

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

In re 2023 Review of Notorious Markets
for Counterfeiting and Piracy: Comment
Request

Docket No. USTR-2023-0009

**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 88 Fed. Reg. 58,055 (Aug. 24, 2023), the Computer & Communications Industry Association (CCIA) submits the following Reply Comments for the 2023 Review of Notorious Markets for Counterfeiting and Piracy.¹

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

While some comments made in the consultation suggest that USTR should include U.S. Internet companies in the 2023 Notorious Markets Report,² USTR should disregard comments that (1) ask USTR to expand the scope of the Notorious Markets Report beyond the statutory purpose of the Special 301 process; and (2) ignore the practices used across different U.S. Internet and e-commerce platforms to address counterfeits and infringements online. In doing

¹ CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For over 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.ccianet.org.

² Comments of AAFA, *In Re* 2023 Review of Notorious Markets for Counterfeiting and Piracy: Comment Request, filed Oct. 6, 2023, *available at* <https://www.regulations.gov/comment/USTR-2023-0009-0033> (naming Meta and Meta's platforms); Comments of the International Anti-Counterfeiting Coalition, *In Re* 2023 Review of Notorious Markets for Counterfeiting and Piracy: Comment Request, filed Oct. 6, 2023, *available at* <https://www.regulations.gov/comment/USTR-2023-0009-0030> (naming Meta); Comment of Transnational Alliance to Combat Illicit Trade Coalition, *In Re* 2023 Review of Notorious Markets for Counterfeiting and Piracy: Comment Request, filed Oct. 6, 2023, *available at* <https://www.regulations.gov/comment/USTR-2023-0009-0021> (naming Meta).

so, USTR can recognize the robust anti-counterfeit and anti-infringement practices used by U.S. Internet companies, encourage greater collaboration between these companies and rights owners, and ensure that the Notorious Markets Report continues to focus on bad actors in foreign markets as it did in the 2021 and 2022 Review.³

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 by which to identify foreign markets 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, codified at 19 U.S.C. § 2242, establishes the Special 301 process. The law 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].” Section 2242(d)(2) 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, the directives in § 2242(h) to USTR to compile the annual Report only contemplate foreign markets. That the Special 301 process must be focused on “foreign countries” is not ambiguous and the parameters for consideration were clearly defined under this trade tool.

The Notorious Markets for Counterfeiting and Piracy Review is now conducted as an Out-of-Cycle Review (OCR) under the Special 301 process pursuant to the 2010 Joint Strategic Plan on Intellectual Property Enforcement.⁴ OCRs have been used to study countries to monitor their progress on intellectual property issues, which may result in status changes for the following year’s Special 301 report. Previously, sections on “Notorious Markets” were included

³ OFFICE OF THE U.S. TRADE REP., 2022 Review of Notorious Markets for Counterfeiting and Piracy, available at [https://ustr.gov/sites/default/files/2023-01/2022%20Notorious%20Markets%20List%20\(final\).pdf](https://ustr.gov/sites/default/files/2023-01/2022%20Notorious%20Markets%20List%20(final).pdf) (declining to include Meta or Amazon). OFFICE OF THE U.S. TRADE REP., 2021 Review of Notorious Markets for Counterfeiting and Piracy, available at <https://ustr.gov/sites/default/files/IssueAreas/IP/2021%20Notorious%20Markets%20List.pdf> (declining to include Meta or Amazon).

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”].

in the Special 301 Report itself (starting in 2006), which, again, only included foreign virtual and physical markets.⁵ The Notorious Markets were treated as separate OCRs since 2010, with the first report issued in February 2011. Per the 2010 Joint Strategic Plan on Intellectual Property Enforcement, the Notorious Markets list is to identify “foreign” marketplaces. The text states:

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

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

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_upload_file473_9336.pdf.

⁶ 2010 Joint Strategic Plan on IP Enforcement at 9.

⁷ 2010 Fed. Reg. Notice (“USTR is hereby requesting written submissions from the public identifying potential Internet and physical notorious markets that exist outside the United States.”), <https://www.federalregister.gov/documents/2010/10/01/2010-24710/2010-special-301-out-of-cycle-review-of-notorious-markets-request-for-public-comment>; 2011 Fed. Reg. Notice (“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.”), <https://www.federalregister.gov/documents/2011/09/22/2011-24523/2011-special-301-out-of-cycle-review-of-notorious-markets-request-for-public-comments>; 2012 Fed. Reg. Notice (“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.”), <https://www.federalregister.gov/documents/2012/08/14/2012-19840/2012-special-301-out-of-cycle-review-of-notorious-markets-request-for-public-comments>; 2013 Fed. Reg. Notice (“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.”), <https://www.federalregister.gov/documents/2013/09/20/2013-22857/2013-special-301-out-of-cycle-review-of-notorious-markets-request-for-public-comments>; 2014 Fed. Reg. Notice (“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.”), <https://www.federalregister.gov/documents/2014/09/26/2014-22904/2014-special-301-out-of-cycle-review-of-notorious-markets-request-for-public-comments>; 2015 Fed. Reg. Notice (“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.”), <https://www.federalregister.gov/documents/2015/09/10/2015-22761/2015-special-301-out-of-cycle-review-of-notorious-markets-request-for-public-comments>; 2016 Fed. Reg. Notice (“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.”), <https://www.federalregister.gov/documents/2016/08/25/2016-20325/2016-special-301-out-of-cycle-review-of-notorious-markets-request-for-comments>; 2017 Fed. Reg. Notice (“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.”), <https://www.federalregister.gov/documents/2017/08/16/2017-17287/2017-special-301-out-of-cycle-review-of-notorious-markets-comment-request>; 2018 Fed. Reg. Notice (“The Office of the United States Trade Representative

It is clear that this tool is designed to focus on bad actors operating in foreign markets and commenters' recommendations to include U.S. companies are outside the scope of the Special 301 process. Calls from proponents to include U.S.-based and U.S.-owned online markets in the 2023 Report should be rejected as they undermine the effectiveness of USTR to use the Report to engage with trading partners per its mission.

II. Commenters Do Not Satisfy Requirements for Nominating U.S. Services.

Even if the Special 301 statute could be interpreted to apply to U.S. companies, comments filed in nominating these U.S. services have not met the requirements for identification as a notorious market. Per the Federal Register notice, submissions that nominate a market for inclusion must provide sufficient details on the market at issue.⁸

For online markets that engage in or facilitate substantial counterfeiting, USTR directed commenters to include information such as:

- Estimate of the number of goods sold or otherwise made available on the market and any other indicia of the market's scale, reach, or relative significance in a given geographic area or with respect to a category of goods.
- Estimate of the number and types of goods sold or otherwise made available on the market that are counterfeit, either in aggregate or in relation to the total number and types of goods sold or otherwise made available on the market, a description of the methodology used to create the estimate and the timeframe the estimate was conducted, and information supporting the claims of counterfeiting.
- Estimate of economic harm to right holders resulting from the counterfeit goods and a description of the methodology used to calculate the harm.
- Whether the number and types of counterfeit goods or the economic harm has increased or decreased from previous years, and an approximate calculation of that increase or decrease for each year.

(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.”), <https://www.federalregister.gov/documents/2018/08/16/2018-17649/2018-special-301-out-of-cycle-review-of-notorious-markets-comment-request>; 2019 Fed. Reg. Notice (“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.”), <https://www.federalregister.gov/documents/2019/08/19/2019-17731/2019-special-301-out-of-cycle-review-of-notorious-markets-comment-request>.

⁸ 88 Fed. Reg. 58,056 (Aug. 24, 2023).

Without this level of detail, it appears difficult for USTR to review the input as submitted and have a real sense for whether the claims really met the putative threshold for inclusion in the Notorious Markets Report (*i.e.* “practices that have significant adverse impact on the value of U.S. innovation.”).

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

The Internet has revolutionized the retail industry. The share of e-commerce to retail sales continues to rise each year.⁹ 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 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,¹⁰ Internet firms take the challenge of addressing the sale of counterfeit and pirated goods online seriously and invest heavily in programs 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 and 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.¹¹

⁹ See MCKINSEY, *How e-commerce share of retail soared across the globe: A look at eight countries* (Mar. 5, 2021), <https://www.mckinsey.com/featured-insights/coronavirus-leading-through-the-crisis/charting-the-path-to-the-next-normal/how-e-commerce-share-of-retail-soared-across-the-globe-a-look-at-eight-countries>; U.S. DEP’T OF COMMERCE, Census Bureau, Quarterly Retail E-Commerce Sales Report (Aug. 19, 2022), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

¹⁰ See, e.g., Comments to Patent & Trademark Off., Future Strategies in Anticounterfeiting and Antipiracy, filed Aug. 24, 2023, *available at* <https://www.regulations.gov/comment/PTO-C-2023-0006-0053>; 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>.

¹¹ 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).

Existing measures taken by companies include the following:¹²

- **Brand registration programs.** E-commerce-focused 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.¹³ 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.¹⁴ Companies comply with requisite obligations under current law regarding trademarks and content protected by U.S. copyright law,¹⁵ and many online services exceed these obligations with online tools providing verified rightsholders priority access to tools for expeditiously flagging and removing potentially infringing products.¹⁶
- **Collaboration with brand owners.** Online services work with brand owners and rightsholders through expanded programs that build upon tools like brand registration. For example, some programs grant more control to trusted and verified brand owners regarding the identification and removal of counterfeit goods.¹⁷ 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

¹² This is an illustrative list and does not purport to identify all tools and programs utilized by Internet and e-commerce services.

¹³ 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-rights-owner-program.html>.

¹⁴ Examples include YouTube’s Content ID and Copyright Match Tool, Google’s Trusted Copyright Removal Program, Meta’s Rights Manager and Brand Rights Protection, and Pinterest’s Content Claiming Portal.

¹⁵ See generally Facebook Help Center, What is a Counterfeit?, <https://www.facebook.com/help/962020680598166>; Google Ads, Counterfeit Policy, <https://support.google.com/adspolicy/answer/176017>; Google Shopping, Counterfeit Policy, <https://support.google.com/merchants/answer/6149993>.

¹⁶ See, e.g., Meta Brand Rights Protection, available at <https://www.facebook.com/business/help/828925381043253?id=4533021280101097>.

¹⁷ 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>; Meta, Brand Rights Protection, <https://www.facebook.com/business/news/ip-reporting-api-brand-rights-protection-new-features>.

intermediary to confirm authenticity.¹⁸ Additionally, some online services engage regularly with rightsowners and brands to share insights that can improve enforcement and to pilot new technologies.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 and takedowns undertaken proactively.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. Many are exploring ways to remove additional suspected counterfeit content on a proactive basis, implement repeat infringer policies and additional measures aimed at tackling recidivism, and developing machine learning tools to identify and remove content.²² Beyond such proactive measures online, platforms and brand owners are also joining forces to take action against counterfeiters in the real world, including by filing joint litigations against these bad actors.²³
- **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

¹⁸ Dharmesh M. Mehta, *Amazon Project Zero* (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>.

¹⁹ See Amazon, *Brand Protection Report*, <https://brandservices.amazon.com/progressreport>.

²⁰ See, e.g., Meta, *2022 Transparency Report: Intellectual Property*, <https://transparency.fb.com/reports/intellectual-property>; Google, *How Google Fights Piracy* (2018), available at https://storage.googleapis.com/gweb-uniblog-publishprod/documents/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>.

²² See, e.g., Meta, *How Meta Helps Protect Against Counterfeits*, <https://www.facebook.com/business/tools/anti-counterfeiting/guide>.

²³ See, e.g., Meta Newsroom, *Facebook and Gucci File Joint Lawsuit Against International Counterfeiter*, <https://about.fb.com/news/2021/04/facebook-and-gucci-file-joint-lawsuit-against-international-counterfeiter/>.

service.²⁴ 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.²⁵

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.

IV. Conclusion

Based on these assessments, it is wholly inappropriate to conflate U.S. firms that utilize extensive anticounterfeiting measures with rogue, bad actors by naming them in the 2023 Notorious Markets Report. Industry remains fully committed to the protection of intellectual property rights and stands ready to work with the U.S. government and other relevant stakeholders to combat any problems in the marketplace.

Respectfully submitted,

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²⁴ See, e.g., Facebook IP Help Center, <https://www.facebook.com/help/399224883474207>; Meta, *UNIFAB, ALPA and Meta Launch a Public Awareness Campaign on the Internet Against Counterfeiting and Piracy*, available at <https://about.fb.com/fr/news/2023/03/lunifab-lalpa-et-meta-lacent-sur-internet-une-campagne-de-sensibilisation-du-grand-public-a-la-contrefacon-et-au-piratage/>.

²⁵ See Amazon, *A Blueprint for Private and Public Sector Partnership to Stop Counterfeiters* (Oct. 18, 2021), <https://www.aboutamazon.com/news/policy-news-views/a-blueprint-for-private-and-public-sector-partnership-to-stop-counterfeiters>.