



October 17, 2022

Filed electronically via www.regulations.gov, Docket No. ITA-2022-0007

Barton Meroney
Executive Director
Office of Manufacturing Industries
International Trade Administration
1401 Constitution Avenue, NW
Washington, DC 20230

Re: Request for Comments on Artificial Intelligence Export Competitiveness, Docket No. ITA-2022-0007, 87 Fed. Reg. 50288, pp. 50288-89 (August 16, 2022)

Dear Director Meroney:

The Entertainment Software Association¹ (“ESA”) welcomes the opportunity to respond to the International Trade Administration’s (“ITA”) request for comments on stakeholder concerns regarding international policies, regulations and other measures which may impact U.S. exports of artificial intelligence (“AI”) technology. Because AI and machine learning technology present revolutionary opportunities in both game development and game operations, we use this opportunity to call attention to industry priorities and concerns in technology policy generally and particularly, in the context of international trade and global policymaking. ESA’s comments in response to the Federal Register notice (“FRN”) focus on aspects of intellectual property, digital trade and market access that are important to the economic competitiveness of video game companies. Our submission also counsels the U.S. government to stay the course on supporting fair digital trade principles, strong intellectual property laws and an evidence-based approach to regulation to maintain the rapid pace of innovation in the AI space.

About the Industry

Every day, millions of Americans play video games. Research has shown that 215 million players in the United States drove industry growth to the tune of \$60.4 billion in 2021

¹ ESA is the U.S. trade association for companies that publish interactive entertainment software for video game consoles, handheld devices, personal computers, and the internet. Our members not only create some of the world’s most engaging interactive experiences for consumers, but also develop novel technologies that are at the cutting edge, such as virtual, augmented, and mixed reality hardware and software as well as the latest consoles and handheld video game devices.

with \$51 billion spent on content, \$6 billion on hardware and an additional \$2.7 billion on accessories.² The industry is fast-growing and leaves a deep economic footprint. In 2019, the industry generated direct economic output of more than \$90 billion, added more than \$59 billion in GDP within the U.S. economy and created over 143,000 direct jobs and more than 428,000 indirect jobs.³ Video game companies distribute their games, hardware and services globally. Through innovative subscription business models, some companies have been able to achieve monthly totals of tens of millions of active users in continual and ongoing engagement with new and extra content and live services. Live services provide additional depth to the game and allow for enhancements such as opportunities in-game micro transactions, subscriptions and e-sports modes in sports franchises. This gamer-centric approach enables customers to try new games and experiences, which in turn, spurs the development of innovative content and services.

The Importance of Artificial Intelligence in Video Games

Video game companies have long utilized AI within games and consider AI and other emerging technologies to be essential for developing and operating the next generation of video games. AI has been and continues to be used to improve content generation, animation, sound and music, natural language processing (for example, natural speech and responses from non-player characters within the game), as well as automating repetitive and tedious tasks on the developer side. Improvements in AI technology can better game experiences, such as the creation of vast open worlds with constant new terrain, generating storylines and narratives via the employment of neural networks, deep learning and machine learning where a game adapts the challenge level to player input and preferences.⁴ AI has also been used in games to improve and maintain player safety and integrity in gameplay by combating cheating, fraud and abuse as well as optimizing quality assurance and player support, such as by allowing a user to report a glitch in the game.

Advancing and Sustaining Fair Digital Trade

Digital trade has grown significantly for 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. Gamers have made their preferences for digital gaming content and associated services known and those choices are reflected in the increasing percentage of revenue from digital content and digital delivery of content. This digital

² ENTERTAINMENT SOFTWARE ASSOCIATION, *2022 Essential Facts About the Video Game Industry*, p. 21 at <https://www.theesa.com/wp-content/uploads/2022/06/2022-Essential-Facts-About-the-Video-Game-Industry.pdf>.

³ Simon Tripp, Martin Grueber, Joseph Simkins and Dylan Yetter, *Video Games in the 21st Century: The 2020 Economic Impact Report* available at <https://www.theesa.com/video-game-impact-map/wp-content/uploads/sites/2/2020/12/Video-Games-in-the-21st-Century-2020-Economic-Impact-Report-Final.pdf>.

⁴ Players have responded, in a measurable way, to technological improvements in games. For example, 50% of video game purchasers pay attention to the overall quality of the game, while 35% are motivated to buy the game based on whether it has an interesting story or premise. *2022 Essential Facts About the Video Game Industry* at p. 22.

transformation has created new opportunities for the delivery of video game content to consumers, not only as a game to be played but also as a service, and to successfully leverage brands traditionally associated with consoles and PCs for play on mobile platforms and through streaming.

The video game industry plays a vital role in the digital economy, with a global footprint of \$196.8 billion in 2022 and with 3.2 billion active gamers in the world.⁵ As such, the industry supports norms that promote digital trade in content, goods and services, the results of which are beneficial for both industry and consumers.

As innovators and creators in the digital space, we support strong protection and enforcement of intellectual property rights, enabling the free flow of data across borders, prohibiting data localization, preventing forced transfers of source code and other technology as a condition of doing business, non-discrimination against foreign digital products, and strengthening market access, including the reduction of tariffs on technology hardware and software-related goods and prohibition of the imposition of customs duties on electronically-transmitted content. These principles are equally important where artificial intelligence and other emerging technologies are concerned.

Eliminating Customs Duties on Electronic Transmissions

Given the global nature of video game services, delivery of content and player engagement, prohibiting customs duties on digital transmissions is of ultimate importance. Allowing its proliferation would impose a significant burden on the video game industry and its consumers. ESA members support the continued extension of the moratorium on customs duties on electronic transmissions at the World Trade Organization, including the newest extension to December 2023. New digital customs duties, formalities, and requirements place the reliability of digital transactions and the workers and employers in the video game sector at risk. The video game industry urges the U.S. government to continue to work towards a more permanent agreement that can foster stability in the digital economy.

Protecting Privacy and Data

Governments around the world are considering and enacting laws to protect consumer privacy and data. We believe that AI regulation should align with existing legal frameworks, particularly on privacy and data protection. Regulations should not adopt a “one-size-fits-all” approach, but instead consider the sector and the use or application in which AI technology is deployed to determine whether such use is a “high-risk” or “low-risk.” High-risk applications, in which the unmitigated use of AI could result in significant risks to safety, privacy or access to fundamental resources, are best suited for regulation. Entertainment software, such as video games and related interactive experiences, such as virtual reality, should be considered low-risk. Less prescriptive regulation for low-risk applications incentivizes investment and innovation while decreasing administrative burdens. In addition, industry- or sector-specific best practices or voluntary frameworks are most appropriate for regulating low-risk applications.

⁵ Newzoo’s Global Games Market Report 2022 available at <https://newzoo.com/insights/trend-reports/newzoo-global-games-market-report-2022-free-version>.

Given the variety of markets in which video game companies operate and the differing regulatory regimes they must navigate, the industry believes calling to attention a system with a set of principles that already exists and to which a number of important economies, including the U.S., already adhere is useful and provides a measure of certainty and predictability in commercial activities. To that end, ITA may want to refer to provisions on data protection already included in the U.S.-Mexico-Canada Agreement (“USMCA”)⁶. Those provisions highlight the APEC cross-border privacy rules, to which the U.S., Mexico and Canada are already parties. The APEC rules have been described as compliant with the European Union’s General Data Protection Regulation, whose provisions have inspired similar regulations and laws in other countries. Finally, we urge the U.S. government to take a cautious and thoughtful approach to regulating emerging technologies, like AI, in advance of hypothetical harms. Such an approach favors evidence-based policymaking and will not unduly burden innovation.

Cross-Border Data Flows and Data Localization

The video game industry supports a U.S. government position that prohibits governments from restricting the flow of cross-border information (with some exceptions) and from requiring companies to use or locate servers in a particular territory as a condition of doing business. As noted previously, our industry is increasingly reliant on electronic delivery of content to gamers in multiple countries, engagement of users in live services, preservation of users’ in-game items and speedy access no matter where they are and so reaffirmation of these principles is economically beneficial to our members, both small and large. Cross-border transfers of data also play a vital role in the process of developing innovative content as U.S. video game makers collaborate with partners located around the globe to create new content in real time.

Encouraging a Workable Framework on Intermediary Liability

The concept of limitation of civil liability in the non-copyright context for intermediaries, including platforms, was included for the first time in a U.S.-negotiated free trade agreement: the USMCA. Video game companies operate online platforms that host user-uploaded and user-generated content, features that enhance the video gaming experience for many users. Therefore, we are beneficiaries of the limitations on attendant liability. But that cannot come at the cost of strong enforcement of intellectual property rights. There must be an exception to immunity for intellectual property infringement. As this principle makes its way into international negotiations, we urge ITA and other U.S. government agencies to monitor implementation for consistency with Section 230 of the Communications and Decency Act.

Preventing Forced Technology Transfer

Video game companies do not support government measures that force companies to transfer their technology, intellectual property or other valuable commercial information, to

⁶ Text of the Agreement between the United States of America, the United Mexican States, and Canada, July 1, 2020 available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

national entities as a condition of doing business. These policies constitute unfair competition, discourage U.S. companies from entering or expanding into markets, and also distort free and fair trade.

Strengthening Market Access

On rules that regulate content, ratings and labeling of video games, the industry asks the U.S. government to encourage trading partners to take a fresh look at the industry's efforts at facilitating a common process for obtaining game app ratings that recognize the cultural regulatory requirements of different countries. This cross-border collaboration between government rating agencies and self-regulatory bodies has proven to be a model of success in providing vital information to consumers regarding content that they plan to purchase or otherwise access. The world's video game rating authorities have formed the International Age Rating Coalition (IARC)⁷, which 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. The IARC process has also made it easier for video game developers and companies around the world to make their apps available cross-platform in online storefronts by simplifying compliance with country-by-country regulations on ratings. With the ubiquity of mobile apps and the need for consistent ratings to avoid localization barriers, we encourage ratings authorities to do more to encourage integration—rather than fragmentation—of the digital economy.

Any discussion of trade in services must observe the principles of non-discrimination and market access for U.S. companies, including that these rules apply to services delivered by electronic means. Bilateral or multilateral commitments to establish non-discriminatory treatment of digital services help to establish an environment in which U.S. video game companies can U.S. video game companies to compete on equal footing when it comes to the delivery of video game content and services. Our industry is increasingly reliant upon the internet for content delivery and related services. For many video game companies, a significant portion, if not the majority, of revenue now originates from digital sales of games rather than from the sale of physical products. For example, 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 2012.⁸ The U.S. government can promote further growth by encouraging our trading partners to reduce discriminatory barriers to the provision of digital services.

Protecting Intellectual Property Rights

Intellectual property rights are vital to the innovative AI technologies incorporated into video games. As governments and intergovernmental organizations begin reviewing intellectual property laws and agreements to determine whether changes are necessary with respect to AI, it will be important to remember that laws and regulations already exist that can address the advent of new technologies and that intervention should take place only when a market failure can be

⁷ International Age-Rating Coalition (IARC) available at <https://www.globalratings.com/>.

⁸ ENTERTAINMENT SOFTWARE ASSOCIATION, *2018 Essential Facts About the Computer and Video Game Industry* at p. 10 available at http://www.theesa.com/wp-content/uploads/2018/05/EF2018_FINAL.pdf.

identified. Robust rules on intellectual property rights preserve incentives for companies in the U.S. video game industry to continue producing the engaging content and interactive experiences that consumers want. It also provides a certain assurance for companies as they invent new technologies that allow them to offer consumers new ways to interact with content. Governments should respect and encourage public-private partnerships on research and adaptation of AI technology but also private-private licensing and contractual arrangements to deal with questions of ownership and access to training data. Governments should also conduct enforcement with respect to infringement where that is necessary according to minimum standards as outlined in the WTO TRIPS agreement.

Copyright

We believe that U.S. copyright law should remain the model with respect to AI technology. U.S. law remains an adequate framework within which to analyze legal questions involving AI, such as authorship, ownership and liability for infringement, given the current state of AI technology. Existing statutory and common law doctrines based on fact-intensive inquiry are sufficient to address complex questions of access to content/training data, protection and ownership of the resulting output and use.

As the U.S. government considers these questions, it will be crucial to take policy positions that continue to incentivize creativity and innovation for U.S. companies by protecting the legitimate interests of rights holders. Video game companies are creators and innovators, who both utilize data and content as input used to train algorithms and machine-learning processes and who develop output, including creative output, as a result of those same AI processes. Creative output may take the form of video games and interactive software experiences that are more dynamic, interactive, and that adapt to gamers' preferences and actions or reactions within the game. As companies that utilize input data and that themselves are the source of such training data,⁹ our members believe that when assessing which policies are most beneficial to the broadest range of content creators and data innovators, it is important that the U.S. government strives to support both innovation and protection.

With respect to inputs, content and data used to train algorithms and other machine processes, ESA members are satisfied with reliance on licenses and other comparable mechanisms for authorized access to such content and data, with emphasis on contractual freedom to design the terms of access that work best for the parties. We believe that protecting the investments creators have made in producing content using emerging technologies is indispensable to incentivizing the creation of more innovative content.

Some countries have and currently are considering exceptions to copyright law with respect to access to training data. We think that thoughtful implementation of any such exceptions will be key but those exceptions will need to comport and be consistent with the three-step test, as articulated in the Berne Convention and in the most recent U.S. trade agreements. Any such exceptions must also not undermine technological protection measures ("TPMs"), which are central to the protection of game content and to the integrity of gameplay, and the circumvention of which should be subject to the rules of protection and enforcement set forth in the WIPO Internet Treaties.

⁹ For example, there are games that provide a virtual environment used to train self-driving or autonomous vehicles.

Patents and Trade Secrets

As an industry at the forefront of innovation, it relies on the strong protection and enforcement of patents. ESA members own global patent portfolios containing thousands of patents that advance the state of the art in entertainment software and hardware, ranging from animation, image generation and processing, machine learning and AI, game server architecture, gesture-based input technology, episodic content delivery, wearable hardware and accessories to social networking integration, avatar-based virtual world chatting and virtual reality hardware. In response to some government inquiries about whether changes to patent law and regulations are required with respect to AI, the industry does not consider, at this time, changes to U.S. patent law to be necessary and urges the U.S. government to continue to advocate for high standards of technology-neutral patent protection both here in the United States and globally.

Source code and algorithms that power video games are sometimes protected by trade secrets, making the protection and enforcement of trade secrets vital to the video game industry. We support the inclusion of rules on the civil protection and civil and criminal enforcement of trade secret theft in international agreements.

Encouraging and Maintaining Innovation

Recently, the U.S. government has taken steps to regulate emerging technologies, including artificial intelligence, in the interests of national security, such as by requiring export clearances. While U.S. national security is a compelling interest, the rulemaking process within the U.S. Department of Commerce has, unfortunately, included low-risk applications, such as mobile game apps, as an activity subject to potential regulation. We would like to reiterate that video games should be distinguished from higher-risk uses of emerging technology and data, such as those involving critical infrastructure or national defense.

The nature of modern video game development is global. Professionals often work on different aspects of games (sometimes on the same game) in different parts of the globe and that international collaboration means that technology may need to be shared with colleagues located in other countries. If care is not taken to distinguish between high-risk from low-risk uses, then video game development may be negatively impacted, which, in turn may have downstream impacts as well, such as loss of jobs. Unnecessary obstacles pose difficulty for innovative U.S. companies to export video game content created and powered with AI hurts the video game industry's competitiveness globally.

We recommend that the U.S. government develop a light-touch approach to risk assessment and not take or support an overly prescriptive posture towards AI regulation, that is, legislating or regulating ahead of the technology in anticipation of theoretical scenarios, especially as the technology is in its infancy. Imposing legal framework in a prescriptive manner that do not accommodate evolving technologies or uses of those technologies before the issues or ramifications are well-understood may instead chill innovation and dis-incentivize creativity.

We also support the U.S. government advocating for a rational and evidence-based approach to AI regulation in international talks. We encourage the government to continue its close consultation with industry and stakeholders who are developing innovative products and services using AI and who will need some regulatory flexibility in order to maintain that pace of innovation.

Harnessing Talent

The U.S. video game industry relies on human capital to drive creativity and innovation, which requires a robust pipeline of highly-skilled workers to produce the next generation of video games and services for the U.S. and global markets. Toward that end, the industry supports the training of American students for STEAM careers and preparation of the American workforce for an AI-powered economy. For example, ESA members assisted with the formation of the Higher Education Video Game Alliance (HEVGA), among other resources, which enables American students, through scholarships and resources, to study coding, game design and other STEAM subjects at U.S. universities. We recommend that the U.S. government partner with businesses and universities, such as through innovation hubs, to assist with such a pivot and transition.

Conclusion

In sum, we thank ITA for conducting this inquiry into AI and its role in international trade. We recommend that ITA continue careful study and analysis of the responses from stakeholders, the state of emerging technologies and of the law, generally and where possible, work to develop evidence-based trade principles that promote innovation rather than hinder it. Lastly, we would like to express our appreciation and encouragement of the Department of Commerce for its sustained collaboration with industry stakeholders as it determines how best to advocate for U.S. competitiveness and leadership globally in innovative technology. We are available to answer any additional questions you may have.

Respectfully submitted,



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