



**ENTERTAINMENT SOFTWARE ASSOCIATION SUBMISSION TO
LEGISLATIVE COUNCIL PANEL ON COMMERCE AND INDUSTRY REGARDING
PROPOSALS CONTAINED IN THE NOVEMBER 2009 REPORT ON COPYRIGHT
PROTECTION IN THE DIGITAL ENVIRONMENT**

JANUARY 2010

The Entertainment Software Association (ESA) is a U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the Internet. ESA members represent some of the world's leading entertainment software publishers whose releases account for a majority of the game software products sold in most countries around the world. A list of current ESA members is attached hereto as Attachment A..

Among its different areas of responsibility and activity, the ESA offers a variety of services to its member publishers, including a global anti-piracy program, owning and operating a major trade show, business and consumer research, and federal and state government relation efforts to promote enhanced levels of intellectual property protection and challenge unwarranted content regulation.

In Hong Kong, ESA has been active in the anti-piracy area since 2001, working to support the enforcement efforts of Hong Kong Customs & Excise against local copyright infringement, whether in the form of infringing copies of games being sold in the form of discs, cartridges, cards or other forms of digital storage, or, more recently, in the form of illegal devices that circumvent the technological protection measures incorporated into game consoles.

A number of years ago, ESA increased the focus of its IP enforcement efforts on the growing problem of global Internet piracy, engaging a number of companies to monitor the incidence of online game piracy involving ESA member company titles. Since that time, ESA has tracked a surge in online infringements in countries around the globe, paralleling closely the expansion in broadband access to the Internet. There is a close correlation between the increase of downloads of illegal files to the rollout of broadband infrastructure, as broadband greatly expedites the transmission of digital information, permitting sufficiently fast bitrate speeds to facilitate the complete download of a game file in a reasonable amount of time. Whereas, downloads of some game files used to take one or more days of continuous connection under an old narrowband system, some new broadband systems enable the downloading of game files in less than an hour.

This phenomenon raises significant concerns in Hong Kong as, according to the government's own published estimates, 79 % of Hong Kong households are using broadband services of one kind or another. Indeed, ESA's monitoring of peer-to-peer ("P2P") networks reveals that, in the second half of 2009, more than 267,000 instances of downloads of illegal copies of ESA member

games by Hong Kong Internet users were detected, the vast majority of which were found on networks using the BitTorrent P2P technology. This amount is likely to be a fraction of the totality of the infringing downloads of ESA member games, as ESA does not monitor downloads of the complete catalog or repertoire of ESA member games but only a select subset of 300-400 of the most recent and/or popular releases. If monitoring were broadened to cover the entirety of games released by ESA member companies, the total download figure would likely be materially higher.

The Hong Kong government recognized the danger of such a development quite some time ago, issuing a consultation document in December 2006. Subsequently, the government issued preliminary proposals in April 2008, collecting views and comments thereon later that year. In addition, the government convened a Tripartite Forum, in which the major stakeholders (content owners, online service providers (“OSPs”) and Internet users) were all provided an opportunity to discuss the creation of a voluntary code for the OSPs to address the infringing activity of their subscribers. Unfortunately, although the Forum gave some consideration to a Memorandum of Understanding regarding a set of practices to be included in a voluntary code, as well as a trial period for such practices to be implemented and assessed, the Tripartite Forum was not reconvened to put either of these into place. ESA regrets this as it appeared that the Forum offered a meaningful opportunity for all parties to reach an understanding and a set of solutions regarding a common problem.

In November 2009, the government outlined the Administration's proposals to the Legislative Council Panel on Commerce and Industry (the “Panel”) in its report “Proposals for Strengthening Copyright Protection in the Digital Environment” (LC Paper No. CB(1)341/09-10(08)) (hereinafter the “Proposals”). The Proposals took into account views received from stakeholders in response to the December 2006 consultation document and the preliminary proposals released in April 2008, as well as views expressed during the Tripartite Forum.

ESA and its members would like to provide the Panel the following comments on some of the recommendations contained in the Proposals.

1. Right to communicate works through electronic transmission.

ESA applauds the recommendation regarding an amendment that would recognize and provide for an exclusive right to communication through electronic transmission. The government has shown great foresight in legislating such a right as such transmission is becoming an important form of distribution of legitimate copies of games. The Internet is emerging as a significant distribution channel for many game publishers. The speed and efficiency of electronic transmission can be a major advantage for this form of distribution, not only for publishers, but especially for consumers.

However, such a distribution channel is threatened by the increasing volume of transmissions of illegal copies over the Internet. The Proposals’ protection of this right through criminalization of infringement is an appropriate remedy, particularly as it parallels the criminal treatment of infringements of other exclusive rights. Focusing the criminal sanction on those initiating an unauthorized communication to the public is properly tailored to target those individuals with

harmful intent. As the Proposal notes, it is crucial that the criminal provision also targets instances of communications that are not in the course of business conducted for profit but which is “made to such an extent to affect prejudicially the copyright owners” as many extremely harmful infringing transmissions over the Internet are initiated outside any business-like circumstances.

2. Limitation of liability for OSPs in addressing online piracy.

ESA commends the Proposals’ recommendation regarding the establishment of liability for OSPs with respect to the infringing activities of their subscribers accompanied by a limitation on such liability if OSPs comply with a set of conditions and obligations in response to such activities. Such liability creates an appropriate incentive for OSPs to take the affirmative actions that are critical for deterring continued infringing behavior on the part of their subscribers.

However, ESA would urge the government to reconsider the Proposal regarding the Code of Practice that is intended to set forth the set of conditions with which OSPs must comply in order to limit their liability. “Notice and Notice” and “Notice and Takedown” systems have generally fallen short of establishing meaningful deterrence of subscribers’ infringing activity. While it may be that some subscribers do cease their illegal download activity when they receive a notice indicating that copyright owners are aware of their infringements, many subscribers do not, especially when it becomes clear that there is no risk of meaningful consequence resulting from their infringing behavior. In any case, a “Notice and Notice” or “Notice and Takedown” approach is really more suited to web-based infringements rather than infringements through P2P communications, as “takedown” generally involves the OSP requesting removal of infringing material from a website operated by a subscriber. A “notice and takedown” regime would not be very effective against P2P infringements as the infringing files in the shared folder in a subscriber’s computer (from which the P2P technology makes additional copies for other peers) have usually disappeared by the time the infringement is detected and a notice advising of the infringing nature of such material has been transmitted.

Rather than adopt a Code of Practice with obligations on the OSPs that are unlikely to produce the intended deterrence and reduction in illegal downloading activity, the government should instead reconsider for the Code a required “graduated response” system that includes a set of notices that have the benefit of educating consumers regarding the illegal and infringing nature of their activity but that also include a sanction element for those subscribers who refuse to conform their behavior appropriately. Combining educational elements and proper incentives, a graduated response approach appears to be the most effective and efficient means of producing the intended change in consumer behavior. Unfortunately, without a sanction element for non-conforming subscribers who continue to engage in infringements, sending notice after notice over time is not likely to produce the necessary change in group behavior. Even those consumers who are initially apt to cease their downloading activities in response to notices will likely regress when they learn that those of their fellow subscribers who continue to engage in infringing activity suffer no adverse consequences.

We understand that the government wishes to avoid experiencing conflict and controversy in Hong Kong that it has seen emerge in countries where graduated response systems are being

considered or implemented. However, we believe that a graduated response system can be well-tailored to its intended goal of educating subscribers regarding the illegality of their activity, with procedural elements incorporated to include a right of appeal to an appropriate Tribunal, such as the Copyright Tribunal, to accord subscribers protection from any interruption in their Internet access without a proper independent review of the circumstances surrounding their alleged infractions and a fair and balanced adjudication of any claims of infringement against them. Safeguards should also be included to ensure that any graduated response respects and protects subscribers' privacy rights. In addition to the graduation of notices, a set of sanctions can also be graduated so that the first sanction to be imposed need not be disproportionate.

Quite frankly, many of the objections and fears articulated regarding the implementation of graduated response systems are highly speculative as very few subscribers have experienced suspended or terminated Internet connections and those that have usually engaged in excessive or prolonged patterns of infringement while ignoring multiple notices regarding such activity. We also believe it important that, if it were to be voluntary, any such Code of Practice needs to be defined and agreed to in a time frame which closely parallels the adoption of any copyright amendments establishing OSP liability and the conditions for its limitation.

3. Prescribing additional factors for additional awards of damages.

ESA urges reconsideration of the decision not to include a statutory damages provision for online infringements. The online environment is rife with infringing and harmful activity in large part because of its success in hiding and anonymizing those responsible. Copyright owners already face steep challenges in properly identifying online infringers and obtaining evidence confirming their responsibility for the harmful activity. Meeting such challenges often requires commitments of substantial resources over many months. The absence of statutory damages adds to these challenges by requiring further evidence to prove the amount of harm sustained as a result of the infringer's behavior, which the Internet makes extremely difficult. A well-tailored range of statutory damages would provide fair and clear guidance to both rights owners and users as to the level of potential liability for infringing activities. On the other hand, factors for the court to consider in assessing additional damages will only add to the cost of an enquiry as well as uncertainty, whereas a properly crafted statutory damages provision would add to certainty and reduce the irrecoverable costs of litigation without unduly prejudicing defendants determined to have engaged in the claimed infringing activity.

ESA MEMBERS

(January 2010)

505 Games
Capcom USA, Inc.
Crave Entertainment
Disney Interactive Studios, Inc.
Eidos Interactive
Electronic Arts
Epic Games, Inc.
Her Interactive, Inc.
KOEI Corporation
Konami Digital Entertainment
Microsoft Corporation
MTV Games
Namco Bandai Games America Inc.
Natsume Inc.
Nintendo of America Inc.
Playlogic Entertainment, Inc.
SEGA of America, Inc.
Sony Computer Entertainment America
Sony Online Entertainment, Inc.
SouthPeak Interactive Corporation
Square Enix, Inc.
Take-Two Interactive Software, Inc.
THQ, Inc.
Trion World Network, Inc.
Ubisoft Entertainment, Inc.
Warner Bros. Interactive Entertainment Inc.
XSEED Games