

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Commerce, Trade and Consumer Protection

Hearing on

Digital Content and Enabling Technology:
Satisfying the 21st Century Consumer

Testimony of

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Mr. Chairman and Members of the Subcommittee:

My name is Stevan Mitchell, and I am Vice President for Intellectual Property Policy with the Entertainment Software Association. We are the U.S. association dedicated to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, and the Internet. ESA members collectively account for more than 90 percent of the \$7 billion in entertainment software sold in the U.S. in 2005, and billions more in export sales of U.S.-made entertainment software.

We are entering another dramatic phase in the growth of this young and vibrant industry. Every day we learn more about the promise of a new generation of game consoles that bring previously unimagined levels of computing power and graphics processing capability to consumers' homes.

In the 34 years since the release of the Magnavox Odyssey, computer and video game sales have grown to over \$27 billion worldwide, and are projected to double again, to nearly \$55 billion, by 2009. Much of this growth will be propelled by enthusiasm for the new generation of video game consoles, including Microsoft's XBox 360, Sony's Playstation3, and the Nintendo Revolution.

Still more growth will come from the dramatic expansion of demand for online and mobile game play -- particularly in Asia. The OECD took particular note of these growth opportunities in its studies, last year, of the Online Computer and Video Game Industry and on Mobile Content.

Our industry's products were born digital and have always been digital -- meaning that the industry has always had to stay ahead of digital piracy. But we have done so with care and have learned a great deal in the process.

Entertainment software publishers learned long ago, through experimentation with various copy-protection technologies in the 1980s and early 1990s, that consumers would vote by closing their wallets for technologies that were inconvenient or that interfered with their enjoyment of legitimately acquired products.

Accordingly, entertainment software publishers have learned to employ technological protection measures, including digital rights management (DRM) and various forms of disc-based authentication, in ways that not only protect publishers' investments in their intellectual property, but that enhance consumer exposure and promote consumer choice.

1) Enhancing consumer choice

These technologies make it possible, for example, for consumers to obtain full versions of games on a "try-before-you buy" basis – which would simply not be possible without the ability to achieve varying levels of access to these products. These technologies even allow sharing of trial versions with family, friends, and over the 'Net.

2) Expanding consumer features, including parental controls

These technologies also increase flexibility for consumers. While parental controls have been a feature of some consoles since 2001, in the next generation, all video game consoles will feature parental controls that allow parents to control children's access to game and movie content based on established industry ratings. The technology that allows parents to permit access to some games but not others is also a variant of the DRM technology built into every console and game.

3) Opening markets previously believed unavailable

Elsewhere in the world, technological protection measures make it possible for consumers to enjoy access to games in markets that were not previously regarded as viable due to astronomical piracy rates for traditional, "disc-bound" copies. In China, for example, DRM technologies are being used by Nintendo to deliver games to owners of its iQue consoles, at very competitive price points, in ways that are highly resilient to piracy.

Also in China, and other high-piracy markets, technological features of online games allow publishers to authenticate users and hardware, and to control access to the game experience through the sale of pre-paid access cards. So publishers, long plagued by piracy rates exceeding 90 percent, are actually beginning to see a return on investments made in online games and are responding accordingly – including by investing in further game development.

4) Implementing technology in ways that consumers appreciate

There is compelling proof of the appreciation of these technologies in the industry's growth – measured not only by the number of games sold but by the proliferation of new and successful game platforms.

Consider the healthy market we are seeing for sales of handheld games. Last year Nintendo announced having surpassed 10 million units in sales of its Dual Screen (DS) handheld device. And Sony's PlayStation Portable (PSP) has successfully launched an entirely new media format for games and movies that can now be found on Universal Media Disc (UMD). Although the PSP was released last March, it took only until the end of the calendar year for all of the major movie studios to begin making content available on the new format.

At a time when some would argue that consumers are being oppressed by DRM technology, our industry provides consumers with an unprecedented level of flexibility to determine where, when and how they wish to enjoy a full range of digital products – with new delivery mechanisms coming on line every day.

Our industry continues to drive broadband uptake and adoption of a wide range of technology-based consumer products. Our industry and our member companies pledge to keep making compelling entertainment experiences available, on an ever-increasing number of platforms.

And to do so, they continue to rely on certain baseline legal protections, like the anti-circumvention provisions of the DMCA. We do not believe changes to this legislation are warranted. Adequate "safeguards," to the extent they are needed, already can be found within the four corners of that legislation.

The Copyright Office's Section 1201 Rulemaking obligates the Copyright Office to remain vigilant to instances in which non-infringing uses of certain classes of works are likely to be adversely affected. This process, we believe, has served as an effective "safety valve" and has been administered in a way that has not adversely affected the growth and success of the entertainment software industry.¹

Entertainment software publishers invest millions of dollars so that consumers are assured of seamless and reliable access to the digital products they have lawfully acquired, and that technological protection measures do not interfere with consumers' entertainment experiences.

The measures that publishers take to furnish access to their products are constantly scrutinized, by the consuming public, and through healthy competition

¹ As we reported earlier this year in our Joint Reply Comments -- since the 2003 rulemaking, over 1800 new console games, 700 handheld games, and over 2200 PC games have been made available to the public.

with one another, over factors including convenience, reliability, and ease of use. To this, U.S. consumers have responded favorably, with their purchases of more than two hundred million PC and video games each year since 1999 – and those numbers continue to grow.

We appreciate the tools that Congress has created, that allow this industry to protect its technologies and products, while at the same time delivering on the expectations of hundreds of millions of satisfied customers. I thank the Subcommittee for its invitation to appear here today, and welcome the opportunity to respond to your questions.