



ESA Takes Aggressive Action to Designate Pirate Markets in Mexico and Brazil as “Notorious”

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On October 11, 2021, the Entertainment Software Association (ESA or Association)^[1] informed the Office of the United States Trade Representative (USTR)^[2] of certain foreign websites and marketplaces that should be labeled “Notorious Markets.” As defined by the USTR, “Notorious Markets . . . reportedly engage in and facilitate substantial copyright piracy or trademark counterfeiting.”^[3] The ESA’s notice came in response to the USTR’s invitation for public comment in creating the Office’s 2021 Review of Notorious Markets for Counterfeiting and Piracy.

In the ESA’s public comment, it claimed that fifteen foreign websites and twelve foreign physical marketplaces “facilitate mass infringement or counterfeiting” of interactive videogames. These markets allegedly “remain either sheltered from, or impervious to, the deterrent effects of enforcement actions.” Of the fifteen websites named, five provide links that facilitate unauthorized access to copies of protected videogames, two host infringing content on “cloud storage platforms,” five provide software “cheats” that give players an unfair advantage, and three provide platforms in which users may buy and sell unauthorized digital items. As alleged by the ESA, millions of users access these sites monthly, on which they can download tens of thousands of different illegally disseminated video games.

The twelve different physical marketplaces the ESA named are in Mexico and Brazil. The marketplaces can span multiple stories or blocks and contain hundreds of stores that sell a combination of videogame copies, consoles, and modification devices.^[4] The Association concluded its public comment by thanking the USTR for enhancing its members’ intellectual property rights and for “[encouraging] foreign government officials to investigate reports of piracy and counterfeiting and bring relevant enforcement actions.”

Notably, the USTR’s 2020 Review of Notorious Markets for Counterfeiting and Piracy included six different markets in which pirated videogames or related products are shared. The goal of these annual reviews “is to motivate appropriate action by the private sector and governments to reduce piracy and counterfeiting.” The inclusion of markets on the “Notorious Markets” list may be the first step in curbing the infringement of videogames creators’ intellectual property rights occurring in other countries.^[5] For example, the USTR’s 2020 report noted that the United Kingdom arrested eleven individuals and seized counterfeited goods valued at \$10 million in a market that was designated as “notorious” by the USTR.^[6] In addition, the governments in Brazil, Spain, and China cooperated with U.S. rights holders or the U.S. Government to address piracy occurring in their respective countries.^[7] These examples demonstrate that videogame copyright owners may consider notifying the USTR in globally enforcing their intellectual property rights, among other options.

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Recognizing that emerging industries require bespoke lawyering, David Enzminger formed and lead Winston's Videogame, Gaming & Esports Group to provide comprehensive legal solutions to companies in these industries. This multidisciplinary group includes more than 60 lawyers across 10 practices working seamlessly to assist companies in these industries in all areas, including managing IP portfolios, assisting esports companies establish global sports leagues, selling franchises, and developing proactive legal solutions for issues that arise from league operations. We represent videogame publishers in antitrust matters and represent both rights owners and gaming companies in licensing issues for game content. In addition, our team helps electronic game clients prepare for all types of regulatory and public scrutiny issues, such as corporate governance, data privacy, and harassment/discrimination claims that are sure to come as the industry continues to grow in both size and influence. Our offices in New York, Silicon Valley, Los Angeles, Shanghai, and Hong Kong provide gaming clients with a global platform for their complex and evolving legal needs.

^[1] The [ESA](#) is the U.S. association “where the major players of the video game industry work together . . . [to] advocate[] for robust intellectual property protection and enforcement measures.”

^[2] The [USTR](#) is an Executive Branch agency that “negotiate[s] directly with foreign government to create trade agreements, to resolve disputes, and to participate in global trade policy organizations. [It] also meets with governments, with business groups, with legislators and with public interest groups to gather input on trade issues and to discuss the President's trade policy positions.”

^[3] Office of the United States Trade Representative, *2020 Review of Notorious Markets for Counterfeiting and Piracy*, [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf).

^[4] However, in a footnote to its public comment, the ESA noted that it was less focused on physical markets “[i]n light of changing trends in the video game industry.”

^[5] Global Innovation Policy Center, “Notorious Markets Make USTR's ‘Naughty’ List,” U.S. Chamber of Commerce, <https://www.theglobalipcenter.com/notorious-markets-make-ustrs-naughty-list/>.

^[6] Office of the United States Trade Representative, *2020 Review of Notorious Markets for Counterfeiting and Piracy* at 10-11, [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf).

^[7] *Id.*

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