized by the 2019 Memorandum on Combating Trafficking in Counterfeit and Pirated Goods.¹³

Existing measures taken by online e-commerce platforms include the following:¹⁴

- **Brand registration programs.** Online services firms allow trademark or brand owners to voluntarily enroll in brand registration programs, which allow the service to better utilize automated tools to identify and remove confirmed counterfeit products.¹⁵ Through enrollment, the owners provide relevant information to the service about their products that better enables the service to proactively address counterfeits.
- **Simplified notice and removal procedures.** Online services have worked to make their reporting processes as efficient and easy as possible to facilitate swift removal of content that violates company policy. Companies comply with requisite obligations under current law regarding trademarks and content protected by U.S. copyright law.¹⁶ Many

¹² See CCIA Comments to Dep't of Commerce, In Re Comment Request: Report on the State of Counterfeit and Pirated Goods Trafficking and Recommendations, filed July 29, 2020, *available at* <https://www.cciagnet.org/wp-content/uploads/2019/07/DOC-2019-0003-0001-CCIA-Comments-Counterfeiting-Pirated-Goods-Trafficking-Report.pdf>.

¹³ Memorandum on Combating Trafficking in Counterfeit and Pirated Goods (Apr. 3, 2019), <https://www.whitehouse.gov/presidential-actions/memorandum-combating-trafficking-counterfeit-pirated-goods/>, Section 1(e).

¹⁴ This is an illustrative list and does not purport to identify all tools and programs utilized by Internet and e-commerce services. Nor does it suggest that all services utilize every practice listed. Business models of all online services vary greatly across platforms.

¹⁵ See, e.g., Amazon Brand Registry, <https://brandservices.amazon.com/>; eBay Verified Rights Owners Program (VeRO), <https://pages.ebay.com/seller-center/listing-and-marketing/verified-rightsoowner-program.html>.

¹⁶ See generally Facebook, Anti-Counterfeiting Guide, <https://www.facebook.com/business/tools/anti-counterfeiting/guide>; Google Ads, Counterfeit Policy, <https://support.google.com/adspolicy/answer/176017>; Google Shopping, Counterfeit Policy, <https://support.google.com/merchants/answer/6149993>.

online services exceed these obligations and proactively take action on bad actors based on evidence of widespread infringement, as well as provide rightsholders priority access to tools for expeditiously flagging and removing potentially infringing products.¹⁷

- **Collaboration with brand owners.** Online services work with brand owners and rightsholders through expanded programs that build upon tools like brand registration. Brand owners can provide critical information and insight on how to improve existing measures. For example, some programs grant more control to trusted and verified brand owners regarding the identification and removal of counterfeit goods.¹⁸ Tools like “product serialization” have also recently been introduced, which allow manufacturers to attribute a unique code to each product which is then verified by the online marketplace intermediary to confirm authenticity.¹⁹
- **Transparency reports and information sharing.** Some services release reports regularly that detail removals on counterfeits, in addition to takedowns related to copyright and trademark claims.²⁰
- **Trust and certification programs.** Some services utilize certification and other indicator schemes that indicate to a user whether a seller has a history of customer satisfaction and complying with online services’ policies.²¹ Consumer reviews are also widely used.
- **Other collaborative proactive measures.** In enforcing their strict prohibitions against counterfeiting, in many cases platforms will take more extensive action than merely removing content that is specifically reported to them, and many are exploring ways to remove additional suspected counterfeit content on a proactive basis.

¹⁷ See, e.g., Facebook, Anti-Counterfeiting Guide, <https://www.facebook.com/business/tools/anti-counterfeiting/guide>; Facebook’s Commerce & Ads IP tool, *available at* <https://www.facebook.com/help/835772913244854>.

¹⁸ See Amazon, Project Zero, <https://brandservices.amazon.com/projectzero>; Dharmesh M. Mehta, Amazon Project Zero, Day One (Feb. 28, 2019), <https://blog.aboutamazon.com/companynews/amazon-project-zero>; Chaim Gartenberg, *Amazon’s Project Zero Will Let Brands Remove Counterfeit Listings of Their Products*, The Verge (Feb. 28, 2019), <https://www.theverge.com/2019/2/28/18244603/amazon-projectzero-counterfeit-listing-remove-products>

¹⁹ Dharmesh M. Mehta, Amazon Project Zero, Day One (Feb. 28, 2019), <https://blog.aboutamazon.com/company-news/amazon-project-zero>. See also Amazon, Transparency, Frequently Asked Questions, <https://brandservices.amazon.com/transparency/faq>.

²⁰ See, e.g., Facebook, Transparency Report: Intellectual Property, <https://transparency.facebook.com/intellectual-property>; Google, How Google Fights Piracy (2018), *available at* https://blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf.

²¹ See eBay Top Rated Program, <https://pages.ebay.com/seller-center/service-and-payments/top-ratedprogram.html#what-is-top-rated-prog>.

- **User education.** Online services provide information to users regarding counterfeits and intellectual property to help them avoid posting or sharing content that violates terms of service.²² Online services also encourage law enforcement agencies, rights owners, and consumer protection organizations to directly educate users by creating participant profile pages and public service campaigns.
- **Coordination with Law Enforcement.** Many online services closely coordinate with domestic and international law enforcement agencies to better identify bad actors and to prevent illegal or infringing practices.

The tools listed above are often accompanied by processes to address abuse, as well as appeals procedures for sellers and users to register complaints and contest removals. Not all tools will be effective or relevant for all online services; there should be flexibility to develop appropriate measures targeted to the issues or problems observed as business models of online services vary greatly across platforms.

III. Conclusion

Based on these assessments, it is wholly inappropriate to conflate U.S. firms that utilize extensive anti-counterfeiting measures with rogue, bad actors by naming them in the 2020 Notorious Markets Report. CCIA and its members recognize the threat of counterfeit and pirated goods, and they support stronger and more effective criminal and border enforcement to stop the manufacture, import, export, transit, and distribution of illegal goods. Further, through bilateral consultations, negotiations of free trade agreements, and engagement at international organizations, the United States can better combat this issue.

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Sincerely,
Rachael Stelly
Computer & Communications Industry Association
25 Massachusetts Avenue, NW
Suite 300C
Washington, DC 20001

²² This includes notification of repeat infringer policies. *See* Facebook & IP Protection (Dec. 2018), available at <https://about.fb.com/wp-content/uploads/2018/11/facebook-ip-protection.pdf> at 5.