

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FAIRLY ODD TREASURES, LLC,

Plaintiff,

Case No.: 1:20-cv-01386

v.

Judge Charles P. Kocoras

THE PARTNERSHIPS AND UNINCORPORATED
ASSOCIATIONS IDENTIFIED ON SCHEDULE “A”,

Magistrate Judge Sidney I. Schenkier

Defendants.

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF ITS
MOTION FOR ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE
DEFENDANTS IDENTIFIED IN THE FIRST AMENDED SCHEDULE A**

Plaintiff, FAIRLY ODD TREASURES, LLC (“FOT” or “Plaintiff”), submits the following memorandum in support of its Motion for Entry of Default and Default Judgment under Fed. R. Civ. P. 55 against the defendants identified in the First Amended Schedule A (collectively, the “Defaulting Defendants”) based on Plaintiff’s action for trademark infringement and counterfeiting, false designation of origin, violation of the Illinois Uniform Deceptive Trade Practices Act, and civil conspiracy. Excluded from this motion are defendants that have settled with FOT.

Plaintiff, Fairly Odd Treasures, LLC, is a limited liability company that maintains its principal place of business at 56 McCachern Blvd. SE, Concord, North Carolina 28025. Plaintiff is engaged in the business of manufacturing, distributing and retailing high-quality novelty toys, gifts and accessories such as the POTTY PUTTER line of toy miniature golf putting green set for use in the bathroom comprised of a putting practice mat, putter, ball and hole. Complaint, Docket Entry 1 at ¶¶ 15-18. Since the initial launch of its original POTTY PUTTER brand

products, Plaintiff's POTTYPUTTER mark is and has been the subject of continuous marketing and promotion by Plaintiff. Plaintiff has and continues to market and promote its POTTYPUTTER marks to consumers. *Id.* The U.S. registration for the POTTYPUTTER Trademark has been continuously used and never abandoned. *Id.*

On information and belief, the Defendants create numerous Defendant Internet Stores and design them to appear to be selling genuine Plaintiff products, while selling inferior imitations of Plaintiff's products. The Defendant Internet Stores share unique identifiers, such as design elements and similarities of the counterfeit products offered for sale, establishing a logical relationship between them and suggesting that Defendants' illegal operations arise out of the same transaction, occurrence, or series of transactions or occurrences. *Id.* at ¶ 9. Defaulting Defendants conduct business throughout the United States, including within the State of Illinois and this Judicial District, through the operation of the fully interactive commercial websites and online marketplaces operating under the Defendant domain names and online marketplace accounts (collectively, the "Defendant Internet Stores") identified in Schedule A. *Id.* at ¶ 2. Each Defaulting Defendant targets the United States, including Illinois, and has offered to sell, and on information and belief, has sold and continues to sell Counterfeit FOT Products to consumers within the United States, including the State of Illinois. *Id.* Additional factual assertions applicable to Defaulting Defendants are found in Paragraphs 19-29 of the Complaint are incorporated herein. *Id.* at ¶¶ 19-29.

FOT filed this action on February 26, 2020, alleging, among other claims, federal trademark infringement and seeks statutory damages and injunctive relief. Docket Entry 1. On March 5, 2020, this Court granted FOT's *Ex Parte* Motion for Entry of a Temporary

Restraining Order (the “TRO”) and subsequently converted the TRO into a Preliminary Injunction on June 30, 2020.

Paragraph 14 of the TRO permitted FOT to complete service of process to Defendants by electronic publication, and by sending an e-mail to the e-mail addresses identified in Exhibit 2 to the Declaration of Eric Hebert and any e-mail addresses provided for Defendants by third parties. The Defendants identified in the Schedule A that are associated with a ContextLogic, Inc. (“WISH”) account or Amazon Payments, Inc. (“Amazon”) or Alipay US, Inc. (“Alipay”) or a PayPal, Inc. (“PayPal”) account or an eBay, Inc. account (“eBay”) or an eBay, Inc. account linked to a PayPal, Inc. (“eBay/PayPal”) account or Alibaba Group Holding Limited (“Alibaba”) account, or a Dunhuang Group d/b/a DHGATE, DHGATE.com, DHPORT, DHLINK, and DHPAY (“DHGate”) account were properly served on April 2, 2020. Docket No. 24. None of the Defaulting Defendants has entered an appearance or otherwise defended this action. *See* Declaration of Keith A. Vogt (the “Vogt Declaration”) at ¶ 2.

Pursuant to Federal Rule of Civil Procedure 55(a) and (b)(2), FOT now moves this Court for an Order entering default and default judgment finding that Defaulting Defendants are liable on Counts I and II of FOT’s Complaint. Fed. R. Civ. P. 55(a) and (b)(2). FOT further seeks an award of statutory damages as authorized by 15 U.S.C. § 1117(c)(2) for willful trademark counterfeiting against each of the Defaulting Defendants for use of infringing and counterfeit POTTY PUTTER Trademark in connection with products sold through each of the Defendant Internet Stores. FOT also seeks entry of a permanent injunction prohibiting Defaulting Defendants from selling Counterfeit/Infringing Products, and that all assets in Defaulting Defendants’ financial accounts operated by eBay, PayPal, WISH, Amazon, Alipay, Alibaba, and DHGate as well as any newly discovered assets, be transferred to FOT.

ARGUMENT

I. JURISDICTION AND VENUE ARE PROPER IN THIS COURT

This Court has original subject matter jurisdiction over the claims in this action pursuant to the provisions of the Lanham Act, 15 U.S.C. § 1051 et seq., 28 U.S.C. § 1338(a)-(b) and 28 U.S.C. § 1331. Venue is proper in this Court pursuant to 28 U.S.C. § 1391, and this Court may properly exercise personal jurisdiction over Defendants since each of the Defendants directly targets business activities toward consumers in Illinois and causes harm to FOT's business within this Judicial District. *See* Complaint, Docket Entry 1, at ¶ 14; *uBID, Inc. v. GoDaddy Grp., Inc.* 623 F.3d 421, 423-24 (7th Cir. 2010) (without benefit of an evidentiary hearing, plaintiff bears only the burden of making a prima facie case for personal jurisdiction; all of plaintiff's asserted facts should be accepted as true and any factual determinations should be resolved in its favor).

Through at least the fully interactive commercial Internet websites and online marketplace accounts operating under the Defendant Internet Stores, each of the Defaulting Defendants has targeted sales from Illinois residents by operating websites and/or online marketplace accounts that offer shipping to the United States, including Illinois and, on information and belief, has sold Counterfeit/Infringing Products to residents within the United States, including Illinois. Many of the websites look sophisticated and accept payment in U.S. Dollars via credit cards, Western Union, PayPal, and Amazon. Docket Entry 1 at ¶ 25. As such, personal jurisdiction is proper since each of the Defaulting Defendants is committing tortious acts in Illinois, is engaging in interstate commerce and has wrongfully caused Plaintiff substantial injury in the State of Illinois. *See, e.g., David Gilmour Music Ltd. v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 19-cv-04973 (N.D. Ill. Sep. 19,

2019) and *Hamann GmbH v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 19-cv-03332 (N.D. Ill. Aug. 6, 2019).

II. FOT HAS MET THE REQUIREMENTS FOR ENTRY OF DEFAULT

Pursuant to Rule 55(a) of the Federal Rules of Civil Procedure, “when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.” Fed. R. Civ. P. 55(a). On December 13 2019, FOT filed its Complaint alleging, among other claims, federal trademark infringement and counterfeiting, 15 U.S.C. § 1114 (Count I) and false designation of origin, 15 U.S.C. § 1125(a) (Count II). The Defendants were properly served April 2, 2020. Docket No. 24. Despite having been served with process, the Defaulting Defendants have ignored these proceedings and failed to plead or otherwise defend this action. Vogt Declaration at ¶ 2. Upon information and belief, the Defaulting Defendants are not active-duty members of the U.S. armed forces. *Id.* at ¶ 3. Accordingly, FOT asks for entry of default against the Defaulting Defendants.

III. FOT HAS MET THE REQUIREMENTS FOR ENTRY OF DEFAULT JUDGMENT

Rule 55(b)(2) of the Federal Rules of Civil Procedure provides for a court-ordered default judgment. A default judgment establishes, as a matter of law, that defendants are liable to plaintiff on each cause of action alleged in the complaint. *United States v. Di Mucci*, 879 F.2d 1488, 1497 (7th Cir. 1989). When the Court determines that a defendant is in default, the factual allegations of the complaint are taken as true and may not be challenged, and the defendants are liable as a matter of law as to each cause of action alleged in the complaint. *Black v. Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994).

One hundred and forty (140) days have passed since Defendants were served, and no answer or other responsive pleading has been filed by any of the Defaulting Defendants identified in the First Amended Schedule A. *See* Fed. R. Civ. P. 12(a)(1)(A). Accordingly, default judgment is appropriate, and consistent with previous similar cases in front of this Court, FOT requests an award of statutory damages as authorized by 15 U.S.C. § 1117(c)(2) for willful trademark infringement and counterfeiting against each of the Defaulting Defendants for use of infringing and counterfeit imitations of FOT's trademark in connection with products sold through the Defendant Internet Stores. FOT also seeks entry of a permanent injunction prohibiting Defaulting Defendants from selling Counterfeit/Infringing Products, and that all assets in Defaulting Defendants' financial accounts operated by eBay, PayPal, WISH, Amazon, Alipay, Alibaba, DHGate and any newly identified accounts be transferred to FOT.

A. Trademark Infringement and Counterfeiting

To properly plead a claim of trademark infringement and counterfeiting pursuant to the Lanham Act, a plaintiff must allege that (1) its mark is distinctive enough to be worthy of protection, (2) defendants are not authorized to use the mark; and (3) defendant's use of the mark causes a likelihood of confusion as to the origin or sponsorship of defendant's products. *See Neopost Industrie B.V. v. PFE Int'l Inc.*, 403 F. Supp. 2d 669, 684 (N.D. Ill. 2005) (citing *Bliss Salon Day Spa v. Bliss World LLC*, 268 F.3d 494, 496-97 (7th Cir. 2001)).

FOT alleged in its Complaint that its POTTY PUTTER Trademark is distinctive, that Defaulting Defendants have knowledge of FOT's rights in the POTTY PUTTER Trademark, that Defaulting Defendants are not authorized to use the POTTY PUTTER Trademark, and that Defaulting Defendants' use of the POTTY PUTTER Trademark causes a likelihood of confusion. Docket Entry 1 at ¶¶ 30-36. Since the Defaulting Defendants have failed to respond

or otherwise plead in this matter, the Court must accept the allegations contained in FOT's Complaint as true. *See* Fed. R. Civ. P. 8(b)(6); *Am. Taxi Dispatch, Inc., v. Am. Metro Taxi & Limo Co.*, 582 F. Supp. 2d 999, 1004 (N.D. Ill. 2008). Accordingly, FOT requests entry of judgment with respect to Count I for willful infringement and counterfeiting of the POTTYPUTTER Trademark and against the Defaulting Defendants.

B. False Designation of Origin

A plaintiff bringing a false designation of origin claim under 15 U.S.C. § 1125(a) must show that: (1) the plaintiff has a protectable trademark; and (2) a likelihood of confusion will exist as to the origin of plaintiff's products. *All Star Championship Racing, Inc. v. O'Reilly Auto. Stores, Inc.*, 2013 WL 1701871, *10 (C.D. Ill. Apr. 18, 2013) (*citing Johnny Blastoff, Inc. v. Los Angeles Rams Football Co.*, 188 F. 3d 427, 436 (7th Cir. 1999)). This is the same test that is used for bringing a trademark infringement claim under the Lanham Act. *See Neopost*, 403 F. Supp. 2d at 684.

FOT alleged in its Complaint that Defaulting Defendants are using the federally registered POTTYPUTTER Trademark without authorization on the Counterfeit/Infringing Products. This creates a likelihood of confusion, mistake, and deception among the general public as to the affiliation, connection, or association with FOT or the origin, sponsorship, or approval of Defaulting Defendants' Counterfeit/Infringing Products by FOT. *Id.* at ¶¶ 37-41. Furthermore, by using the POTTYPUTTER Trademark on the Counterfeit/Infringing Products, Defaulting Defendants create a false designation of origin and a misleading representation of fact as to the origin and sponsorship of the Counterfeit Counterfeit/Infringing Products. *Id.* As a result, FOT requests entry of judgment with respect to Count II for willful false designation of origin against the Defaulting Defendants.

IV. FOT IS ENTITLED TO MONETARY DAMAGES AND INJUNCTIVE RELIEF

The awarding of statutory damages serves dual interests in that it is remedial in nature, but also intended to protect an important public interest. Given the broader economic losses and harm to the job market caused by counterfeiting, coupled with the possible harm to consumers who are tricked into purchasing low quality, counterfeit products over the Internet, it is important to both penalize defendants and try to deter future violations.

A. Statutory Damages Are Appropriate in this Case

Pursuant to the statutory damages provision of the Lanham Act, 15 U.S.C. § 1117(c), a plaintiff in a case involving the use of a counterfeit mark may elect to receive “not less than \$1,000 or more than \$200,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just.” 15 U.S.C. § 1117(c)(1). When the counterfeiting is found to be willful, 15 U.S.C. § 1117(c)(2) provides for statutory damages of up to “\$2,000,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just.” 15 U.S.C. § 1117(c)(2).

Although 15 U.S.C. § 1117(c) contains the dollar range for possible statutory damage awards, the only guidance provided by the statute for how to determine a damage award within the statutory dollar range is “as the court considers just.” 15 U.S.C. § 1117(c). Courts interpreting 15 U.S.C. § 1117(c) have analogized case law applying the statutory damage provision of the Copyright Act contained in 17 U.S.C. § 504(c). *See Lorillard Tobacco Co.*, 2004 U.S. Dist. LEXIS 22563, *10; *Sara Lee v. Bags of New York, Inc.*, 36 F. Supp. 2d 161, 166 (S.D.N.Y. 1999). In *Sara Lee*, 36 F. Supp. 2d at 170, the court awarded statutory damages in the amount of \$750,000 after estimating the defendants' ill-gotten gains and trebling them to "deter and punish a willful continuous course of infringements and defiance of the judicial

process." The *Sara Lee* analysis included seven factors: (1) the profits made by the defendants; (2) the revenues lost by plaintiff; (3) the value of the mark; (4) the deterrent effect on others; (5) whether the conduct was innocent or wilful; (6) whether a defendant has cooperated in providing records; and (7) the deterrent effect on the defendant.

The USPTO's Office of Policy and International Affairs and the National Telecommunications and Information Administration ("NTIA") together working as part of the Department of Commerce's Internet Policy Task Force conducted a review of the relationship between the availability and protection of online copyrighted works and innovation in the Internet economy. The Internet Policy Task Force's White Paper on Remixes, First Sale, and Statutory Damages (White Paper) was published on January of 2016, (See, Exhibit 1), which recognizes in copyright law that reduced damages may be warranted to avoid impeding new creative works, e.g., remixes -- works created through changing and combining existing works to produce something new and creative -- as part of a trend of user generated content. *Id.* at 98. However, in cases of willful infringement, such as before this Court, the same report finds that high statutory damages are warranted since "[t]hese circumstances present the clearest need for deterrence and punishment. *Id.* at 99. Moreover, regarding straight-out counterfeiting where impeding creativity is not a concern, The Office of the U. S. Trade Representative issued findings of the Special 301 Out-of-Cycle Review of Notorious Markets for 2015, December 2015 (See, Exhibit 2), highlighted disturbing trends in the marketing and distribution of counterfeit goods online, with escalating levels of counterfeit sales online including an increase in the services that support such operations. With an estimated 15% increase in online sales of counterfeit goods last year, the economic toll of counterfeiting on governments, businesses, and consumers is disturbing.

Accordingly, a significant consideration should be whether infringing sales were made over the Internet, with the rationale was that sales over the Internet increased the amount of an award because use of the Internet made the infringement widely available.

The lack of information regarding Defaulting Defendants' sales and profits makes statutory damages particularly appropriate for default cases like the instant case. *See Petmed Express, Inc. v. medpets.com, Inc.*, 336 F. Supp. 2d 1213, 1220 (S.D. Fla. 2004). Likewise, Courts have recognized that statutory damages should be awarded without requiring an evidentiary hearing. *See Lorillard Tobacco Co. v. Montrose Wholesale Candies & Sundries, Inc.*, 2008 U.S. Dist. LEXIS 31761, *11 (N.D. Ill. Apr. 17, 2008).

B. Defendants' Counterfeiting Was Willful

As alleged in FOT's Complaint, Defaulting Defendants facilitate sales by designing the Defendant Internet Stores so that they appear to unknowing consumers to be authorized online retailers, outlet stores, or wholesalers selling genuine FOT Products. Docket Entry 1 at ¶ 6.

It is clear that Defaulting Defendants' counterfeiting was willful. "Willful infringement may be attributed to the defendant's actions where he had knowledge that his conduct constituted infringement or where he showed a reckless disregard for the owner's rights." *Lorillard Tobacco Co. v. S & M Cent. Serv. Corp.*, 2004 LEXIS 22563, *19-20 (N.D. Ill. Feb. 25, 2005). As such, knowledge need not be proven directly, but can be inferred from a defendant's conduct. *Id.* at 20. In the instant case, Defaulting Defendants clearly had knowledge that their activities constituted infringement or at least a reckless disregard for FOT's rights in the POTTY PUTTER Trademark, especially given FOT's extensive promotional efforts discussed above.

Finally, this Court has deemed counterfeiting willful when defendants default. *See, e.g., David Gilmour Music Ltd. v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 19-cv-04973 (N.D. Ill. Sep. 19, 2019) and *Hamann GmbH v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 19-cv-03332 (N.D. Ill. Aug. 6, 2019).

C. A High Statutory Damages Award Is Appropriate and Just

The Seventh Circuit's standard for awarding statutory damages for copyright infringement under 17 U.S.C § 504(c) is articulated in *Chi-Boy Music v. Charlie Club*, 930 F.2d 1224, 1229 (7th Cir. 1991). Under the *Chi-Boy* standard, a court awarding statutory damages is “not required to follow any rigid formula,” but instead “enjoys wide discretion.” *Id.* In computing the award amount, a court may consider factors such as “the difficulty or impossibility of proving actual damages, the circumstances of the infringement, and the efficacy of the damages as a deterrent.” *Id.* Courts in this district have also considered the significant value of a plaintiff’s brand and the efforts taken to protect, promote and enhance that brand in determining the appropriate dollar figure for the award. *Lorillard Tobacco Co.*, 2004 U.S. Dist. LEXIS 22563, *16.

In addition, courts have awarded high damage amounts where a defendant’s counterfeiting activities attracted wide market exposure through Internet traffic or advertisement. *See Coach, Inc. v. Ocean Point Gifts*, 2010 U.S. Dist. LEXIS 59003, *15-16 (D.N.J. Jun. 14, 2010) (high damage awards in counterfeit cases were “due in part to the wide market exposure that the Internet can provide”); *Burberry Ltd. v. Designers Imports, Inc.*, 2010 U.S. Dist. LEXIS 3605, *28-29 (S.D.N.Y. Jan. 19, 2010) (damages amount based, in part, on “Defendant's ability to reach a vast customer base through internet advertising”).

In similar cases involving willful Internet-based counterfeiting, this Court has awarded significant damages, including up to the maximum provided by law, to the plaintiff to serve the purposes of: (1) deterring the defendant and others situated like him from bringing into commerce counterfeit goods, (2) compensating the plaintiff for damages caused by defendant's infringement, and (3) punishing the defendant appropriately for his counterfeiting activities. *See, e.g., David Gilmour Music Ltd. v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 19-cv-04973 (N.D. Ill. Sep. 19, 2019) and *Hamann GmbH v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 19-cv-03332 (N.D. Ill. Aug. 6, 2019) (granting Default Judgment). Given the Court's clear discretion in determining the appropriate amount of the statutory damages award within the statutory limits of 15 U.S.C. § 1117(c), FOT respectfully requests the Court's entry of an award of two hundred fifty thousand dollars (\$250,000) per Defaulting Defendant as it has done in the past under similar circumstances.

D. FOT is Entitled to Permanent Injunctive Relief

In addition to the foregoing relief, FOT respectfully requests entry of a permanent injunction enjoining Defaulting Defendants from infringing or otherwise violating FOT's registered trademark rights in the POTTY PUTTER Trademark, including at least all injunctive relief previously awarded by this Court to FOT in the TRO and Preliminary Injunction. FOT is also entitled to injunctive relief so it can quickly take action against any new websites and online marketplace accounts that are identified, found to be linked to Defaulting Defendants, and selling Counterfeit FOT Products. *See, e.g., David Gilmour Music Ltd. v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 19-cv-04973 (N.D. Ill. Sep. 19,

2019) and *Hamann GmbH v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 19-cv-03332 (N.D. Ill. Aug. 6, 2019).

V. CONCLUSION

FOT respectfully requests that the Court enter default and default judgment against each Defaulting Defendant, award statutory damages in the amount of two hundred and fifty thousand dollars (\$250,000) per Defaulting Defendant pursuant to 15 U.S.C. § 1117(c) and enter a permanent injunction order prohibiting Defaulting Defendants from selling Counterfeit/Infringing Products, and transferring all assets in Defaulting Defendants' financial accounts operated by eBay, PayPal, WISH, Amazon, Alipay, Alibaba, and DHGate to FOT.

DATED: August 21, 2020

Respectfully submitted,

/s/ Keith A. Vogt

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ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2020, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, I will electronically publish the documents on a website, and I will send an e-mail to the e-mail addresses identified in Exhibit 2 to the Declaration of Eric Hebert and any e-mail addresses provided for Defendants by third parties that includes a link to said website.

/s/ Keith A. Vogt

Keith A. Vogt, Esq.

Exhibit 1



White Paper on Remixes, First Sale, and Statutory Damages

Copyright Policy, Creativity, and Innovation
in the Digital Economy

THE DEPARTMENT OF COMMERCE
INTERNET POLICY TASK FORCE

January 2016

extraordinarily large.⁵⁷⁴ These levels of awards could potentially have a chilling effect on investment and innovation. Moreover, the “per work” calculation makes less sense in the context of secondary liability than in cases involving direct infringement. Where an online service provider enables thousands or even millions of users to infringe by offering many copyrighted works to the world at large, there is a more attenuated connection between the service provider’s actions and the number of works that are infringed; typically, the service provider will have no control over or knowledge of the number of works that are infringed.

At the same time, the Task Force acknowledges that the potential for harm to individual creators and the creative industries caused by infringement using mass online services is considerable. And while some chilling effect may result from potentially massive damages, the scope of any such chilling effect is unclear. Although some investment may be deterred by uncertain legal environments and litigation over the issue of infringement may have bankrupted some companies, there is little concrete evidence of how much lawful innovation has actually been chilled. Even assuming a reduction in innovation and investment, it is not clear that this was solely the result of the potential magnitude of statutory damages awards—as opposed to potential liability itself, litigation costs or the threat of other remedies such as injunctive relief. And it may well be that the risk of statutory damages has had a positive effect in deterring innovators from engaging in conduct likely to be infringing, or encouraging investment in other innovation instead.

After careful consideration of all of these aspects, the Task Force concludes that an adjustment in the law is advisable. We recommend that section 504 be amended to provide that, in cases of nonwillful secondary liability by online services involving large numbers of infringed works, courts shall have the discretion to depart from the strict “per work” calculus and adjust the overall award to an amount that appropriately reflects the purposes set forth in the statutory factors we have proposed above.⁵⁷⁵ This recommendation goes further than the leeway permitted under factor 7 described above, since without this additional change the courts are still bound to the minimum statutory per work amounts. When a court must multiply this minimum by a very large number of copyrighted works, it may not be possible to avoid an excessive outcome.⁵⁷⁶

Congress should consider whether to set a minimum number of infringed works beyond which an additional per-work award would not be mandatory, or whether that number should be determined in each case by the court.⁵⁷⁷ Courts would not be required to abandon the strict “per work” method of calculation, but instead would have the discretion to do so if that calculus would lead to a disproportionate overall award. Nor should the enactment of such a provision be read to mean that this is the favored result in cases involving more than the threshold amount.

⁵⁷⁴ See discussion *above* at note 482.

⁵⁷⁵ See *above* Part C.2.a.iv (Adjusting for Multiple Works), pp. 93-94 (discussing factor 7).

⁵⁷⁶ See discussion *above* at note 482.

⁵⁷⁷ The per-work minimum would not be suspended with respect to all infringed works in the case, but only with respect to those works beyond the minimum number of works necessary to permit application of the alternative calculation method. It may be worthwhile to conduct a study to determine what the minimum number of works should be.

The Task Force is confident that the courts will be in the best position to determine whether, in each case, the alternative approach should be used.⁵⁷⁸

This flexibility should not, however, be available in cases involving willful infringement or intentional inducement of infringement.⁵⁷⁹ These circumstances present the clearest need for deterrence and punishment. Concerns that high statutory damages awards may have a chilling effect on companies engaging in technological innovation are premised on the proposition that such companies should be encouraged to innovate and we should not unduly penalize those that inadvertently cross the line. However, such concerns do not apply with respect to those who infringe willfully, or actively induce infringement by those who use their services or products. In the words of the Supreme Court, “the inducement rule premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.”⁵⁸⁰

d. Establish a Streamlined Procedure for Adjudicating Small Claims

Finally, the Task Force supports the creation of a streamlined procedure for adjudicating small claims of copyright infringement and believes that further consideration should be given to the proposal of the Copyright Office to create a small claims tribunal.⁵⁸¹ The proposal would provide for a cap on awards of statutory and actual damages, limited discovery and counterclaims, assertion of all relevant defenses (including fair use), optional attorney representation, and awards of costs and fees against frivolous litigants.⁵⁸² Among other features of the system suggested by the Copyright Office, participation in small claims proceedings would be voluntary and would be administered by a centralized tribunal in a single location.⁵⁸³ One recommendation of particular relevance to our review here is that the Copyright Office proposal would cap statutory damages awards on both a per work and per case basis.⁵⁸⁴

⁵⁷⁸ We recognize that in some cases, online services facing claims of secondary liability for non-willful large-scale infringement may fall within one of the safe harbors set forth in 17 U.S.C. § 512.

⁵⁷⁹ See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁵⁸⁰ *Id.* at 937.

⁵⁸¹ COPYRIGHT OFFICE SMALL CLAIMS REPORT, note 468 *above*. The Small Claims Report was issued after the Green Paper.

⁵⁸² *Id.* at 4, 109-12, 117, 119-20. The Small Claims Report also detailed the current copyright enforcement system, discussed constitutional and federal procedure issues, analyzed state small claims courts and other enforcement bodies, and outlined stakeholder proposals and its recommendations to support the establishment of a small claims tribunal. *Id.* at Sections III-IV and *passim*. In the Green Paper, the Task Force described the then-ongoing study and observed that an alternative to the federal courts could be useful for certain online infringement claims. See Green Paper at 58.

⁵⁸³ See Small Claims Report at 97-99, 102-03. While the Task Force agrees that a small claims procedure with all of these features is desirable, we do not necessarily endorse each and every detail of the Copyright Office proposal, nor do we offer a particular legislative proposal at this time. However, we do note that any small claims system should include safeguards to prevent abuse.

⁵⁸⁴ *Id.* at 109-112 (discussing stakeholder proposals for the range of damages and recommending a \$15,000 per work cap and a cap of \$30,000 for all damages in a single case involving a registered work, and half those amounts for

A small claims procedure for infringement claims of relatively low economic value would provide individual and smaller rights holders an alternative mechanism to enforce their rights if they lack the resources to litigate or employ another remedy under the current copyright system.⁵⁸⁵ Given a damage cap, alleged infringers in the small claims process would not face the highest levels of statutory damages available under the current system. Other aspects of a small claims process could also help balance the interests of claimants and alleged infringers.

After considering the Copyright Office proposal in light of the comments the Task Force received,⁵⁸⁶ we believe that a small claims process should be established to resolve infringement claims involving, *inter alia*, online file-sharing.⁵⁸⁷ Many copyright owners would be willing to trade the potential for higher damages in exchange for lower costs and simpler, more expedited procedures, and defendants would also be attracted to a less costly forum where the exposure to damages is limited.⁵⁸⁸ This could also help diminish the risk of disproportionate levels of statutory damages against individual infringers. Both parties would ultimately benefit from a small claims process that aims to streamline copyright litigation while reducing the potential costs for everyone involved.

late-registered works); *see also* notes 50-51, 55-56 & 62 and accompanying text, *above* (presenting stakeholder views on capping statutory damages).

⁵⁸⁵ We note that if a small claims tribunal can adjudicate file-sharing and other types of claims, it could become a useful venue for rights holders to engage in direct enforcement actions against alleged individual infringers.

⁵⁸⁶ *See above*, pp. 77, Part B.1.d (Solutions Proposed by Stakeholders).

⁵⁸⁷ A small claims tribunal is not likely, however, to have an appreciable impact on large scale secondary liability cases against online services given the magnitude of potential damages. Although our focus is on file-sharing, a small claims tribunal could also be useful in other infringement cases.

⁵⁸⁸ *See Small Claims Report* at 24 (“Copyright owners whose works are infringed often are deterred from enforcing their rights due to the burden and expense of pursuing litigation in the federal system. Especially in the case of lower-value copyright claims, the potential for monetary recovery can be quickly overcome by the costs of discovery, motion practice, and other litigation expenses.”); *see also* Green Paper at 58 (noting that a small claims procedure could provide an alternate remedy for rights holders lacking the resources to effectively use the DMCA takedown mechanism).

Exhibit 2



2015 Out-of-Cycle Review of Notorious Markets



OFFICE *of the* UNITED STATES TRADE REPRESENTATIVE

DECEMBER 2015

ISSUE FOCUS

Emerging Marketing and Distribution Tactics in Internet-Facilitated Counterfeiting

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This year, USTR is highlighting emerging trends in the marketing and distribution of counterfeit goods online. The Internet provides many new opportunities for economic growth, encouraging innovation, and the development of new business models. The Internet can also be used to carry out infringing activity due to the ease of conducting commerce through unverified vendors, inability for consumers to inspect goods prior to purchase, and deceptive marketing. In this OCR and in recent years, rights holders have noted escalating levels of counterfeit sales online and an increase in the services that support such operations. With an estimated fifteen percent increase in online sales of counterfeit goods last year, the economic toll of counterfeiting on governments, businesses, and consumers is mounting.^[14] Internet-facilitated counterfeiting includes e-commerce sites that provide large-scale platforms for counterfeit sellers and wholesalers to reach a global consumer base such as auction sites, business-to-business (B2B, also known as trade boards), consumer-to-consumer (C2C), and business-to-consumer (B2C) sites. It also includes individual, one-off websites offering counterfeit versions of branded products or mimicking the look and feel of a legitimate retailer.

In the case of standalone websites, there can be tens of thousands of websites targeting a single brand making it difficult to identify a notorious example when these online one-off markets have lower popularity. The List therefore cannot capture the scope and scale of this global problem. These illicit sites use deceptive tactics including cybersquatting (such as nominated sites [HTTP://MACYS-SHOES.COM](http://MACYS-SHOES.COM) and MACYSKOREA.COM), typosquatting (for example, MACIYS.COM, MAXCYS.COM, and MWCYS.COM) and search engine optimization manipulation to hijack genuine traffic and lure customers to counterfeit offerings.^[15] Increasingly sophisticated criminals operate networks of hundreds of sites, use paid search ads and social media campaigns to promote their illegitimate sites, and use mobile apps to solicit sales.

[14] For a discussion of the costs of counterfeiting, including online counterfeiting see Net Names, "Counting the Cost of Counterfeiting," Oct. 2015, available at <http://www.netnames.com/blog/wp-content/uploads/2015/10/NetNames-Counterfeiting-Report-A4-2015.pdf>

[15] Brand enforcement company MarkMonitor saw a 22 percent increase in cybersquatting in 2014 (<https://www.markmonitor.com/download/Infographics/MarkMonitor.infographic.CorporateOverview.pdf>) and reports that 14 percent of searches on a branded item lead online users somewhere other than the legitimate brand's site. See also MarkMonitor, "Seven Best Practices for Fighting Counterfeit Sales Online" available at https://www.markmonitor.com/download/wp/wp-Fighting_Counterfeit_Sales.pdf

Counterfeit sellers on large e-commerce platforms are also using social media and email campaigns to drive traffic to their online shop windows. Counterfeiters bury trademark references in lengthy product descriptions, remove logos and trademarks on otherwise recognizable products, blur the trademark from original copyrighted images, or use creative angles to showcase infringing products without running afoul of strictly-construed trademark policies. As one e-commerce submission notes, e-commerce platforms must make continuous efforts to address the ever-more-ingenious techniques for evading detection.

Online counterfeiters enjoy such low operating costs and easy, immediate access to a global customer base that counterfeit goods can be as profitable for criminal gangs as illegal drugs.^[16] Retail, luxury brands, electronics, and pharmaceuticals are among the worst-affected sectors. For example, an investment in the trafficking of counterfeit pharmaceuticals can generate a return ten to twenty-five times higher than the same investment in drug trafficking.^[17] In addition to counterfeit pharmaceuticals, counterfeit consumer products—such as car parts, children’s toys, mobile phones, and sporting equipment—can also endanger consumer health and safety as many counterfeits are made inexpensively with substandard or hazardous materials.^[18]

Distribution of counterfeits purchased online from standalone websites and large e-commerce platforms also presents enforcement challenges for rights holders and governments. Instead of shipping a container of counterfeits, today’s Internet-facilitated counterfeiters can ship infringing articles one at a time, decreasing the risk of customs detection and minimizing their losses if the shipment is seized. Seizure statistics from U.S. and European customs authorities in the United States and European Union confirm the surge of small consignment shipments. Counterfeiters are also attempting to evade enforcement by shipping trademarked packaging, holograms, and labels separately from the products for later downstream assembly.

USTR applauds governments that are addressing these challenges through legislative, administrative, and executive actions. For example, the European Union recently enhanced its border enforcement authority to address the increase in trafficking of counterfeit goods via small, postal, or express courier consignments.^[19]

Provisions in the recently concluded TPP agreement seek to address many of these challenges. These include commitments to provide for criminal procedures and penalties for trafficking in counterfeit labels and packaging; to make enhanced penalties available for particularly serious cases, such as trafficking in counterfeit trademark products that threaten health and safety; to close loopholes used by counterfeiters that threaten global supply chains; and to confirm that enforcement procedures for trademark and copyright infringement are available to the same extent in the digital environment.^[20] USTR invites foreign governments to use these and other TPP provisions as a benchmark for addressing online trademark counterfeiting and other 21st century challenges. ■

[16] United Nations Office on Drugs and Crime, *Transnational Organized Crime in East Asia and the Pacific*, 2013; available at http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA_EAP_web.pdf (p.128).

[17] International Institute of Research against Counterfeit Medicines, “Counterfeit Medicines and Criminal Organizations,” Sept. 2013, at 18 available at http://fightthefakes.org/wp-content/uploads/2013/11/Rapport-Etude_IRACM_Contrefacon-de-Medicaments-et-Organisations-Criminelles_EN_FINALs2.pdf

[18] For a recent example, see “U.S. Customs and Border Protection Holiday Advice for Consumers – Hoverboards” <http://www.cbp.gov/newsroom/national-media-release/2015-12-11-000000/us-customs-and-border-protection-holiday-advice>

[19] Please see <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52005DC0479>

[20] Visit USTR’s TPP resource center for more information at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-fact-sheets>

Results of the 2015 Out-of-Cycle Review of Notorious Markets

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As noted, the 2015 List identifies particular online and physical markets in which pirated or counterfeit products and services are reportedly available, but it does not constitute a legal finding or a conclusion as to IPR protection and enforcement in any affiliated country or economy, nor is it intended to be an exhaustive listing of all notorious markets around the world. Rather, the List highlights some of the most prominent examples of both online and physical marketplaces where pirated or counterfeit goods are trafficked that were reported and examined during the OCR process.

Owners and operators of the notorious markets included in the 2015 List that are willing to address piracy and counterfeiting have many options for doing so. Such owners and operators can adopt business models that rely on the licensed distribution of legitimate content and can negotiate appropriate licenses with rights holders. If an otherwise legitimate business has become a platform for piracy or counterfeiting, the owner or operator can work with rights holders and enforcement officials to help discourage and curtail acts of infringement. There are a variety of best practices developed by industries themselves that can help combat these problems. However, in the absence of such good faith efforts, responsible government authorities should investigate reports of piracy and counterfeiting in these and similar markets, and pursue appropriate action against such markets and their owners and operators. Governments should also ensure that appropriate enforcement tools are at the disposal of right holders and government authorities, which may require closing the loopholes that permit operators to evade the law.

Online Markets^[21]

The 2015 List of notorious online markets again includes examples of various technologies and business models. USTR based its selections not on specific technologies or business models but on whether, based on available information, a nominated site or affiliated network of sites appears to engage in or facilitate IPR infringement. Accordingly, the 2015 List reflects sites and online services that reportedly engage in and facilitate substantial piracy and counterfeiting to the detriment of U.S. creators and brand owners, as well as legitimate sellers and distributors. In addition to facilitating IPR infringement, these sites may lack safeguards for consumer privacy, security and safety, and some reportedly actively and surreptitiously install malware on users' computers, commit ad-

[21] In most cases, the List identifies online markets by the domain name provided in the public responses to the Federal Register request. However, it is common for operators of online Notorious Markets to change a site's domain name or to use multiple domain names at once to direct users to the main site. The List reflects each market's most commonly referred to or well-known domain name or names as of December 8, 2015.

vertisement fraud, and enable phishing scams to increase their unlawful profits.

4SHARED.COM

With more than 117 million unique visitors a month, this cyberlocker site^[22], reportedly based in the British Virgin Islands and hosted in Cyprus, is well-known globally and particularly popular in Brazil.^[23] While 4shared provides legitimate services, the site also continues to facilitate streaming and downloads of allegedly pirated videos, music, books and games. By some measurements, 4shared is one of the largest and most profitable direct download cyberlockers that facilitates infringement.^[24] 4shared mobile apps further allow users to stream infringing content to mobile devices and recently added search and music player features appear to encourage music infringement. While this site responds to takedown notices, reportedly provides direct access to trusted right holders representatives, and has implemented a feature that scans for unauthorized content, the music industry reports no change in the levels of infringing files.

BUKALAPAK.COM

This consumer-to-consumer marketplace is based in Indonesia and has an Alexa ranking of 12 in that country and 571 globally. While Bukalapak is a platform for legitimate sales, apparel and footwear companies report challenges with counterfeit sellers and a lack of effective procedures for reporting and removing counterfeit listings on this quickly growing e-commerce platform.

[22] The cyberlockers identified in the List reportedly operate primarily to provide users with access to unauthorized content. Such sites are distinguishable from legitimate cloud storage services that allow consumers to lawfully store, share, backup, and access data.

[23] Unless otherwise noted, the global and country-specific popularity of online markets referenced in this List is determined through Alexa rankings, SimilarWeb data, and public submissions. Alexa.com utilizes a proprietary methodology to analyze global and country-specific user traffic and develop a numerical rank that indicates a website's popularity relative to other sites. Rankings can change dramatically and quickly. SimilarWeb.com uses big data technology to estimate websites' unique visitors and the origin of those visits. For example, according to Alexa, 4Shared.com is the 98th most popular website in Brazil and has the highest percentage of global visitors (16 percent) and according to SimilarWeb, 4Shared.com is the 42nd most popular site in Brazil and Brazil has the highest percentage of unique visitors (30 percent). Both the Alexa rankings and SimilarWeb data that appear in this document are current as of December 8, 2015.

[24] NetNames & Digital Citizens Alliance, "Behind The Cyberlocker Door: A Report on How Shadowy Cyberlocker Businesses Use Credit Card Companies to Make Millions," Sept. 2014, available at <http://www.digitalcitizensalliance.org/cac/alliance/content.aspx?page=cyberlockers>. 4shared.com disputes the allegations made in the report.

DHGATE.COM

This Chinese e-commerce site connects Chinese factories and sellers directly with businesses and individual buyers and reportedly hosts over 30 million product listings, some of which allegedly infringe the trademarks and copyrights of U.S. companies. Over the past six years and in each OCR of notorious markets, trademark owners have consistently reported challenges with counterfeit goods on this online wholesale marketplace. Consumer health and safety has been endangered due to counterfeit products that evade detection on the DHgate platform.^[25] According to SimilarWeb and Alexa data, DHgate is most popular in China, India, the United Kingdom, Brazil, and the United States.

EBOOKEE.ORG

ALSO OPERATING AS EBOOKEE.DOC.ZZZ.COM

Ebookee is a top indexing site with connections to China that is allegedly dedicated to pirated ebooks, magazines, and other digital media. The site has been operating for more than eight years and provides direct links to files available for download from notorious cyberlockers, some of which, including 4shared and uploaded.net, appear in this List. Along with others, the site and its subsequent variations have been the subject of a court-imposed blocking order in the United Kingdom.

EX.UA AND EXTRATORRENT.CC

These sites, both of which have appeared on the List several times, continue to benefit from Ukraine's status as a haven for online piracy. Almost 35 million users visit EX.UA every month to download and stream content including reportedly infringing music, videos, movies, TV series, e-books, and audiobooks, and software that one commenter alleges is uploaded by site administrators themselves. Similarly, EXTRATORRENT.CC allegedly has extremely high rates of piracy with more than 75 million visits a month and a 14 percent increase in August 2015 compared to August 2014.^[26] While Extratorrent has been the subject of successful enforcement actions in several countries, it maintains a global Alexa ranking of 333. Furthermore, Extratorrent has Alexa rankings in India and Pakistan of 76 and 26, respectively, which illustrate the commercial impact that sites which facilitate infringement can have on geographically diverse markets. In 2015, other players in the Internet ecosystem have voluntarily taken reasonable actions against Extratorrent as a result of piracy and malware complaints, including removing search engine access to the site and deleting its social media profile. USTR encourages the Government of Ukraine

[25] Lindsey, Joe "To Catch a Counterfeiter: The Sketchy World of Fake Bike Gear," *Bicycling.com*, Sept. 15, 2015, available at <http://www.bicycling.com/bikes-gear/components/catch-counterfeiter-sketchy-world-fake-bike-gear>

[26] According to reported comScore Media Metrix, Word Wide data.

to take lasting action against those who operate these and similar sites within Ukraine's jurisdiction.

KAT.CR

Formerly **KICKASS.TO**, **KICKASSTORRENTS.COM**, and also operated as **KAT.SX**

This BitTorrent indexing site is now the biggest torrent site in terms of visitors and popularity after surpassing ThePirateBay in 2014. KAT.CR has the highest global Alexa ranking of all the online notorious markets on this List. Over 6 million torrent files attracted more than 25 million unique visitors in one month. Reportedly based in Canada, over the past several years the site operators have changed the domain name numerous times, obscured or hidden their locations, and have used multiple servers in various countries to evade or otherwise frustrate enforcement actions. The site originally operated as KICKASSTORRENTS.COM but moved to KAT.PH, until Philippine authorities took enforcement action. The .tt domain registry cancelled the domain KA.TT in 2013, followed by the .so domain registry which cancelled the domain KICKASS.SO in February 2015 and the .im domain registry which cancelled KICKASSTORRENTS.IM in April 2015 within hours.^[27] The domain hopping tactics deployed by KAT.CR allow the site to reappear at the top of search results and evade court-ordered injunctions.

MOVSHARE GROUP

OPERATING As NOWVIDEO.SX, WATCHSERIES.IT, TORRENTZ.EU, VIDEOWEED.ES, NOVAMOV.COM, AMONG OTHERS

This group of affiliated and extremely popular sites, with ties to Switzerland, Sweden, the Netherlands, Panama, Canada, and other countries, reportedly uses multiple technologies to make available countless unauthorized copies of movies, games, music, audio-books, software, and sporting event broadcasts. These cyberlockers, linking sites, forums, and streaming sites all work together to facilitate global distribution of allegedly infringing content. The sites are said to generate revenues through advertising and premium membership or subscription fees, and to compensate users for uploading infringing content. Rights holders report that Nowvideo and others in the Movshare group are systematically unresponsive to takedown notices.

[27] .tt is the country code top-level domain (ccTLD) of Trinidad and Tobago, .so is the ccTLD of Somalia, and .im is the ccTLD of Isle of Man.

PRIVATE LAYER-HOSTED SITES

PUTLOCKER.IS, **CUEVANA.TV**, WATCHSERIES.IT, and NOWVIDEO.SX (listed as part of the Movshare Group)

This group of websites, all hosted by Private Layer based in Switzerland and Panama, are evidence of the rising popularity among pirate sites of certain Swiss hosting services. Switzerland has announced plans to close a loophole in its law that restricts enforcement against pirate sites. However, at this time, rights holders report that Switzerland is an increasingly popular host country for such sites. PUTLOCKER.IS returns to the List after rebuilding its user base and rising in the ranks to once again become a globally popular site for allegedly pirated movies and television shows. The operator of Putlocker is based in Vietnam. Another streaming site based in Argentina, CUEVANA.TV, attracts large numbers of Spanish-speaking users from Argentina, Mexico, Spain, and Chile.

REBEL

A DIVISION OF MOMENTOUS

This Canada-based domain name registrar allegedly knowingly licenses domain names to a disproportionate number of illegal online pharmacies. Rebel maintains less than 0.05 percent of the total domain name market but reportedly more than 17 percent of the entire illegal online pharmacy market.^[28] One submission estimated that Rebel sells domain name registration services to 4,850 illegal online drug sellers.^[29] Private organizations and regulatory authorities have notified Rebel of the illegal nature of the online pharmacies it sponsors but Rebel has reportedly not taken action and has allegedly become a “safe haven” for criminal enterprises specializing in counterfeit drugs.^[30] This year’s submissions reflect that, while the role of domain name registrars remains an ongoing subject of important discussion, Rebel’s outlier status is evidence that it is not taking measures that other domain name registrars have found to be reasonable to address infringement, such as having policies that prohibit domain names from being used in furtherance of criminal activity and acting on complaints as appropriate to suspend or lock domain names of illegal online pharmacies.

[28] United States. Cong. House. Subcommittee on Courts, Intellectual Property and the Internet. Stakeholder Perspectives on ICANN. Hearings, May 13, 2015. 114th Cong. 1st sess. (testimony of John C. Horton) available at http://judiciary.house.gov/_cache/files/479d5a53-11d3-4919-80fb-e8e24d462cbf/legitscript---john-horton---house-judiciary-committee-testimony---05-13-15.pdf

[29] Previously-listed domain name registrar **Tucows** was again nominated this year. Illegal online pharmacies reportedly continue to obtain domain names from Tucows.

[30] Consumer information regarding online pharmacies is available from the U.S. Food and Drug Administration’s through the BeSafeRx campaign (<http://www.fda.gov/Drugs/ResourcesForYou/Consumers/BuyingUsingMedicineSafely/BuyingMedicinesOvertheInternet/BeSafeRxKnowYourOnlinePharmacy/>) and Know Your Source campaign (<http://www.fda.gov/Drugs/ResourcesForYou/HealthProfessionals/ucm389121.htm>) as well as at the following websites: <http://safeonlinerx.com>; www.safemedsonline.org; and www.nabp.net/programs/accreditation/vipps While these sites focus primarily on the U.S. audience, similar resources are available to consumers outside the United States, including at <http://asop.eu/home>

RAPIDGATOR.ORG AND RUTRACKER.ORG

Formerly **TORRENTS.RU**

Commenters from the book publishing, movie, entertainment software, and music industries all nominated Rapidgator for inclusion on this year's List. Rapidgator is hosted in Russia but primarily provides allegedly infringing content to users outside of the country. RAPIDGATOR.NET employs rewards and affiliate schemes to compensate users based on downloads and sales of new accounts. Operators of the site allegedly net an estimated \$2 million annually.^[31] RUTRACKER.ORG, hosted in and operated from Russia, is a BitTorrent portal with more than 13 million active accounts. The site is currently one of the most popular in the world and a top site in Russia. Ongoing court action in Russia may result in decreased use of the site, but that court action is not final.

SEGUNDAMANO.ES

Also operating as **VIBBO.COM**

This site is the most popular example of a circumvention device distribution website that allegedly facilitates the unauthorized use of copyright-protected games by selling "mod chips" or game copier hardware that are used to circumvent technological protection measures designed to promote authorized uses. Segundamano is based in Spain.

UPLOADED.NET

Also operating as **UL.TO** and **UPLOADED.TO**

This cyberlocker with alleged connections to Switzerland and Netherlands, provides access to a broad range of unauthorized copies of copyright-protected content, provides a reward system to its users, and reportedly generates over \$6 million per year in advertising and subscription revenues. The site operator allegedly employs multiple IP addresses, domain names, and server locations to evade law enforcement. The site is popular around the world and undermines the market for legitimate content in Japan, Germany, France, Spain, and the United States, sometimes before the content has even been released.

VK.COM

Also known as **VKONTAKTE.COM**

Nominated again this year, vk.com is one of the most popular sites in the world and continues to operate as an extremely popular social networking site in Russia and neighboring countries. vk.com reportedly facilitates the distribution of allegedly infringing mov-

[31] NetNames, Behind the Cyberlocker Door, 28.

ie, television and music files. Social networking sites can serve as a uniquely valuable communication platform, enabling beneficial commercial, cultural, and social exchanges. Most successful social networking sites do so in ways that do not involve the active facilitation of copyright infringement. Reports that vk.com is taking steps to address piracy are encouraging, and the United States hopes to see measurable and lasting measures comparable to other social media sites.

ZIPPYSHARE.COM

Well-known for downloads and distribution of allegedly infringing music, Zippyshare allegedly offers more pre-release music, i.e. music that has not yet been commercially released, than any other cyberlocker. Zippyshare is reportedly hosted in France. Its revenues reportedly come from paid advertising, which targets millions of users from around the world, particularly from India, where the site has an Alexa ranking of 278. Zippyshare pages are known to install malware on visitors' computers and send visitors to dangerous websites.^[32]

Physical Markets

The Internet has brought about a global revolution in the authorized and unauthorized distribution of films, music, software, video games, and books. In many markets, unauthorized online distribution of, or access to, copyright-protected content largely has replaced unauthorized distribution via physical media. In other markets, however, physical media (including CDs, DVDs, video game cartridges, and pre-loaded computer hard drives and other storage devices) continue to be prevalent, with widespread distribution, at times involving local manufacture, through markets such as those identified below.

The Internet also makes available innumerable sites that facilitate the distribution of counterfeit products to consumers worldwide. However, physical markets, such as the ones listed below, remain the primary distribution channel for counterfeit goods in much of the world.

In a global environment, enforcement against unscrupulous retailers, although important, will not be sufficient to reduce the flow of counterfeit products. Enforcement tools, such as asset forfeiture, can help target custodians of locations that sell and store infringing products. The importance of effective border enforcement measures to prevent the exportation of counterfeit goods from their countries of manufacture, the importation into the destination country, and the transiting of such goods through third countries on their way to destination countries cannot be overstated. Another key to reducing piracy and counterfeiting, however, lies in the ability to influ-

[32] Safe Browsing Site Status, Google Transparency Report available at <https://www.google.com/transparencyreport/safebrowsing/diagnostic/?hl=en>. As of December 8, 2015, ten of the online markets on this List were identified as sending visitors to dangerous websites, four were identified as installing malware on visitors' computers, one site was identified for trying to trick visitors into installing programs that harm their browsing experience, and dangerous websites were sending visitors to at least four of the listed sites.

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FAIRLY ODD TREASURES, LLC,

Plaintiff,

Case No.: 1:20-cv-01386

v.

Judge Charles P. Kocoras

THE PARTNERSHIPS AND UNINCORPORATED
ASSOCIATIONS IDENTIFIED ON SCHEDULE "A",

Magistrate Judge Sidney I. Schenkier

Defendants.

DECLARATION OF KEITH A. VOGT

I, Keith A. Vogt, of Chicago, Illinois, declare as follows:

1. I am an attorney at law, duly admitted to practice before the Courts of the State of Illinois and the United States District Court for the Northern District of Illinois. I am one of the attorneys for Plaintiff. Except as otherwise expressly stated to the contrary, I have personal knowledge of the following facts and, if called as a witness, I could and would competently testify as follows:
2. I hereby certify that the Defaulting Defendants (as defined in the accompanying Memorandum) have failed to plead or otherwise defend this action within the allotted time in violation of Federal Rule of Civil Procedure 12(a)(1)(A).
3. My office investigated the infringing activities of the Defaulting Defendants, including attempting to identify its contact information. Our investigation confirmed that the Defaulting Defendants are primarily domiciled in Asia. As such, I am informed and believe that the Defaulting Defendants are not active-duty members of the U.S. armed forces.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: August 21, 2020

/s/ Keith A. Vogt
Keith A. Vogt
Counsel for Plaintiff