entertainment® software association

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Submitted via Email

Fiona Alexander
Associate Administrator
Office of International Affairs
Room 4706
National Telecommunications and Information Administration
United States Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Re: Notice of Inquiry on International Internet Policy Priorities at the National Telecommunications and Information Administration, 83 Fed. Reg. 26036, pp. 26036-38 (June 5, 2018)

Dear Ms. Alexander:

The Entertainment Software Association ("ESA") welcomes the opportunity to respond to the above-referenced Notice of Inquiry ("NOI") on the International Internet Policy Priorities of the National Telecommunications and Information Administration ("NTIA").

As the association that represents nearly all major video game publishers and video game platform providers in the United States,[1] ESA is pleased to provide an overview of the state of the U.S. video game industry and also present some recommendations for the continued growth of a robust and inclusive global digital economy to NTIA as it formulates its international internet policy priorities.

Digital trade has grown significantly for many industries, including the video game industry, which has seen in the past few years marked shifts (from physical to digital formats) in the derivation of its revenue from the sale of video games and related services. ESA members are an integral part of the digital economy and rely on rules and policies that promote principles of fairness and flexibility in order to succeed commercially on the modern internet.

[1] A list of ESA members is available at http://www.theesa.com/about-esa/members/.

About the Industry

In 2017, the U.S. video game industry generated $36 billion in overall revenue, with consumers spending $29.1 billion on software, downloadable content and subscriptions, up from 24.5 billion in 2016.[2] The industry added more than $11.7 billion in value to U.S. GDP in 2017 and directly employed more than 65,000 people nationwide who earned an average compensation of $97,000 per year.[3]

The video game industry is increasingly reliant upon the internet for content delivery and related services and, as such, we are affected, both domestically and internationally, by policies covering data governance, privacy and security and emerging technologies, among others. For many video game companies, a significant portion, if not the majority, of revenue now originates from digital sales of games rather than the sale of physical products. In 2017, sales of digital content and services (including subscriptions, full game downloads, digital add-on content, mobile apps and social network games) outpaced the sales of physical product, a trend that has become more pronounced since 2012.[4] Digital content constituted 79% of video game sales in 2017, up from 54% in 2013.[5] Consumer spending on video game content and services delivered in innovative digital formats stood at $9 billion in 2013; in contrast, by 2015 that number had climbed to $11.2 billion.[6]

The Free Flow of Information, Privacy and Security

As a technology-intensive sector, video game companies rely on broadband internet connections and data to deliver engaging gaming content, services and experiences to their consumers, who are based all over the world. For video game publishers, ensuring smooth data flows across national borders is crucial to providing the best game experience to players and to creating new and innovative business models for delivering digital content. Generally, the elimination of obstacles to the free flow of data across borders is designed to ease the ability of internet-native companies to conduct every-day business. However, in the past decade, complex

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[2] *2018 Essential Facts about the Computer and Video Game Industry* at p. 9 *available at* http://www.theesa.com/wp-content/uploads/2018/05/EF2018_FINAL.pdf.
[3] *Id.* at p. 13.
[4] *Id.* at p. 10.
[5] *Id.*
[6] *2017 Essential Facts about the Computer and Video Game Industry* at p. 14 *available at* http://www.theesa.com/wp-content/uploads/2017/04/EF2017_FinalDigital.pdf.

rules and policies have emerged in various countries around the world regarding data, including its collection, protection, use and transfer. Some of these rules, such as those that do not distinguish amongst different types of data or that disregard how different industries make legitimate use of that data, make it much more difficult for video game companies to provide access to content or maintain a seamless gameplay experience for users.

Data Localization and Storage

Laws that promote localization, protectionism and other restrictions on data flows under the guise of privacy and data security are counterproductive and impose unnecessary burdens on industry. While regulators often frame localization requirements as necessary to safeguard individual privacy or national security, they may be less about data protection than other policy considerations. For example, by requiring local storage or data processing, governments may be providing favorable treatment to their local technology industries or economies. The opportunity for local law enforcement to gain easier access to the personal data of its citizens appears to be another important motivation. But regulations that require video game companies to store data within a particular country create operational and financial challenges. They can also lead to a proliferation of databases containing personal information, which can then lead to enhanced security concerns as well as increased costs of development and maintenance.

Moreover, data localization rarely makes sense for network efficiency. Such regulations may force video game companies to limit their product offerings in jurisdictions with onerous requirements. Ultimately, such regulations could interfere with the growth of American video game companies, including their ability to hire more American workers, and could limit the ability of the industry to reach consumers in new markets.

Data Breach Notification

The patchwork of laws and regulations that address notification timelines for data breaches constitute a significant burden on industry. It is already exceedingly difficult for companies to know the scope and scale of a data breach, and the diversity of rules on notification only make it harder to comply with reporting obligations. In crisis situations, companies need clarity when it comes to rules on reporting as well as time to figure out what really happened. When developing notification requirements, data regulators should take into account that time

may be needed to understand the scale of a breach. We believe NTIA should encourage other governments to adopt policies on data breach notification using as a possible model the voluntary Cybersecurity Framework administered by the U.S. National Institute of Standards and Technology (NIST).

Cybersecurity

ESA members are deeply concerned about the issue of cybersecurity because the protection of game networks and platforms is critical. We support continued consultation and voluntary engagement with industry stakeholders, as modeled in NIST's framework on cybersecurity, as well as a whole-of-government approach that emphasizes communication and coordination between technology-focused and law enforcement agencies along with industry.

Differentiation of Data

As governments around the world, including the U.S. Government, seek to regulate data transfers between consumers and content service providers, the video game industry urges NTIA to consider approaches that account for how different business models support different types of digital industries. A one-size-fits-all regulatory approach may stifle innovation in customized content delivery, a service which is essential to the video game industry. We also believe that not all data should be subject to the same regulatory treatment. Non-personal data in video games is of little, if any, value to consumers in the vast majority of circumstances. Regulation of this type of data may harm the free flow of information and potentially interfere with already existing regulation of personal data. The cautious consideration of evidence and information is necessary when crafting rules and policies in this space.

Privacy

We believe that consumer privacy protections are advanced by laws and regulations that encourage free cross-border data flows. Consumers have highly individualized preferences when it comes to privacy, which is why video game developers provide them with information and tools (such as customized privacy settings) that enable informed decisions about the handling of their personal information. In addition, the video game industry seeks to enhance consumer

privacy through voluntary self-regulatory mechanisms, such as the *Privacy Certified*™ program offered and administered by the Entertainment Software Rating Board (ESRB).[7]

Countries around the world have begun evaluating and implementing regimes protecting consumer privacy, such as the General Data Protection Regulation (GDPR). As they do so, we ask that NTIA emphasize the importance of on-going dialogue between governments and industry stakeholders to create balanced and appropriately-tailored legislation. ESA members strive to comply with rules on privacy but in the case of GDPR, for example, ambiguities in the law surrounding consent requirements and alternative to consent, such as what constitutes a "legitimate interest" for data processing, complicate efforts by companies to achieve compliance. While such ambiguities will likely be resolved over time, companies are now faced with daunting challenges as they try to discern the right steps in moving forward where there is not yet clear guidance from European data protection authorities.

Regulation of Content

Some countries possess onerous laws that regulate content, ostensibly to protect minors and/or public morality, but which ultimately disadvantage U.S. video game companies, make it much more difficult to succeed in those markets and pose obstacles to the free flow of information. In certain countries, industry self-regulation is considered inadequate even though the video game industry has been recognized by the U.S. Government as more than capable of self-regulation, through the ESRB.[8]

To address concerns about content in video games internationally, the world's game rating authorities have formed the International Age Rating Coalition (IARC)[9], designed to reflect the unique cultural differences among nations and regions, provides a globally-streamlined age classification process for digital games and mobile apps and helps ensure the consistent cross-platform accessibility of established, trusted age ratings by today's digital consumers. With the ubiquity of apps and the need for consistent ratings to avoid localization

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[7] *See* the ESRB "Privacy Certified™" Program *available at* https://www.esrb.org/privacy/.

[8] Federal Trade Commission, Commissioner Maureen K. Ohlhausen, "Success in Self-Regulation: Strategies to Bring to the Mobile and Global Era BBB Self-Regulation Conference," p. 7, Speech given at the Better Business Bureau Self-Regulation Conference on June 24, 2014 *available at* https://www.ftc.gov/system/files/documents/public_statements/410391/140624bbbself-regulation.pdf. Commissioner Ohlhausen noted that the "electronic game industry continues to have the strongest self-regulatory code and enforcement of restrictions on marketing, advertising and selling mature-rated games to younger audiences."

[9] IARC is available at: https://www.globalratings.com/about.aspx.

barriers, we encourage ratings authorities to do more to encourage integration—rather than fragmentation—of the digital economy.

Other countries go even further with content and censorship requirements that effectively prevent wholly foreign games from being sold, downloaded or otherwise published or distributed in their countries. As is evident, the prohibition of discrimination against foreign digital products, such as online and mobile games, is necessary for the U.S. video game industry in order for it to better compete on equal footing with its counterparts in overseas markets.

Multi-Stakeholder Approach to Internet Governance

With the advent of the GDPR, registries and registrars have begun to mask critical WHOIS data (without regard for the distinction between legal or natural persons) necessary to discover who may be behind websites that host or link to downloads or sales of infringing video games and circumvention accessories. This practice has had a hampering effect on industry and law enforcement alike. ESA member companies must now rely on internet service providers (ISPs) and other online intermediaries in order to have takedown notices forwarded to site operators. If positive action is not forthcoming, then companies have no meaningful way to conduct enforcement and safeguard their intellectual property rights without expending even greater resources; this is especially difficult for ESA members that are small businesses and that do not conduct their own enforcement in-house.

Willful infringers will be emboldened, knowing that they can hide from accountability because of the veil cast over the WHOIS database. ESA urges NTIA to continue to support limiting the cascading effects of the loss of WHOIS information for U.S. consumers and business owners by advocating for the distinction between collection of information for legal versus natural persons and that U.S. registrars and registries abide by the terms of their contracts with ICANN including continuing to provide WHOIS information about U.S. persons as before. In the case of non-U.S. registries and registrars, we ask NTIA to lend its support to discussions on a viable tiered access model that prioritizes rights holders and members of law enforcement. We also support ongoing talks within ICANN towards implementing "thick" WHOIS.

Emerging Technologies and Trends

NTIA can play an important role in advancing the deployment of emerging technologies in overseas markets through policies that enable entrepreneurs and innovators to take risks and access global markets to export digital products and services. Rules and policies that promote the rule of law, the strong protection and enforcement of intellectual property rights, and investment in internet infrastructure, all help foster an environment that will allow emerging technologies and small businesses to thrive. We have previously discussed data policies above and now focus on intellectual property and internet infrastructure below as important to supporting emerging technology.

Intellectual Property

In order to maintain its technological edge, our industry relies on modern rules on intellectual property that promote fair trade and competition, increase access to new markets and expand high-wage job creation. Strengthening rules on copyright, trademark and trade secret protection and enforcement—especially those that take into account evolving and emerging technologies—is an effective way to preserve the incentives for companies in the video game industry to continue to produce the engaging content gamers want and embrace the technology that offers consumers new ways to interact with that content. These rules should be crafted to allow video game companies to seek compensation for infringement through adequate civil, administrative and criminal procedures.

In particular, the protection from mass infringement afforded to video games and consoles by access controls and digital rights management has unleashed new methods of making games available to players across a multitude of platforms and devices and its protection is of utmost importance to the industry. Technological protection measures have long been fundamental to protecting and rewarding the investments made in improving console technology and enabling innovation in game hardware, such as virtual[10] and mixed[11] reality headsets, accessories and systems and augmented[12] reality devices.[13] In order to continue to push the

[10] With virtual reality, the user wears opaque goggles or glasses and is completely closed off from the "real world," and is fully immersed in the virtual world displayed before her eyes.
[11] Mixed reality contains elements of both virtual and augmented reality. Using a transparent lens or goggles, the user can see both the real world and a virtual world seamlessly tied together.
[12] An augmented reality user wears a semi-transparent lens that allows her to see both the real world and the digital content layered on top of the real world.

envelope in innovation and pioneer the adoption of new technologies, video game companies continue to rely on robust rules governing technological protection measures and anti-circumvention.

As the vast majority of infringement challenges the industry faces is online, a legal framework that provides incentives for internet and online service providers as well as online intermediaries (such as that described in the Digital Millennium Copyright Act) to cooperate with rights holders to combat online infringement, while granting those service providers and online intermediaries qualified protection from liability for infringement does not pose an obstacle to innovation, economic growth or the creation of new content. The video game industry benefits from rules that encourage all stakeholders in the online content ecosystem to work together with the goal of fostering legitimate trade, fair competition and facilitating the emergence of new and beneficial technologies.

On ISP and OSP liability for content generally, it is critical to video game companies that NTIA maintain the distinction in government discussions between immunity for online service providers in a copyright and non-copyright context. Video game companies operate online platforms that host user-uploaded content and are beneficiaries of the limitations on attendant liability. But that cannot come at the cost of strong enforcement of intellectual property rights. As NTIA contemplates its position on rules or policies that exempt platforms from liability for user-generated or user-uploaded content, those must have a properly constructed exception for intellectual property infringement. NTIA must work closely with other agencies in the U.S. Government, such as the U.S. Patent and Trademark Office, the International Trade Administration's Office of Intellectual Property Rights, the U.S. Copyright Office and the Office of the U.S. Trade Representative, when formulating its policies to take proper consideration of U.S. intellectual property law and enforcement as well as trade and technology policy.

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[13] New technologies, such as augmented, virtual and mixed reality allow users to solve a murder mystery as a detective, defend one's castle from invaders, catch pocket monsters, or play with palm-sized elephants or fairies using these technologies. Virtual and augmented reality platforms are projected to be the next big groundswell in computing with possible industrial applications that are far beyond video games or entertainment. One report estimated that, by 2025, virtual reality and augmented reality will constitute a $23 billion market and if VR becomes a generic computing platform, it could reach a $182 billion market.

Expanding Broadband

Mobile games are a vital and growing segment of the video game industry, and we support appropriate efforts to upgrade wireless broadband capabilities. We welcome the deployment of 5G networks, which hold great promise for enhancing and extending the user experience. NTIA plays a vital role in developing and driving the Executive Branch's policies on telecommunications and information technology. For years, its policy mission has focused on expanding broadband Internet access and adoption and ensuring that the Internet remains an engine for innovation and economic growth. The benefits of increasing unlicensed use in valuable bands are well known. The expansion of unlicensed uses in the 5 GHz band over time has improved Wi-Fi speeds, thereby improving online and mobile gameplay as well as the streaming of gameplay for consumers.

We ask that NTIA continue to support partnerships and collaboration between the public and private sectors in developing the infrastructure of the internet and improving access for consumers and businesses, both domestically and internationally. For example, new network infrastructure that drives down latency in gameplay and that increases bandwidth enables consumers to enjoy video games in new ways, such as game streaming services, where video game processing occurs via streaming from the cloud rather than on a local device, like a game console. As the location of game processing shifts to the cloud, the number of devices that can play video games increases substantially, resulting in new markets and consumers that can enjoy playing video games. Also, a pervasive and robust internet can help expand the market for full-game downloads and multiplayer gameplay experiences.

Conclusion

We believe that advancing high standards and well-crafted rules in the areas of data governance, privacy and security and emerging technologies, can have a beneficial impact on the creation and distribution of entertainment software and hardware. Evidence-based and data-driven policymaking will go a long way to improving international e-commerce, sustaining economic growth, furthering market access and encouraging innovation, both in content and in technology. Cutting-edge rules on the protection of intellectual property rights on the internet and the free flow of cross-border data further enhance the digital economy. These, in turn, will

help American video game companies continue to contribute to the growth of the U.S. economy and create high-wage jobs.

Thank you for your leadership on this important matter. We are available to answer any additional questions you may have.

Respectfully submitted,

Stanley Pierre-Louis
Senior Vice President and General Counsel