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Daniel Lee
Assistant U.S. Trade Representative for Innovation and Intellectual Property
Office of the U.S. Trade Representative
600 17th St., N.W.
Washington, D.C. 20508

**Re: 2019 Special 301 Out-of-Cycle Review of Notorious Markets:
Comment Request, 84 Fed. Reg. 42975, pp. 42975-76 (August 19, 2019)**

Dear Mr. Lee,

We are writing to respond to the above-referenced Federal Register Notice inviting comments on Internet and physical notorious marketplaces that exist outside the United States. As the U.S. association that represents companies that publish interactive games for video game consoles, handheld devices, personal computers, and the Internet, the Entertainment Software Association (“ESA”) regards the out-of-cycle review of notorious markets as an important opportunity to shed light on markets that facilitate mass infringement or counterfeiting of industry products and services and that remain either sheltered from, or impervious to, the deterrent effects of enforcement actions.

Notorious Online Markets

FlokiNET: FlokiNET is a hosting provider that does not respond to notices of infringement or warning letters concerning their hosting and support of infringing websites. Despite attempts to send notices to FlokiNET’s abuse contacts pursuant to FlokiNET’s Acceptable Use Policy, the notices go ignored. FlokiNET allows anonymous hosting for websites associated with infringing activity, including video game piracy and the distribution of devices that circumvent the technological protection measures (TPMs) of video game consoles, such as <https://team-xecuter.com> and <https://sx.xecuter.co>.

Linking Websites: These sites provide links to infringing copies of complete versions of copyrighted video games stored on third-party hosting sites known as “cyberlockers” (described below). The links are typically organized by content category (*i.e.*, “Games” sections) and/or are supported by a search functionality that enables visitors to find content. These sites typically generate revenue from user donations and/or online advertisements. The following link sites are notable due to their heavy traffic, high volume of infringing video game file links that are indexed, and non-responsiveness to rights holder notices:¹

¹ The figures that follow are based upon research conducted in August 2019 in anticipation of this filing.

oceanofgames.com (Global Alexa Rank: 2,765).² This games-focused site is extremely popular in India with an Alexa ranking of 1,185 in that country. In August 2019, oceanofgames.com made available over 9,200 links leading to unauthorized copies of ESA member titles, of which less than 1% were removed. This site is hosted by Small Business Hosting Infrastructure in Ukraine.

darkumbra.net (Global Alexa Rank: 35,992). Another website dedicated exclusively to video game piracy, darkumbra.net had over 410,000 registered members and more than 705,000 posts as of August 30th, 2019. The site is particularly problematic in that it links to infringements for the latest generation of video game platforms, in addition to legacy content. The site does not respond to ESA member takedown requests and uses the services of a U.S.-based content delivery network (“CDN”).³

Hosting Websites (“Cyberlockers”): Cyberlockers host the infringing content accessible through links indexed on linking sites. Users visit linking sites to find content on cyberlockers because cyberlockers generally do not support native search functionality. The following sites are notable for the substantial volume of infringing game files that they host and the sites’ limited response rates to notices of infringement:

rapidu.net (Global Alexa Rank: 29,527). In August 2019, this site hosted more than 5,600 infringing video game files. This site is very popular in Poland, with an Alexa ranking of 442 in that country. This site operates with the assistance of the U.S.-based CDN referenced above.

1fichier.com (Global Alexa Rank: 1,132). This cyberlocker continues to have an extremely low response rate (*i.e.*, 0.12%) to ESA’s takedown notices (down from last year’s 0.59% response rate). In August 2019, this site hosted over 2,000 links to infringing content, some of which were found to contain infringing copies of multiple ESA member titles. The site derives revenue through a subscription service, a referral scheme, and advertising, although some major credit card processors do not service the site due to allegedly illegal activity. The site is hosted by Dstorage S.A.S. in France, where it holds an Alexa rank of 108 (up from 112 in 2018).

Torrent Indexing Websites: Torrent indexing sites provide links to torrent files that enable users to join peer-to-peer “swarms” to share infringing content, including illegal copies of video game software files. In contrast to the linking site/cyberlocker model, torrent indexing sites do not link to content hosted on a single

² Alexa rank is a measure of a website’s popularity and is used to rank millions of websites in order of popularity, with an Alexa Rank of 1 being the most popular. Alexa.com states that its rank is “calculated using a proprietary methodology that combines a site’s estimated average of daily unique visitors and its estimated number of page views over the [preceding] 3 months.” See <https://www.alexa.com/about>. Traffic and engagement are estimated from the browsing behavior of people in Alexa’s global panel, which is a sample of all Internet users. See <https://blog.alexa.com/marketing-research/alexa-rank/>.

³ A content delivery network (also known as a content distribution network) (“CDN”) is a service that provides a system of proxy servers and data centers, often global in scope, for resiliency services and DDOS protection for websites. CDNs enter into service agreements with websites to effectively ensure that the content of those sites is always available and that site visitors enjoy an optimal user experience. Among other functions, CDNs cache copies of web pages to ensure the availability of site content in the event of web server malfunction. While CDNs are used by legitimate services, infringers may make specific use of these services both to hide true hosting information (*i.e.*, public registries reference only the CDN, and not the actual host cached by the CDN) and to speed the transmission of large files, such as infringing copies of video games. Approximately half of the websites referenced in this document have a business relationship with a single U.S.-based CDN. Therefore, it is important that all U.S.-based CDNs join ISPs, search engines, payment processors, and advertising services that have successfully collaborated with rights holders in recent years to develop reasonable, voluntary measures to prevent sites focused on copyright infringement from using their services.

server, but rather to torrent files that facilitate downloads from multiple peers in infringing swarms using the BitTorrent protocol. The following sites are among the most popular sources for infringing copies of ESA member video games and are not responsive to notices:

thepiratebay.org (Global Alexa Rank: 169). This site continues to be a major source of infringing copies of ESA member company video games. Over 3,100 infringing URLs were found on the site in August 2019 alone. It currently operates with the assistance of the U.S.-based CDN referenced above.

skytorrents.to (Global Alexa Rank: 42,528). Over 6,100 infringing downloads were found on this site in August 2019. The site currently solicits donations in the form of three kinds of cryptocurrency: Bitcoin, Ethereum, and Litecoin. It currently operates with the assistance of the U.S.-based CDN referenced above.

Unauthorized Private Servers (a/k/a “pirate” servers or “grey shards”): More than ever before, high-quality, compelling video games are offered “free-to-play,” with publishers seeking to monetize the video games through on-screen advertising, micro-transactions involving virtual “in-game” items, or subscription fees. The cloud-based nature of these video games makes them less susceptible to harm associated with traditional forms of infringement, such as the distribution of unauthorized copies of client software.

However, new threats have emerged to these alternative revenue models, including the establishment and operation of unauthorized, third-party, “private” servers. When users are diverted to play on such servers, video game publishers are not able to monetize their online content on as described above and thus face reduced opportunities to recoup their investment in new distribution platforms. Establishing and maintaining unauthorized game servers often involves multiple acts of copyright infringement as well as the circumvention of technological protection measures (“TPMs”).⁴ Below are noteworthy examples of servers that have been unresponsive to ESA members’ enforcement efforts to date:

warmane.com (Global Alexa Rank: 16,327). This site enables an observed over 20,000 active users to play the World of Warcraft game without having to pay for the monthly subscription fee established by Blizzard Entertainment, which owns this online video game. The server employs the services of the U.S.-based CDN referenced above.

firestorm-servers.com (Global Alexa Rank: 55,584). This site enables an observed over 5,000 active users to play World of Warcraft without having to pay the monthly subscription fee established by Blizzard Entertainment. The server employs the services of the U.S.-based CDN referenced above, but is also the destination page for fstorm.cc, which is hosted by Internet-Hosting Ltd. in Russia.

Unauthorized Digital Goods

Unauthorized sales of in-game digital items have become a growing concern for the video game industry. Closely related to these in-game items are software products (collectively known as cheat software) that enable the unfair and rapid collection and aggregation of virtual goods, such as bots, hacks, and “cheats”,

⁴ When cloud-based video games are distributed, the video game publisher typically incorporates into the client software TPMs that prevent the client from connecting to servers other than those operated by the video game publisher. Operators of unauthorized servers must therefore distribute either hacked versions of the publisher’s client software or circumvention software designed to disable the client’s TPMs that would otherwise prevent the client from connecting to an unauthorized server. Moreover, to enable online gameplay, operators of unauthorized servers must often utilize infringing copies of a publisher’s server software.

or which otherwise tilt the scales in favor of one player over another. The rise of Unauthorized Digital Goods (UDGs) and cheat software have a negative impact on video game companies and consumers in the following ways: (1) sellers of unauthorized digital goods and cheat software divert significant revenue away from video game developers and publishers; (2) sales of digitally-delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; (3) the unchecked sales of cheat software can threaten the integrity of game play, alienating and frustrating legitimate players, and (4) video game publishers and developers are forced into a perpetual virtual “arms race” to update their products and security technology before the sellers can update theirs.

Cheats: These sites provide “cheats”, which (using software code) are ways to modify the game in order to allow an advantage for the player. These include: aimbots (which help a player aim in a first-person action games), trainers (which allow a player to turn on or off features to make the game easier or more difficult), and one-button setups that allow a player to complete a task in-game with a single click that normally would take extended gameplay (like “Instant Build,” “Always Run”). These sites generate revenue through sales transactions (where the site itself is the seller), but also through advertisements. The following sites are notable due to their global popularity and the number of cheats available to purchase.

unknowncheats.me (Global Alexa Rank: 9,325). This site allows a self-reported 2.8 million users to develop and submit cheats to this forum-based site since 2000. According to the site, between 6,000 and 10,000 cheats are downloaded daily across 100+ titles offered. It does not charge for cheats, instead relying on advertisements to generate revenue. All cheats are created by the community and the site encourages an open, free, and collaborative environment to develop and distribute these unauthorized goods.

mpgh.net (Global Alexa Rank: 13,583). According to the site, mpgh.net offers “several hundred thousand” free cheats to over 5.6 million users. Users can also sell their own cheats and recovery services. The site generates revenue through advertisements and the offering of premium accounts that bypasses restrictions found on free accounts, thereby giving them better visibility for sellers.

iwantcheats.net (Global Alexa Rank: 81,215). On this site, nearly one million members can pay for premium access to the site’s forum and download cheats for over 70 video game titles. The site focuses on cheats for first-person action games that help with aiming as well as in-game information that normally is hidden such as player names, distance, and location of items.

Unauthorized Online Marketplaces: These sites provide a platform for users to list and sell (depending on the site’s focus) unauthorized digital items including in-game currency, items, skins, accounts, power-leveling, and keys. The site organizes the listings by game and then usually by type of item. While some prefer an online market aesthetic, other sites use a forum to keep listings organized. Users can set their own price for the product they are selling and many have power sellers with high ratings and positive feedback. The owners of these sites generate revenue through transaction fees, advertisements, or the sale of their own currency, which users can then use to boost their profile. The following sites are notable due to their global popularity and the number of games available:

playerauctions.com (Global Alexa Rank: 16,471). This site provides a marketplace for users to sell in-game currency, items, skins, accounts, CD keys, and power-leveling for over 200 ESA member titles. In addition, physical items are sold on the site. The site charges transaction fees and purports to offer protection against fraudulent purchases. According to the website statistics firm, Similar Web, playerauctions.com had an estimated 1.37 million visits within the past six months.

ownedcore.com (Global Alexa Rank: 15,193). A self-reported total of 600,000 members can gain access to cheats and account resales for many major first-person shooters and Massively Multiplayer Online (MMOs) games. The site sells its own in-game currency that allows users to boost visibility to their premium listings, eliminate ads, and receive trade feedback. As of August 2019, according to Similar Web, the site received nearly 1 million visits within the past six months.

Account Resale: These sites sell video game user accounts straight to the user at reduced prices. Often, these transactions include games and/or premium accounts with online subscription services included.

G2G.com (Global Alexa Rank: 14,189). This site often obtains digital editions of games and online subscription services at a reduced cost (whether from games and services developed for use in different regions, or from potentially fraudulent means such as stolen payment methods or compromised accounts) for the Sony PlayStation 4, Xbox One, and Nintendo Switch consoles and PCs. The site then sells the games and services using an account that can be played in the buyer's region. The website also offers users in-game items, virtual currency and account boosting.

Notorious Physical Markets⁵

Mexico⁶

In Mexico, large open-air markets and shopping complexes remain significant sources of infringing products across a range of industries and supports enforcement efforts undertaken to protect intellectual property rights in these locations. Insofar as infringing products are often stored in small storage lockers and other physical premises within these markets, ESA supports the use of enforcement measures, such as asset forfeiture, that target not only vendors, but also the custodians of these storage locations who profit from the sale of counterfeit goods. We respectfully suggest that the proceeds from asset forfeiture be directed to sustain the cyber unit.⁷

Tepito (Mexico City). Tepito is an open-air market, 80 square blocks in size in the middle of Mexico City. Despite the decrease in the sale of around 3.3 million infringing products due to the rise in electronic downloads, Tepito continues to be the main point of active trafficking of infringing video games, modified consoles, and game circumvention devices, as well as countless other infringing items.

Mercado San Juan de Dios (Guadalajara). Mercado San Juan de Dios is the largest marketplace in Latin America, and its notoriety attracts a significant number of Mexican and foreign visitors. The San Juan de Dios market entered the list of the biggest piracy markets in the world a few years ago and has retained its position to date. There is a large section of the market where pirated current films and newly released video games are offered. More than one-third of this market's approximately 3,000 vendors offers video game circumvention devices.

La Cuchilla (Puebla): La Cuchilla, which is approximately 10 square blocks, contains an average of 120 warehouses and more than 150 stores. This is the biggest market for infringing goods in southeastern Mexico and one of the largest centers where counterfeited goods are manufactured,

⁵ In light of changing trends in the video game industry, including increased reliance on digital distribution models as well as the proliferation of online infringement more generally, physical markets are becoming less of an enforcement priority for ESA's membership.

⁶ ESA notes that a complicating factor in combatting mass infringement in Mexico is the cumbersome requirement that each copy of an infringing game disc be accompanied in prosecution files by a copy of a legitimate original for comparative examination by *peritos* (experts). Under this system, when the comparison involves multiple copies of the same infringing video game, rights holders must submit an equal number of legitimate video game copies for the *peritos* to compare to the infringing copies. ESA encourages Mexican IP enforcement authorities to create a reference library of legitimate originals so that multiple copies of the same infringing video game can be compared to a single legitimate copy. Additionally, we recommend requesting that the prosecutors (*Ministerios Públicos*) and the experts (*peritos*) be able to conduct inspections of the online records of the U.S. Copyright Office (available at www.copyright.gov) in order to validate that video games are duly registered, according to existing case law, and that judges accord such inspections with the fullest probative weight permitted under Mexican procedural laws. Currently, prosecutors and judges require rights holders to submit certified copies of U.S. copyright registrations ("Additional Certificate") and have them apostilled by the U.S. State Department. The time and expense of obtaining Additional Certificates from the U.S. Copyright Office in person and then having the State Department apostille the documents could be easily alleviated by allowing the *peritos* to inspect and verify the online copyright registration records for video games maintained by the U.S. Copyright Office.

⁷ In ESA's 2017 submission for the Notorious Markets List, both the Bazar Pericoapa and Plaza Meave markets were listed as problematic markets for selling infringing copies of video games and circumvention devices. However, since that submission, the Mexican government has undertaken effort to clear these areas of counterfeit products and their vendors and turn them into legal, viable shopping malls. Therefore, ESA removed them from this year's submission.

along with the Tepito. Infringing copies of video games and circumvention devices are readily available at this market.

La Pulga Río (Monterrey): Situated in downtown Monterrey in northeast Mexico, La Pulga Río is the biggest market in the area with pirated merchandise, including video games, records, footwear, and clothing.

Brazil

Galeria Pagé (São Paulo). This Galleria is a multi-story shopping complex located in the center of São Paulo. Selling a variety of products, this Galleria houses over 170 vendors, with 30 percent of them specializing in the sale of electronic products and counterfeit merchandise, including infringing video games, game circumvention devices, and modified consoles (*i.e.*, consoles with circumvention devices pre-installed). It is estimated by local authorities that around 8,000 consumers visit Galeria Pagé daily. A number of enforcement raids took place during the year, which included the seizure of video games and related products. During the year, there was a noticeable increase in the volume of visits and popularity at the secondary, more upscale location of Galeria Page in the Bras neighborhood in central Sao Paulo. This new location has 630 shops and around 10 percent of those are dedicated to video game products, and despite the newer appearance, it is possible to easily identify the video game circumvention and modified devices being offered.

Santa Efigênia (São Paulo): Covering eight blocks in downtown São Paulo, this market remains famous for offering a wide variety of electronic goods in its over 525 shops and outlets. Approximately 200 shops exclusively offer video game products (a growth of five percent in comparison to the previous year and 40 percent of the total of shops), such as infringing video games, game circumvention devices, and modified consoles, as well as smuggled products, ranging from consoles to popular and newly-released game titles. This increase in the volume of infringing video game content being offered is due to the increased number of street vendors offering products to pedestrians and directing these customers to the illegal booths inside the galleries. Brazilian customs officials and local police have conducted enforcement operations in the area over the past year under "Operation Ostentation," but no real impact on the volume of customers or illegal activity has been seen. Prices of infringing video game products sold at the market are typically 25 percent higher than those available online, but the attention to customers and variety of products are part of the attraction to the market.

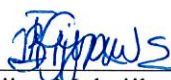
Rua Uruguaiana (Rio de Janeiro): Rua Uruguaiana is one of the most famous outlets to buy counterfeit goods in downtown Rio de Janeiro with over 105 active stores. The estimated volume of video game goods offered in exclusive booths and shops has decreased 22 percent over the year but do still include infringing video games, game circumvention devices and modified consoles. Many unregistered street vendors also operate in the area, selling infringing copies of popular video games. It is estimated by local police that the volume of street vendors at this location is four times bigger than the volume of illegal booths. It is also known that the warehouses storing the illegal products are located nearby and raids have been executed at these locations by the local police forces to seize larger quantity of products. Local police conducted regular raids during the year, but the volume of daily visits to the location increased during the period, as well.

Oiapoque Outlet (Belo Horizonte, state of Minas Gerais): Also known as ShoppingOi, this market is located in downtown Belo Horizonte, with three floors of outlet shops dedicated to all variety of products, mostly illegal goods. Video games remain popular among the products

available in the market. It is estimated that 30 out of the 90 active shops/booths are dedicated to video games and electronic goods (a 20 percent increase compared to the previous year) and around 13 percent of all products available/offered in the galleria are infringing games. It is estimated that most of all video game-related products available in the market are illegal (counterfeit or smuggled). The market also has an online marketplace – shoppingoi.com.br – and a Facebook page.

We would like to underscore our appreciation to the U.S. officials who drive and administer the out-of-cycle review of notorious markets. The resulting Notorious Markets List provides important insights that allow national and local policymakers, as well as law enforcement officials, to evaluate and fairly demand accountability from these marketplaces and the services that support them.

Sincerely,



Bijou Mgbojikwe
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