Before the
U.S. DEPARTMENT OF COMMERCE
Office of the Secretary; Patent and Trademark Office;
National Telecommunications and Information Administration

In the Matter of the Notice of Inquiry on "Copyright Policy, Creativity, and Innovation in the Internet Economy"	))))))))	Docket No. 100910448-0448-01

COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION

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The Entertainment Software Association ("ESA") is grateful for the opportunity to participate in this Notice of Inquiry ("NOI") on the relationship between online copyright protection and innovation in the Internet economy. ESA is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish interactive games for video game consoles, handheld devices, personal computers, and the Internet. As the NOI recognizes, ours is an industry at the cutting edge of digital distribution. We are deeply appreciative of the efforts of the Internet Policy Task Force ("Task Force"), whose policy mandate – "to combat online copyright infringement more effectively and to sustain innovative uses of information and information technology" – is crucially important to the continued growth of our industry.

An interesting aspect of the NOI is that it appears to presuppose a tension between copyright enforcement efforts on the one hand, and technological innovation in the Internet economy on the other. The video game industry is perhaps uniquely positioned in that our success is based in equal parts on both – copyright and technological innovation. Adequate protection for intellectual property is necessary to ensure that companies who spend millions of dollars on the development of a single game are positioned to make a return on investment commensurate with the game's ultimate popularity. At the same time, our members are among those whose technological innovations rely on flexibilities provided by laws such as the Digital Millennium Copyright Act ("DMCA"). It is our hope that the following answers to selected questions from the NOI will aid the Task Force as it develops its policy proposals.

The issues under review by the Task Force are both broad and extremely complex. It is our hope that this NOI is not the end of the process, and that the Task Force will continue to confer with stakeholders to ensure that any proposed policy recommendations will not result in unintended consequences. We look forward to a continuing dialog over the coming months with the Task Force and with other stakeholders.

I. Rights Holders: Protection and Detection Strategies for Online Infringement

Rates and Trends in Piracy: *What are stakeholders' experiences and what data collection has occurred related to trends in the technologies used to engage in online copyright piracy, and what is the prevalence of such piracy? What technologies are currently used to detect or prevent online infringement and how effective are these technologies? What observations, if any, have been made as to patterns of online infringement as broadband Internet access has become more available?*

A major component of ESA's services to its members involves maintenance of robust domestic and international anti-piracy programs. ESA anti-piracy efforts include: investigations and civil litigation against individuals and companies engaged in infringing activities; monitoring and enforcement against online piracy; supporting investigations and prosecutions of game software infringers by law enforcement officials and government agencies, including foreign enforcement bodies; and educating customs agents and law enforcement officials in the United States and a number of countries overseas. In addition to these enforcement efforts, ESA

has also developed and promoted IP education programs aimed at explaining to school age children the harms that illegal downloading and other forms of copyright infringement can inflict on industries that create games and other content.

It is heartening that the NOI identifies "the prevalence of online copyright infringement" as the "primary motivation" for the Task Force's efforts, and recognizes that "the infringement of works online remains a persistent and significant problem." It is our experience that debates regarding the precise economic effect of piracy, while well-intentioned, often tend to miss the forest for the trees. Debates about methodologies and substitution rates too often become polarized, driven not by efforts to achieve consensus, but rather by efforts to undermine the claims of others. Consequently, ESA has preferred to avoid these debates, and has instead focused on measuring the magnitude of illicit online activities implicating our members' intellectual property. The results of our efforts confirm the intuition posited in the NOI; namely, that online piracy persists at extraordinarily high levels.

In past years, online piracy of ESA member software grew primarily via user downloads enabled by peer-to-peer ("P2P") protocols, such as BitTorrent and eDonkey. ESA utilizes third party vendors to gauge the extent to which select member games are subject to piracy. Each month, ESA's vendor detects several million peers in P2P swarms in which participants are exchanging infringing copies of member titles. In recent years, there has also been a surge in the amount of piracy occurring through the use of direct download hosting providers, also known as "cyberlockers." Unlike P2P traffic, it is difficult for rights holders to actively monitor the number of downloads of infringing files taking place on individual cyberlockers. Instead, ESA's vendor searches the Internet for links, typically on online forums or blogs, to infringing files hosted on cyberlockers. Between July 1, 2009 and June 30, 2010, ESA's vendor found more than 28.5 million links to infringing video game files stored on various cyberlockers. When comparing this figure to the P2P figure discussed above, it is important to bear in mind that each link is accessible by untold numbers of Internet users – that is, each of the 28.5 million infringing game files may have been downloaded multiple times by different users.

These figures are disturbing, particularly in light of the fact that the entertainment software industry is on the leading edge in the development and use of technological protection measures ("TPMs") designed to prevent online infringements by making it impossible to play unauthorized copies of games. As is obvious from the aforementioned piracy statistics, industry uses of TPMs are by no means a panacea. Nonetheless, we believe that, but for the protection afforded by use of TPMs, the rate of piracy of entertainment software would be significantly higher. To make use of infringing copies of PC games, users must obtain a "cracked" version of a game in which the TPM for the game has been stripped or otherwise rendered inoperable, typically by members of so-called "warez release groups." To play a pirated copy of a console games, users must obtain and install a circumvention device to modify their game console and render the TPM protection scheme incapable of blocking the play of unauthorized copies of games. In the past, game console circumventions were effected primarily through the use of "mod chips," which had to be physically installed onto the motherboard of a game console. Increasingly, however, circumventions are undertaken through the use of "software modification" or "soft mod" techniques, which involve installation of software that modifies console firmware to bypass or disable TPMs. Laws that proscribe the distribution of

circumvention devices, such as the DMCA and the laws of dozens of other adherents to the WIPO "Internet" Treaties, remain integral to any reasonable effort to combat online piracy, as TPMs make the downloaded copies of games unplayable.

Detection Technologies: *Consistent with free speech, due process, antitrust, and privacy concerns, what incentives could encourage use of detection technologies by online service providers, as well as assistance from payment service providers, to curb online copyright infringement?*

The industry does not support technology mandates that would require the compulsory adoption or introduction of a specific technological solution into a network as, among other things, such mandates tend to lack the flexibility necessary to adapt to the rapidly changing technological landscape. The industry favors industry-initiated technology solutions to the problem of online piracy, coupled with incentives for ISPs to not only remove infringing hosted content, but also to forward notices of infringement to subscribers engaged in transitory infringements on P2P protocols, and, with appropriate procedural safeguards, to disable or terminate the accounts of repeat infringers.

Business Models – *What challenges have the creative industries experienced in developing new business models to offer content online and, in the process, to counteract infringing Internet downloads and streaming? Can commenters make any generalizations about the online business models that are most likely to succeed in the 21st century, as well as the technological and policy decisions that might help creators earn a return for their efforts? How can government policy or intellectual property laws promote successful, legitimate business models and discourage infringement-driven models? And, how can these policies advance these goals while respecting the myriad legitimate ways to exchange non-copyrighted information (or the fair use of copyrighted works) on the Internet?*

The emergence and widespread consumer adoption of broadband Internet are the most important technological and cultural developments to impact the video game industry in the past decade. Broadband Internet has helped spawn new game genres, launched new distribution models, and forever changed the face of home entertainment. In May 2009, online game sites attracted more than 87 million U.S. visitors.[1] Most of today's popular game titles include Internet-enabled features. All three current-generation home console systems connect to the Internet, as does the current generation of handheld gaming devices, enabling consumers to participate in an online community that spans the globe.

Digital distribution of game content through legitimate channels is growing at a healthy clip. PC and console-based games are now available for download through a number of outlets. Consumers can purchase and download PC games directly from a number of publishers, or from third-party marketplaces that offer games from a variety of publishers. An exciting recent development is the emergence of cloud-based services that enable users to stream PC games located on remote servers directly to their computers. Each of the three home consoles works in

[1] Tom Ivan, *Online Gaming Sees Significant Growth*, Edge Online (June 13, 2009), http://www.next-gen.biz/news/online-gaming-sees-significant-us-growth.

tandem with an integrated, console-specific online marketplace that enables consumers to purchase various forms of digital content for download.

In recent years a range of new business models has emerged to address the changing consumer and technological landscape. In addition to offering direct downloads of console and PC games, many game developers are re-thinking the paradigm for how games are monetized. Rather than relying on revenues from sales of game software, some publishers now focus on potential downstream revenues, including games that are free to the user and supported by advertisements. Ad-supported games can feature advertisements integrated into the game itself, or banner advertisements similar to those on traditional websites. Another free-to-play business model involves use of so called "microtransactions." Games predicated on this model enable dedicated users to purchase virtual goods that improve the overall game-play experience. For instance, users can purchase items designed to improve the attributes of their online characters, whether by making their characters more attractive, more powerful, or better problem-solvers. Another form of downstream monetization involves the use of "trialware," games that are distributed without an initial charge but that may be limited in some capacity to entice users to purchase the full version of the game. Many variations of this "try before you buy" model exist, ranging from "demos" that provide users with access to only limited portions of the game to restrictions on the number of times or the amount of time a game may be played.

Perhaps the most important thing to understand about business model innovations in our industry is that no single model is ever likely to predominate, particularly given the increasing diversity of potential game-playing platforms. These innovations, though, rely in large part on an intellectual property policy framework that provides stability for creators. It should also be stressed that no discussion of game industry business models can ever be exhaustive. Indeed, publishers and developers are already finding ways to blend several of the aforementioned business models to monetize their works. At any rate, there can be no doubt that the entertainment software industry remains poised to innovate business models designed to meet consumer demands and thereby counteract the demand for pirated copies of games. Paradoxically, the greatest challenge to the ability of publishers to develop these new business models remains the availability of free pirated content and the perception among much of the public that accessing unauthorized content is acceptable. Another challenge for game publishers offering content online is the increasing level of credit card fraud that injures vendors who are forced to pay chargeback fees.

II. Internet Intermediaries: Safe Harbors and Responsibilities

DMCA Takedowns *– What are stakeholders' experiences with the volume and accuracy of takedown notices issued for allegedly infringing content across the different types of online services (i.e., storage, caching, and search) and technologies (e.g., P2P, cyber lockers, streaming, etc.)? What processes are employed by rights holders to identify infringers for purposes of sending takedown notices? What processes do Internet intermediaries employ in response to takedown notices? Are Internet intermediaries' responses to takedown notices sufficiently timely to limit the damage caused by infringement?*

The effectiveness of the notice-and-takedown system turns on the willingness of online service providers to respond to notices sufficiently promptly and effectively so as to minimize the harm to the rights holder whose work is being infringed. Unfortunately, intermediary responses to takedown requests vary, and a significant number of intermediaries are completely unresponsive to takedown requests. Unsurprisingly, sites predicated on providing access to infringing content typically ignore rights holder notices of infringement entirely.

As demonstrated by the discussion of business models above, the distinction between content creators and online service providers is becoming less clear. Online games increasingly empower users to interact with game publishers' servers and other users to build virtual worlds and share user-generated content. Consequently, many game publishers are now also online service providers for purposes of the DMCA. We are therefore sensitive to the need for balance in the online copyright ecosystem. In our view, the DMCA's takedown procedures remain fundamental to that balance. It is our members' experience, as both senders and recipients of DMCA takedown notices, that rights holders typically exercise a high degree of care in verifying the accuracy of takedown notices prior to submission.

Systemic Infringers – *What are stakeholders' experiences with online copyright infringement by users who change URLs, ISPs, locations, and/or equipment to avoid detection? What challenges exist to the identification of such systemic infringers? What are stakeholders' experiences with Section 512(i) on the establishment of policies by online service providers to inform subscribers of service termination for repeat infringement?*

Because ISPs are responsible for assigning IP addresses to their subscribers and because of the widespread use of dynamic IP addresses, it is virtually impossible for a rights holder to unilaterally identify systemic P2P infringers. As a result, only an ISP is capable of identifying which of its subscriber accounts is responsible for engaging in infringement at a given time, and when one of its subscriber accounts is doing so repeatedly. Given that ISPs are the only parties so positioned, section 512(i) of the DMCA plays an essential role in maintaining the balance the statute was intended to strike. To benefit from the statute's safe harbors, ISPs must adopt and implement a "policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers." Section 512(i) is particularly important in relation to P2P infringement, as the DMCA's notice-and-takedown provisions are incapable of addressing transitory infringements because infringing content is not actually being hosted but is nonetheless traversing an ISP's network. Unfortunately, there is scant evidence that ISPs are fulfilling this obligation.

Repeat infringement by users on hosted sites also presents enforcement challenges for rights holders, as rights holders are generally unable to identify the users who repeatedly upload the infringing content. Rights holders are relegated to forwarding notices of infringement to site operators with the hope that infringing content will be removed quickly enough to minimize losses caused by infringement. Although rights holders send notices regarding millions of infringing files each month, many online service providers are unwilling to take the necessary steps to enforce the terms of service agreements required by § 512(i) of the DMCA. As a result,

the notice-and-takedown process is rendered Sisyphean in nature, with rights holders having to continually issue takedown notices for content that is repeatedly uploaded by the same users.

III. Internet Users: Consumers of Online Works and User-Generated Content

Education Initiatives – *What initiatives have been undertaken to improve the general awareness of internet users about online copyright infringement and the availability of legitimate sources to access online copyrighted works?*

Public education on the importance of copyright to creators is among the highest priorities for ESA. To that end, ESA has developed an educational outreach program for elementary school students designed to raise awareness and respect for intellectual property rights. The program provides educational materials to students on the right way to copy words, pictures and other digital content, both at home and at school. In addition to providing guidance on copyright, the program also introduces students to the ground rules for copying in the classroom, where mistakes can lead to plagiarism. The materials show students how these rules apply outside the classroom, where violations of the rules can also have consequences. These lessons have become even more important to teachers who continue to report increasingly alarming rates of plagiarism among high school and college students who copy information from the Internet without attribution, often because they do not consider Web sites to be "real" sources like books and journals. As these bad habits may be the result of a lack of early guidance, our educational materials help students to address these issues at the beginning of their academic careers to help them become responsible "cybercitizens." ESA's educational materials introduce even the youngest students to some of the issues arising from copying the work of others, especially when making copies with a computer. The materials also provide positive guidelines to help students "copy right" in school, at home and on the Internet. ESA hopes to instill in young people respect for the intellectual property rights of all the people who contribute to the creation of content, especially as most digital content is the result of the collective endeavors of many different people. The entire "Join the © Team" curriculum is available at www.jointhecteam.com.

ESA has also developed an Intellectual Property Education Workshop program for middle and high school students, designed to provide them an easy way to learn about intellectual property rights, game piracy and the interactive entertainment industry. These in-school interactive workshops help students explore the significance of intellectual property in their everyday lives and understand both why it is important to respect the intellectual property rights of others and why violating those rights can have consequences, not only for others but for themselves.

Respectfully submitted,

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