

Why Including Domestic Companies on USTR's Notorious Markets List Undermines U.S. Trade Policy

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Including U.S. firms on the official list that names and shames havens for piracy and counterfeiting would give the false impression that America has weak IP enforcement and undermine U.S. efforts to convince other countries to do more to address the problem.

KEY TAKEAWAYS

- The purpose of the U.S. Trade Representative's annual Notorious Markets List is to highlight foreign marketplaces known for selling counterfeit or pirated goods.
- Including U.S. firms on the Notorious Markets List would give the false impression that the United States has weak IP enforcement, which would allow other countries to deflect attention away from their own shortcomings.
- The United States already has robust IP laws and multiple avenues to take action against domestic firms that facilitate sales of fake goods.
- USTR should encourage other countries to follow the best practices of the OECD Task Force on Countering Illicit Trade, which collects invaluable data about opaque and illegal activities in global markets.
- The EU-US Trade and Technology Council should explore opportunities to align policies between the United States and the European Union to effectively address counterfeiting on e-commerce platforms.

INTRODUCTION

The United States Trade Representative (USTR) has published the Review of Notorious Markets for Counterfeiting and Piracy (Notorious Markets List, or NML), an annual report designed to highlight foreign markets that have facilitated the sale of counterfeit and pirated goods since 2006.¹ The goal of the NML is to motivate foreign governments to enact stronger measures against the sale of counterfeit and pirated products, a problem that, according to an Organization for Economic Cooperation and Development (OECD) estimate, amounted to 3.3 percent of global trade in 2016.² Recently, some industry groups have sought to have USTR include U.S. companies on the NML.³ The inclusion of domestic firms on a list intended for promoting fair and rule-based trade makes no sense because USTR would essentially be publishing a report “naming and shaming” the U.S. government for failing to take sufficient action to protect intellectual property (IP). To the extent that the U.S. government should take more action domestically to address piracy and counterfeiting, there are many avenues available domestically to address the issue. As such, USTR should keep the report focused on its core purpose: targeting foreign practices.

The NML is USTR’s compilation of marketplaces—physical and online spaces where vendors sell consumer goods—known for large-scale copyright piracy and counterfeiting. USTR’s goal is to name and shame marketplaces that flout global norms for IP rights. Counterfeit and pirated goods hurt U.S. companies, workers, and consumers, and the overall U.S. economy. The NML serves as a way to publicly denounce these illicit marketplaces and protect U.S. interests.

USTR should not expand the NML purview to include U.S. companies. Doing so would undermine the report’s effectiveness and decrease the legitimacy of U.S. trade enforcement actions.

The global pandemic and the rapid increase in e-commerce have fueled the proliferation of counterfeit goods consumers believe are legitimate and safe.⁴ Counterfeit personal protective equipment such as N-95 masks and COVID-19 testing kits are among the most common fraudulent products sold in illicit marketplaces.⁵ USTR emphasizes that online marketplaces should adhere to best practices developed in partnership with government and industry, such as those produced by the European Union or the U.S. Department of Homeland Security, to reduce the sale of counterfeits.⁶

USTR updates the NML each year to acknowledge positive and negative developments relating to anticounterfeit enforcement in various countries. The list is nonexhaustive and relies on an annual public engagement effort in which private companies and citizens alike can submit comments to nominate certain marketplaces for inclusion and describe their own anticounterfeiting efforts. The purpose of the list is not to document or analyze the IP laws in a particular country, but rather to highlight prominent examples of marketplaces that violate IP rules.⁷ Each new report lists specific marketplaces with accompanying reasons for their inclusion and a rotating section that highlights a specific issue relating to piracy and counterfeiting, such as the adverse impact of counterfeiting on workers (since counterfeit goods may be produced in unsafe workplaces using unsafe materials).

The primary purpose of the NML is to encourage foreign governments to take concrete action toward cracking down on illicit marketplaces. Because it is a tool for U.S. trade, the NML is not the proper forum for domestic concerns. Moreover, many avenues exist to address domestic counterfeiting issues, such as through enforcement actions brought by the Department of Justice (DOJ) or state attorneys general.

USTR should not expand the NML purview to include U.S. companies. Doing so would undermine the report's effectiveness and decrease legitimacy of U.S. trade enforcement actions. During the next period of public engagement, USTR should reemphasize the report's original purpose to target foreign markets that hurt U.S. businesses and consumers. The United States already has strong IP enforcement mechanisms in place, so if companies have complaints about U.S. firms, they should work with domestic law enforcement agencies such as the Department of Homeland Security (DHS) to improve best practices, not try to co-opt a tool for international trade. USTR should continue to work hard to showcase to other countries its findings in the NML.

HISTORY

USTR has long prioritized the protection and enforcement of IP rights. Each year, the office conducts a review of the state of foreign IP law and enforcement as part of the "Special 301" provisions in the Trade Act of 1974 amended in the Omnibus Trade and Competitiveness Act of 1988.⁸ Beginning in 2006, the Special 301 report has included a section identifying so-called notorious markets, stating that "global piracy and counterfeiting continue to thrive, in part due to large marketplaces that deal in infringing goods."⁹ The report classified China as a major infringer, with Chinese physical marketplaces and online sites listed under the notorious markets banner.

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China has long had weak IP safeguards. During the early 2000s, USTR delegations visited marketplaces in China almost entirely made up of counterfeit goods, many of them based on products made by U.S. companies. These marketplaces existed in numerous Chinese cities, with the government refusing to act because of the economic benefits. Under the statutory authority of USTR relating to foreign countries and their adequate protection of IP, USTR sought to highlight such markets in foreign jurisdictions.

Beginning in 2010, USTR has published the NML as a separate, complementary report to the Special 301 review. Although the primary focus originally was on physical marketplaces, because of the prevalence of online piracy, the NML now also includes online marketplaces.

By "naming and shaming," the United States can put pressure on foreign governments to implement stronger enforcement. For example, listing The Pirate Bay, a well-known site containing pirated digital content, put pressure on the Swedish government to criminally prosecute its founders and update the country's IP laws.¹⁰ The evolving nature of the list and USTR's public engagement also reward positive action by foreign governments. For example,

USTR removes marketplaces from the list after they've resolved key issues or show evidence of improvements. The NML also includes a section highlighting positive changes.

RECENT TRENDS TOWARD INCLUDING U.S. COMPANIES

Arguments over whether U.S. firms should be included in USTR's NML have emerged in recent years via public submissions—as USTR solicits annual comments nominating marketplaces for inclusion.

Over the last five years, USTR received an average of 45 comments each cycle, and 85 in 2021 alone. While the public-engagement effort seeks specific nominations for the list, commenters often include narratives about the harms stemming from specific sites or apps. For example, industry groups such as the Motion Picture Association and the Intellectual Property Owners Association have submitted nominations based on the harms inflicted by piracy and counterfeiting. In addition, some companies use their comments to defend their business practices. For instance, Snap, Inc. and Amazon have submitted comments to discuss improvements made in a past cycle to combat counterfeiting.

Submissions from the past several years reflect two central trends: a desire to address counterfeiting by all companies, both foreign and domestic, and the need for policymakers to tighten definitions of online marketplaces.

In 2018, the American Apparel and Footwear Association (AAFA), an industry group representing over 1,000 brands, retailers, and manufacturers, began highlighting Amazon and its global affiliates as a key offender due to its allegedly slow response to counterfeits. In its comments, AAFA stated that “while USTR's Notorious Markets List is concerned with foreign markets that engage in and facilitate substantial trademark counterfeiting and copyright piracy, it is important to emphasize that many of AAFA's members report the same issues detailed in this section also persist on Amazon.com.” Seven comments mentioned Amazon affiliates in 2018.¹¹ AAFA continued to recommend including Amazon in 2019. USTR acknowledged that it does not seek submissions about U.S.-based e-commerce platforms, but decided to list the American company's foreign domains *amazon.ca*, *amazon.co.uk*, *amazon.de*, *amazon.fr*, and *amazon.in*, citing concerns from AAFA that a lack of available seller information had led to a proliferation of counterfeits in the marketplace.¹² USTR included Amazon's foreign domains again in 2020.¹³ In both instances, the company characterized its inclusion as the result of a “personal vendetta” based on President Trump's frequent clashes with Jeff Bezos, the founder of Amazon and owner of *The Washington Post*, which frequently criticizes the former president.¹⁴

Multiple commenters have also nominated Facebook for inclusion in the NML in the last four years.¹⁵ The Transnational Alliance to Combat Illicit Trade and AAFA described evidence that Facebook and Instagram allowed the spread of fraudulent advertising. Likewise, British brand-protection firm Incopro nominated the social media platforms due to continued high levels of IP rights infringement.

Some organizations submitting comments also want “notorious market” redefined when it comes to online markets. At the core of the dispute is a lack of clarity over what criteria USTR should use for inclusion. For example, some commenters continue to nominate companies to be included even when their apps or services do not include any form of marketplace. For example, Snap, the company behind the social network Snapchat, had multiple nominations in 2021 for

allegedly facilitating the sale of harmful goods.¹⁶ Many comments rebuking a nomination or listing point toward vague criteria from USTR.

KEEPING THE ORIGINAL FOCUS OF THE NOTORIOUS MARKETS LIST

Although some parties seek to include U.S. companies in the NML, USTR should resist the urge to include American enterprises. Piracy and counterfeiting are serious issues and enforcement actions both in the United States and abroad should be swift and appropriately strong. But using the NML to address domestic challenges weakens a key tool for international trade negotiations and gives trading partners the false impression of weak IP enforcement in the United States. Those with grievances against domestic actors should use existing avenues for action. The United States has robust IP laws, as allowing for the reporting of alleged violations to DOJ or state attorneys general. Similarly, if companies want to work on changes to voluntary measures taken by online platforms to address counterfeiting, they should work through existing channels such as the U.S. Government's National Intellectual Property Rights Coordination Center or the DHS. And if any of these organizations want to see changes made to U.S. IP laws, they should take those concerns to Congress. USTR's NML is a tool for engaging with foreign governments and pushing forward positive change, not for shaping individual companies.

Nominating American companies to the NML undermines the ability of USTR to protect U.S. IP interests. USTR develops and coordinates international trade policy and is tasked with asserting the rights of the United States in trade agreements.¹⁷ Under Section 301 of the Trade Act of 1974, it is responsible for enabling American innovation via effective IP protections. USTR's focus has always been trade policy, and its remit is to work with foreign governments.

Like the 301 report, the NML is a government-to-government report meant to encourage change and stronger enforcement from foreign governments. The impact of the NML would be significantly weakened if USTR were to regularly include American companies because it would give the false appearance of weak counterfeit and piracy enforcement in the United States and undermine USTR's assertion that other countries should be doing more to address this serious issue. The same would be true if USTR included the United States in its Special 301 report.

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Bringing U.S. companies into trade issues is not a problem exclusive to the NML. There is an impetus in the United States to take domestic policy conversations and bring them into the trade space. Both the public and policymakers alike want key digital issues to be addressed and that any available forum be used to do so, regardless of suitability.¹⁸ However, the NML was intended for one purpose, and one purpose only. Including U.S. companies on the list gives foreign governments an opportunity to criticize the United States and disregard USTR's evaluations.

Compiling a list of the top offenders for piracy and counterfeiting creates the threat of reputational harm for those listed. Consumers who see headlines detailing how well-known marketplaces and websites are filled with illicit goods may be deterred from shopping at those same places again. The potential reputational harm creates a strong incentive for reform. But if USTR includes U.S. companies on the same list as egregious foreign offenders, the ramifications

for inclusion on the list will likely diminish over time because those peddling fake goods can simply point to the American companies on the list as evidence of their own legitimacy. Including U.S. companies would therefore also make the NML ineffective in negotiations.

RECOMMENDATIONS

The rise of digital trade has led to a corresponding rise in piracy and trade in counterfeit goods. The United States and other countries need to do more to create not just new digital trade rules but new domestic and foreign trade policy tools to counter trade in illegal and illicit goods online.

USTR Should Keep the Notorious Markets List Focused on Foreign Markets

The NML should only focus on foreign markets. Therefore, it should not include U.S. firms. The inclusion of U.S. companies on the list implies that American companies are equally complicit in allowing piracy and counterfeiting in their online marketplaces, which is inaccurate given that U.S. firms are subject to strong IP laws and enforcement at home. Including U.S. firms gives the false impression that the United States has weak IP enforcement and allows other countries to deflect attention away from their own shortcomings.

USTR should reemphasize the importance of the NML in its trade policy strategy and reaffirm in its next invitation for comments that nominations should only be for foreign offenders.

USTR Should Encourage Trading Partners to Follow OECD Best Practices to Address Piracy and Counterfeiting Online

While direct U.S. efforts to promote IP protection are essential to protect U.S. interests, the United States should also promote the work of international organizations to protect IP, such as that of OECD to gather data and develop best practices in addressing piracy and trade in counterfeits online.¹⁹

The OECD Task Force on Countering Illicit Trade is the most effective global forum for the United States to work with other trading partners on the growing issue of piracy and counterfeiting online.²⁰ It was created to chart the flows of illicit trade in order to better quantify the risks and also the illicit markets, actors, and networks that thrive in the shadows of global trade. It collects invaluable data about these opaque and illegal global activities to ensure policymakers better understand these issues as they discuss potential ways to address them.

For example, OECD's work on trade in counterfeits and free trade zones (FTZs) led to new data, information sharing, and a certification to show which FTZs are committed to recommended best practices.²¹ Its 2021 report "Misuse of E-Commerce for Trade in Counterfeits" provides the most comprehensive and detailed analysis of the issue.²² This work is the basis for policy discussions between the United States and other OECD members and their respective customs and trade enforcement agencies, as well as with the World Customs Organization and other relevant organizations.

USTR should increase efforts to use the NML and OECD best practices as the basis for bilateral and regional engagement with trading partners on addressing the issue of piracy and the sale of counterfeits online. As part of its enforcement efforts, USTR should continue supporting the work of organizations taking part in OECD discussions about strengthening anticounterfeiting measures and IP rights more broadly.

EU-U.S. Trade and Technology Council Should Explore Aligning U.S. and EU Policies for E-commerce Platforms

The United States should also seek to align policies for e-commerce platforms with the European Union to avoid inconsistent rules. For example, the European Union has implemented fairness and transparency requirements for online platforms in the EU Regulation on platform-to-business relations (P2B Regulation) and is considering a “know your business customer” proposal in the Digital Services Act.²³ At the same time, Congress has proposed legislation such as the SHOP SAFE Act and the INFORM Consumers Act, which would similarly impose various requirements on e-commerce platforms.²⁴ Moreover, both the United States and the EU have developed principles for e-commerce platforms to address counterfeits.²⁵ Given the alignment of interests, rather than have the European Union and the United States pursue different requirements for e-commerce platforms, they should explore a common set of rules through the EU-U.S. Trade and Technology Council.

Congress and the Administration Should Continue to Explore Domestic Policies to Reduce Fake Goods Sold Online

While USTR should focus on foreign markets, other parts of the U.S. government, including DHS and DOJ, should prioritize domestic policies and enforcement actions aimed at reducing the sale of fake goods online.

These U.S. government agencies should work with relevant stakeholders to gather better data about the issue and develop and apply industry best practices and standards to address it. For example, policymakers should strengthen data-sharing partnerships between the public and private sectors to collect and analyze data about counterfeit activity online and create forums for stakeholders to come together to share new solutions and develop best practices.²⁶

For example, the 2020 DHS report, *Combating Trafficking in Counterfeit and Pirated Goods*, provides best practices for the private sector and key areas for government action. It identifies appropriate administrative, statutory, regulatory, and other actions, including enhanced enforcement measures, modernization of legal and liability frameworks, and best practices for private sector stakeholders. Recommendations for the private sector focus on increasing self-policing efforts and using methods such as enhanced vetting of third-party sellers, limits on high-risk products, and efficient notice-and-takedown procedures.

CONCLUSION

USTR created the NML in 2006 to shine a spotlight on foreign actors that allow piracy and counterfeiting to flourish within their borders. As a tool for trade, the list creates reputational harm for both the organizations included and the countries that allow the proliferation of these illicit goods. The recent politicization of the NML and inclusion of American firms dilutes the list’s effectiveness and leaves the United States vulnerable to criticism from abroad.

The NML highlights the most egregious examples of piracy and counterfeiting, and is the wrong forum to shed light on the business practices of American companies. While U.S. firms may have room for improvement, there are other clear avenues for action in the United States. Moreover, many U.S. firms have already acknowledged the role they should play in thwarting counterfeit goods in online marketplaces.

USTR should keep the list true to its original purpose: targeting foreign bad actors. The office should continue to work hard to enforce its findings and encourage foreign governments to take necessary actions.

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ERRATA

This report has been updated to clarify that multiple commenters have nominated Facebook for inclusion in the NML in the last four years. A previous version erred in stating they nominated Facebook's foreign domains. Facebook does not have foreign domains.

ENDNOTES

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