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

Re: 2021 Review of Notorious Markets for Counterfeiting and Piracy: Comment Request, 86 Fed. Reg. 48464, pp. 48464-66 (August 30, 2021)

Dear Mr. Lee,

We are writing to respond to the above-referenced Federal Register Notice inviting comments on online and physical notorious markets 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 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

Hyperlinking Websites (“Linking Sites” or “Link Sites”): These sites provide hyperlinks (“links”) to infringing copies of complete versions of copyright protected 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

oceanofgames.com (Global Alexa Rank: 9,168). This games-focused site’s popularity is global in nature, based on its high Alexa ranking. In August 2021, oceanofgames.com made available over 5,100 links leading to unauthorized copies of ESA member titles, of which less than 1% were removed based on infringement notices sent. Previously hosted in France as of last year, this site is now hosted by Velvety Network Soution by IntraVex in Ukraine.

¹ The figures that follow are based upon research conducted in September 2021 in anticipation of this filing.

nsw2u.xyz (Global Alexa rank 35,153). This website indexes, manages, and organizes links to unauthorized copies of ESA member copyright protected content hosted on third-party platforms. In September 2021, the website offered over 5,500 posts with links to game downloads for the Nintendo Switch, including the most recent ESA member video game releases. To counter anti-piracy enforcement actions, the website utilizes multiple alternative domains including .com and .org. The website also links to game-2u.com which makes available pirate games for the PlayStation, Xbox and PC platforms. The website does not respond to ESA take down notices and uses a U.S.-based content delivery network (“CDN”)² in addition to privacy registration services to conceal the identity of its owners and administrators.

darkw.pl (Global Alexa Rank: 49,557). Although this site is exclusively presented in the Polish language, it links to a large volume of infringing content from multiple creative industries. In August 2021, darkw.pl indexed over 65,000 new links to infringing copies of ESA member video game content and has over 187,000 registered users. The site also employs the services of the U.S.-based CDN referenced above and blocks access from U.S. IP addresses in an effort to appear offline.

Hosting Websites (“Cyberlockers”): Cyberlockers host the infringing content on cloud storage platforms and are 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 platforms’ limited response rates to notices of infringement.

1fichier.com (Global Alexa Rank: 1,701). This cyberlocker platform is a piracy haven for uploaders to disseminate unauthorized copies of the latest video game titles. 1fichier hosted over 1,156 unauthorized copies of copyright protected ESA member video game titles (as of August 2021) and has a 0.71% response rate to ESA’s take down notices. One ESA member reports that the platform does not respond to any of its take down notices. 1fichier’s extremely low compliance rate for the removal of infringing content attracts more unauthorized uploaders to the platform due to the fact that the content will remain active on the platform for longer periods of time. Linking websites that index and manage the links to content hosted on 1fichier also benefit from the platform’s low compliance rate as these websites derive greater advertising revenue from users clicking on the links to pirate content hosted on 1fichier.

The French based company operating the 1fichier.com website has been sentenced by both civil and criminal courts in France:

- In a decision dated May 25, 2021, the Paris Judiciary Court ruled it was liable for failing to remove unauthorized copies of games stored on its platform despite notifications from

² 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.

the ESA member demanding to take down pirate content. The Court also ordered the company to pay a total sum of EUR 935,500 (approximately USD 1.1 million) in compensation. Although the Court ordered provisional enforcement of its decision, which should have resulted in immediate compliance by the company, the company operating the 1fichier platform has failed to do so.

- In a decision dated April 23, 2021, the Nancy Criminal Court convicted this company for multiple counts of copyright infringement for failing to remove content from its servers. The Court ordered the company to pay a criminal fine and more than EUR 1,300,000 (approximately USD 1.5 million) in damages to rights holders. Its chairman was also convicted to one year suspended imprisonment and to a criminal fine.

Both decisions have been appealed. The platform thus continues to derive revenue through a subscription service, a referral scheme and advertising; although some major credit card processors do not service the platform due to its allegedly illegal activities. The platform is operated by DStorage SAS in France where it holds a Similarweb rank of 230.

rapidu.net (Global Alexa Rank: 155,368). In August 2021, this site hosted more than 10,600 infringing video game files. The site also employs the services of the U.S.-based CDN referenced above.

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 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.

torrentfunk.com (Global Alexa Rank: 53,139). Approximately 3,300 infringing URLs that initiate the download of ESA member video game titles were found on this site in August 2021 alone. Previously hosted in Sweden, the site now employs the services of the U.S.-based CDN referenced above.

torrentdownloads.pro (Global Alexa Rank: 21,466). Over 3,200 infringing downloads of ESA member video game titles were found on this site in August 2021. This site employs the services of the U.S.-based CDN referenced above, but is popular in Libya with an Alexa country rank of 367.

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”, 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 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: The sites listed below provide “cheats”, which (using software code) are ways to modify the game in order to allow an advantage for the player. Examples of cheats include: aimbots (which help a player aim in a first-person action game); trainers (which allow a player to turn on or off features to make the game easier or more difficult); and one-button maneuvers 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”). Cheats can infringe ESA member IP in instances where the cheat software code copies the underlying code of the game software. In addition, cheat software is specifically designed to defeat security codes measures meant to prevent unfair player advantages within the game. The sites referenced below 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: 11,393).³ This site has allowed a self-reported 4.1 million users (Up 20% since last year) to develop and submit cheats to this forum-based site since 2000. The site offers cheats and tutorials for 100+ titles as well as information and links to anti-cheat software and how to bypass their protocols. 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 illegal goods.

se7ensins.com (Global Alexa Rank: 108,500). The site offers 1.2 million users access to unauthorized mods, boosting services, and online support for reversing bans (administered by game publishers as a result of players violating the rules) since 2010. The site generates revenue through advertisements and subscriptions that allow premium members to acquire additional perks to their user profile.

mpgh.net (Global Alexa Rank: 46,474). Mpggh.net offers “several hundred thousand” free cheats to over 4 million users, as well as tutorials and a marketplace where users can buy and sell cheats, accounts, and in-game items. The site generates revenue through advertisements and the offering of premium accounts that bypasses restrictions found on free accounts, thereby making them attractive to sellers.

iwantcheats.net (Global Alexa Rank: 189,707). On this site, over 1.2 million members can pay for premium access to the site’s forum and download cheats for over 40 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.

engineowning.com (Global Alexa Rank: 56,053). A self-reported 291,000 members can purchase cheats for 14 popular action video games. The cheats include automatic aiming, auto fire, and other hidden information. The site sells access to the cheats from three days to one year and uses servers in six different countries.

³ 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/>.

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, in-game items, game accounts, and the unlicensed sale of potentially fraudulent game keys, which can provide access to features within a game or to the game itself. Each site organizes the listings by game and then usually by type of item. While some sites 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.

G2a.com (Global Alexa Rank: 2,247) G2a.com sells to a reported 25 million plus global visitors digital keys, virtual currencies, and in-game items. The site makes money through transaction fees and premium services that provide extra discounts and free games on a monthly basis. While G2a.com supports several payment processors, the site also provides its own in-house payment option.

playerauctions.com (Global Alexa Rank: 11,080). This site provides a marketplace for users to sell in-game currency, digital items, digital cosmetic (skins), accounts, CD keys, and power-leveling for over 200 video game titles. 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 2.2 million monthly visits over the past six months.

G2G.com (Global Alexa Rank: 9,321). Over 1 million members can access over 1 million listings that include in-game items, virtual currency, boosting, and digital accounts offered by other users of the site. The site charges a fee from 4.99% to 9.99% per successful transaction. According to Similar Web, the site had 3.5 million visits in its most recent month.

Notorious Physical Markets⁴

Mexico⁵

⁴ 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.

⁵ 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.

In Mexico, hard goods piracy continues at large open-air markets and shopping complexes that remain the most significant sources of infringing video game-related products. Lately, consoles that resemble arcade controllers and pre-loaded with pirated copies of video games have become more common. Also, illegal circumvention devices remain of great concern across a range of industries, including the video game industry, and there persists a significant lack of enforcement efforts to protect intellectual property rights in these locations. 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 owners of these storage locations who profit from the sale of counterfeit goods.

Plaza Meave (Mexico City). Plaza Meave is located in the historic center of Mexico City and is considered the main marketplace for video games and related items, both legal and illegal. In its three floors and more than 250 vendors, this market receives an approximate average of 70,000 visitors weekly. Even during COVID-19 pandemic access restrictions, activities in this market remained consistent, including the continued sales of circumvention devices and console modifications.

Plaza de la Computación (Mexico City). A popular market within the nation's capital, Plaza de la Computación offers video game and game console circumvention services and modification devices, as well as pirated copies of video game copies, consoles, and other video game accessories. The market consists of three levels and approximately 250 vendors, some of those vendors offer the installation of circumvention devices and other infringing video game products; however, those activities are not carried out openly.

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 infringing physical goods due to the rise in electronic downloads, the Florida Street section in Tepito continues to be the main point of active trafficking of pirated copies of video games, modified consoles (*i.e.*, consoles with circumvention devices pre-installed), and circumvention devices. Tepito remains a dangerous spot in Mexico City, hindering enforcement efforts in the area.

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 visitors, domestic and foreign alike. In 2012, the San Juan de Dios market entered the list of the biggest piracy markets in the world, and despite the loss of some foot traffic related to the COVID-19 pandemic, the market has retained its position to date. There is a large section of the market where pirated copies of newly released video games and films are offered, comprising more than one-third of this market's approximately 3,000 vendors.

Frikiplaza (Mexico City). Dedicated to specialized pop-culture paraphernalia, Frikiplaza consists of various floors stocked with pirated video games and other legitimate and illegitimate collectible items. It is well-known as a location where vendors will openly offer to "hack" video game consoles through the installation of circumvention devices and video game console modification devices. In addition, the selling of arcade and retro-inspired consoles preloaded with pirated copies of video games has recently become a growing problem at this market. This market continues to receive an approximate average of 20,000 visitors weekly.

Pericoapa (Mexico City). Pericoapa is a well-known bazaar in Mexico City located in a three-level semi-inhabited building that offers video game circumvention and modification chips, as well as other original and questionably legal products. This marketplace remains as an important spot of illegal video game related goods and services.

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, along with the Tepito market, is one of the largest centers where counterfeited goods are manufactured. Pirated copies of video games and circumvention devices are readily available at this market.

La Pulga Río (Monterrey). Located in downtown Monterrey in northeast Mexico, La Pulga Rio is the biggest market in the area with pirated merchandise, including video games and services, records, footwear, and clothing can be found. This marketplace has also gained online presence with its own website and a Facebook page, both of which offer deliveries of counterfeit and pirated goods.

Brazil

In Brazil, the Covid-19 pandemic strongly impacted the Brazilian economy, including high levels of unemployment, decreased purchase capacity, and stalled market recovery. As for the video game industry, the pandemic also brought an increased demand for counterfeit and modified devices offered by street vendors and physical markets to respond to the increased demand. Many physical markets remained open during the pandemic with vendors continuing to sell counterfeit and modified video game consoles and accessories, with many of them also having an online presence.

Galeria Pagé (São Paulo). This galleria is a multi-story shopping complex located in the center of São Paulo, running two main facilities with an increased focus on offering electronic goods. Selling a variety of products, this galleria houses over 170 vendors, with approximately 75 shops offering electronics, including video game-related products. Approximately 25 of these shops are solely dedicated to the sale of infringing video games, game circumvention devices (ranging from USD 5.00 to USD 300.00), and modified consoles. Due to the pandemic, foot traffic at both locations dropped dramatically, but once they reopened in December 2020, they have remained consistently popular.

Santa Efigênia (São Paulo). Covering eight blocks in downtown São Paulo, this popular market remains famous for offering a wide variety of electronic goods typically at lower prices than at regular shops. On the main street of Santa Efigenia, there are approximately shops and outlets, with another 500 shops in the surrounding areas. During the pandemic, Santa Efigenia remained open but did suffer from lower foot traffic until the end of 2020. In 2021, it is estimated that there are over approximately 75 shops dedicated solely to offering video game-related products, which is down from the more than 160 shops in the previous year. These shops continued to offer infringing video games, game circumvention devices, and modified consoles, as well as smuggled products, ranging from consoles to popular and newly-released game titles in order to avoid import taxes. Due to the clientele, it is believed that Santa Efigenia sells more circumvention devices as compared to other Brazilian markets. In the last twelve months, local authorities conducted to major

raids on this market, specifically targeting stores selling IPTV streaming devices and other specific electronics.

Rua Uruguaiana (Rio de Janeiro). Rua Uruguaiana remains one of the most infamous outlet areas to buy counterfeit goods in downtown Rio de Janeiro with over 198 registered stores and booths. Due to COVID-19, the number of active video game shops decreased from 41 shops and booths to 32 in 2021, but still exclusively offering video game services and products, including infringing video games, game circumvention devices, and modified consoles. Many unregistered street vendors continue to operate in the area, selling infringing copies of popular video games. One major raid at Rua Uruguaiana by the local police took place in 2021, targeting a number video game shops. Unlike other markets in Brazil, Rua Uruguaiana e-commerce activities remain poor, and it did not establish an online marketplace during the pandemic.

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 the pandemic reduced the number of active booths dedicated to video games from 16 to ten booths out of the 900 active shops/booths dedicated to video game products and electronic goods. Prices on retro games and consoles are 15 to 25 percent higher at Oiapoque shops compared to similar products offered in Sao Paulo. It is estimated that most of all video game-related products available in the market are illegal (counterfeit or smuggled).

ESA would like to underscore our appreciation to the U.S. government officials who: (1) drive and administer the review of notorious markets; (2) implement and coordinate the use of policy tools that enhance intellectual property protection and enforcement domestically and overseas; and (3) encourage foreign government officials to investigate reports of piracy and counterfeiting and bring relevant enforcement actions. The resulting Notorious Markets List provides important insights that allow national and local policymakers, as well as law enforcement officials, in other countries to evaluate and fairly demand accountability from these markets and the services that support them, including through appropriate enforcement actions.

Should the Office of the United States Trade Representative have any questions or comments concerning ESA's response, please contact Jason Jeffreys at (202) 903-2353 or JJeffreys@theesa.com.

Sincerely,



Jason Jeffreys
Counsel, Intellectual Property Protection and
Security