

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 Request for Comments on)
“Department of Commerce Green Paper,)
Copyright, Policy, Creativity, and Innovation) Docket No. 130927852-3852-01
in the Digital Economy”)
)
)

COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION

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The Entertainment Software Association (“ESA”) is grateful for the opportunity to provide comments responding to issues raised in the Internet Policy Task Force’s (“Task Force”) Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy (“Green Paper”).¹ As 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, ESA has a keen interest in copyright policy, and in specific issues identified in the Task Force’s most recent Request for Public Comment. We appreciate the Task Force’s effort to identify aspects of copyright law that may be under strain due to technological advancements and the rise of the Internet. Because our industry’s success depends on leveraging those very technologies, we regard the Task Force’s work as critically important. We are particularly interested in the Task Force’s inquiry into “the relevance and scope of the first sale doctrine in the digital environment” and the possibility of “establishing a multistakeholder dialogue on improving the operation of the notice and takedown system,” and thus focus these initial comments on those two issues.

I. Relevance and Scope of the First Sale Doctrine in the Digital Environment

As a threshold matter, we believe the Green Paper fairly characterizes the current state of the law with respect to the applicability of the first sale doctrine in the digital environment.² The first sale doctrine generally provides owners of physical copies of works in a digital format, such as CDs and DVDs, the ability to resell or otherwise dispose of such physical copies by narrowing the scope of the distribution right,³ but does not apply to the “distribution of a work through

¹ Department of Commerce - Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy*, (2001), available at <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf> (“Green Paper”).

² *See id.* at 35-38.

³ *See* 17 U.S.C. § 109.

digital transmission where copies are created implicating the reproduction right”⁴ nor to works obtained pursuant to a licensing agreement. We understand that the Task Force is interested in examining whether there are benefits historically associated with the first sale doctrine that may be at risk due to the increasing reliance on online distribution and the trend toward structuring such transactions as “licenses” rather than “sales.”⁵ Given our perspective as an industry that has seen tremendous benefit for publishers and consumers alike from current licensing practices for digital entitlements, we urge the Task Force to carefully consider the complete picture, including the impact an abrupt policy shift would have on the existing market for copyrighted works, in evaluating whether to endorse an expansion of the first sale doctrine.

The video game industry was among the earliest of the content industries to respond to the emergence and widespread consumer adoption of broadband Internet by developing new business models and modes of distribution that eschew the need for physical goods in favor of a purely digital, online user experience. Broadband penetration has enabled publishers to develop a range of online services that deliver interactive content to consumers in a variety of new ways and under multiple pricing models. Indeed, the manner in which the entertainment software industry has delivered engaging experiences to consumers has evolved dramatically. Just 15 years ago, industry products consisted primarily of console and PC games that were sold on disc and played at home with limited opportunities for multiplayer interaction. Today, however, online game delivery and game play are the norm, providing consumers with additional channels for acquiring game content, and expanded options for playing against and engaging with other gamers around the world.

⁴ Green Paper, *supra* note 1 at 35.

⁵ We take no position on whether the Green Paper’s characterization of this trend is correct. Historically, many video games, like much software generally, were licensed, and thus have always been subject to license restrictions. *See, e.g., Vernor v. Autodesk*. As noted below, whether video game publishers adopted this or another distribution method largely depends on how to provide the best experience for consumers.

For instance, the video game industry has developed both hardware platforms, including home consoles and handheld devices, and software platforms, including web portals and cloud services, that are dedicated to delivering game content and enabling game play. Each of the three major home consoles works in tandem with an integrated, console-specific online network. Those networks provide a wide array of functions in support of game play, including enabling multiplayer game play, downloading of games, announcements for new games, expansion packs and updates, tournaments, tracking of trophies and achievement badges, social and community features, and customization of avatars. The consoles' online networks also offer access to non-game entertainment services, including films and TV shows. In addition to physical game consoles and their associated networks, consumers also may access, obtain, and play video games through online game platforms, such as EA's Origin, Microsoft's Games for Windows Live, and Valve Corp.'s Steam, or game streaming services such as OnLive. Separately, game publishers also develop video game software for other multipurpose platforms, such as the Windows Store and Apple's App Store, which serve as digital hubs for games playable on mobile phones, tablets and PCs. Finally, game publishers offer games directly to consumers that are played exclusively online over the PC platform, in some cases through a game client that connects to the publishers' servers and often through a mere web browser interface. In each of these distribution models, much of the functionality and entertainment experience is directed by or occurs on the publisher's server.

In addition to expanding the universe of platforms and distribution models, advances in cloud capabilities have also provided game developers with flexibility to experiment with alternative means of monetization. For example, under the "free-to-play" ("F2P") model frequently employed with online web and mobile games, publishers provide consumers with free access to games and seek to generate revenue through in-game advertising and/or the sale of in-game items. Some "massively multiplayer online" games ("MMOs") employ a monthly subscription fee model.

The video game industry's position on the leading edge of consumer-focused innovation should not be surprising. Gamers are consumers with high expectations, and gaming itself is an interactive experience between publisher and gamer. To compete effectively, platforms and publishers must anticipate, appreciate, and exceed gamer expectations. The expansion into new digital distribution models, a development enabled by effective licensing models, has been a critical tool to deliver gamers content in a manner that meets their demands. Indeed, these innovations give consumers greater access to more content, through a greater number of distribution channels, and on more flexible terms than ever before. As a consequence, the introduction of these new business models has resonated with consumers, generating incredible growth for the online segment of the game industry. In fact, in 2012, PricewaterhouseCoopers ("PWC") estimates that consumers spent more than \$22.4 billion on online video game content and an additional \$8.7 billion on content playable on mobile devices, accounting for just under half of the video game industry's \$63.4 billion in global sales.⁶ By 2017, PWC forecasts that these segments of the video game industry alone will account for more than \$44.67 billion in consumer spending.⁷

Although the first sale doctrine is generally framed as pro consumer, efforts to expand the first sale doctrine carry the potential to undermine these market-driven developments. In this regard, the passage of time has proven prescient the reasoning underlying the Copyright Office's reluctance to endorse a broader "digital" first sale doctrine in the Section 104 Report:

Proposals for a digital first sale doctrine endeavor to fit the exploitation of works online within a distribution model that was developed within the confines of pre-digital technology. Digital communications technology enables authors and publishers to develop new business models, with a more flexible array of products that can be tailored and priced to meet the needs of different consumers. Requiring that transmissions of digital files be treated just the same as the sale of tangible copies artificially forces authors and publishers into a distribution model based on outright sale of copies of the work. The sale model was dictated by the

⁶ See PricewaterhouseCoopers, *Global Entertainment and Media Outlook: 2013-2017*, available at <http://www.pwc.com/gx/en/global-entertainment-media-outlook/segment-insights/video-games.jhtml>.

⁷ See *id.*

technological necessity of manufacturing and parting company with physical copies in order to exploit a work – neither of which apply to online distribution. If the sale model is to continue as the dominant method of distribution, it should be the choice of the market, not due to legislative fiat.⁸

As the Task Force considers whether changes to § 109 are needed, it is important that it weigh the benefits historically associated with the first sale doctrine against those afforded by digital distribution models. The Task Force must be mindful that efforts to expand the first sale doctrine, either by amending § 109 or by “[reinterpreting] what constitutes a ‘license,’”⁹ raise the specter of a dramatic chilling effect on the types of service offerings that are now made available to the public because of the flexibility provided by a digital entitlement licensing scheme. We agree with the Copyright Office’s warning that “[s]traight-jacketing copyright owners into a distribution model that developed around a different technology at a different time is a formula for stifling innovative, market-driven approaches to meeting consumer demand for digital content.”¹⁰

II. Establishing a Multistakeholder Dialogue on Improving the Operation of the Notice and Takedown System

As an industry of both content creators and platform operators, and one in which game products and services increasingly empower users to interact with one another to build virtual

⁸ See U.S. Copyright Office, *A Report of the Register of Copyrights Pursuant to § 104 of the Digital Millennium Copyright Act*, 91-92 (2001) available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> (“Section 104 Report”).

⁹ Green Paper, *supra* note 1, at 36.

¹⁰ Section 104 Report, *supra* note 8, at 101. We also agree with the Section 104 Report’s conclusion that “[a]sserting, by analogy, that an online digital transmission is the same as a transfer of a material object ignores the many differences between the two events.” *Id.* at 99. Unlike the transfer of physical goods, the online transmission of a digital work results in the creation of an additional perfect copy, and is thus “accompanied by a greatly increased risk of piracy.” *Id.* Moreover, there remain significant technological (and privacy) impediments to confirming the deletion of a file by its original owner.

worlds and share user-generated content, ESA members find themselves straddling the “DMCA divide.” On the one hand, our members rely on flexibilities provided by the DMCA’s safe harbors to develop and bring their games, game platforms, and innovative consumer experiences to market. On the other, our members’ games, like other desirable digital content, are subject to extraordinarily high levels of online piracy and other forms of copyright infringement that is facilitated by service providers who fail to take meaningful action in response to notices of infringement. Thus, as both recipients and senders of takedown notices, ESA members are well positioned to lend a balanced perspective to discussions focused on potential improvements to the DMCA’s notice and takedown system. Should the Task Force initiate a multistakeholder process on improving the operation of the Notice and Takedown system, we would like to participate. We further believe it is imperative that any such process must include, and be driven by, those groups with significant, practical, *operational* experience with notice and takedown practices.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'C. Genetski', is positioned above the typed name and title.

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