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Katherine K. Vidal
Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office
United States Patent and Trademark Office
600 Dulany Street
Alexandria, VA 22314

Shira Perlmutter
Register of Copyrights and Director
United States Copyright Office
101 Independence Avenue, SE
Washington, DC 20540

Re: Request for Comments on Study on Non-Fungible Tokens and Related Intellectual Property Law Issues, Docket No. PTO-C-2022-0035, 87 Fed. Reg. 71584, pp. 71584-86 (November 23, 2022)

Dear Directors Vidal and Perlmutter:

The Entertainment Software Association¹ (“ESA”) welcomes the opportunity to respond to the joint request for comments on stakeholder concerns regarding intellectual property rights and enforcement for non-fungible tokens (“NFTs”) by the United States Patent and Trademark Office and the United States Copyright Office (“agencies”). Because the market for NFTs and the associated technology is still emerging and enforcement of intellectual property rights associated with NFTs has, so far, been effective, ESA recommends no change to intellectual property laws, regulations, or policy at this time.

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.

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 \$56.6 billion in 2022 with \$47.5 billion spent on content, \$6.57 billion on hardware and an additional \$2.5 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.

NFTs and the Video Game Industry

NFTs are unique cryptographic tokens that exist on a blockchain and cannot be copied, altered, replicated or deleted. We agree with the government's definition of NFTs to the extent that NFTs are not the underlying asset, such as the image or media, but instead are the unique digital identifiers contained in the metadata of a file which identifies it and which may be used to certify the asset's authenticity. However, it should be noted that the NFT does not actually convey rights or prove the validity of the transaction.

Although digital assets and in-game items have become commonplace in video games, ESA member companies are still considering how best to leverage NFTs to enhance gameplay and better connect with players. Some companies have developed games playable entirely with NFT-actuated characters while others use NFTs only as limited in-game items that may be collected and traded or only for promotional purposes. Yet others are exploring how to use NFTs to deepen the creative relationship between a game developer and players interested in sharing in the creative journey of a game's development by utilizing NFTs.

NFTs and Intellectual Property Considerations in Video Games

As agencies begin examining the intellectual property implications of NFTs, it will be important to remember that copyright and trademark laws and regulations already exist that can address the advent of new technologies, which means that government intervention should take place only when a market failure can be identified. It will also be crucial for the U.S. government to take policy positions that continue to incentivize creativity and innovation for American companies by protecting the legitimate interests of rights holders. To do otherwise would counterproductively hinder both the evolution of NFTs and the further production of the

² ENTERTAINMENT SOFTWARE ASSOCIATION, "U.S. Consumer Video Game Spending Totaled \$56.6 Billion in 2022," Jan. 17, 2023 at <https://www.theesa.com/news/u-s-consumer-video-game-spending-totaled-56-6-billion-in-2022/>.

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>.

underlying creative assets. 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. We believe that existing U.S. copyright and trademark law, as well as a mix of both statutory and common law doctrines, remain an adequate framework within which to analyze legal questions, as we presently understand them, involving NFTs, such as ownership, scope of rights and liability for infringement, given the current state of blockchain technology.

Intellectual Property Ownership and Licensing

Some ESA members are considering instances where NFTs may allow players the opportunity to own parts of a game including NFTs of characters, weapons, skins, etc., not just in an already-developed game but as part of a game that is being created by players alongside the game developer. In other cases, some member companies are evaluating instances where digital assets created by game developers and publishers are licensed to or owned by players or are created by players for use in games (which may be created jointly or by players or by developers alone).

Because of these innovative approaches to video games, questions sometimes arise about the scope of intellectual property rights that would belong to the parties (user and developer) involved in the creation and sale of co-created video games using NFTs, such as ownership rights of the NFT's underlying asset, what rights are granted within and outside the game platform and the transfer of rights when the NFT is sold and resold.⁴ NFTs can also live beyond the platform and ecosystem in which they were originally created so thought is being given to how terms of use should remain accessible to and binding on successive owners of the token.

For each of the scenarios noted above, our member companies recognize that there are considerations about how best to structure the conveyance and reservation of intellectual property rights in the underlying assets. A few members do think that this period of experimentation with different approaches with respect to rights to an NFTs in video games, represents opportunities to consider how player "creators" could feel more connected to the game they love and gain a greater sense of ownership of the resulting product. However, all believe that these questions can be addressed or resolved through smart contracts, clear terms of service and consumer education, all of which, so far, have been adequate at managing consumer and licensee expectations and uncertainty.

Infringement

ESA members who mint NFTs as well as those who do not or have not, experienced infringement of their copyrights and trademarks, which are used to create unauthorized and counterfeit NFTs. The majority of these infringements are unauthorized uses of digital images that are marketed (or passed off) as unique, legitimate NFTs in order to leverage brand goodwill,

⁴ Some members believe that transfer of rights will likely be determined by the terms (i.e., the smart contract) of the NFT itself, usually set by the NFT's creator.

consumer buzz and demand surrounding game-related assets. In some cases, after purchasing an unauthorized NFT, consumers may believe they have obtained a digital token authorized by the video game company that represents a blockchain-recorded transaction conveying exclusive use of a scarce digital asset including intellectual property rights in the underlying asset, which is not the case, only to discover that all they have purchased is an unauthorized digital image.

Some member companies have discovered infringing NFTs not only on NFT-specific marketplaces, but also on websites and social media platforms as well as related conduct involving consumer harms, such as fraud and other risks to cybersecurity. Others report that when consumers purchase what they believe to be an authentic NFT belonging to a member company, often they are taken to a separate website to redeem the purchase. At that website, they are then asked to download what turns out to be malware, which can infect computers and devices as well as steal personal and financial information. Often, listings for NFTs associated with copyrighted or trademarked assets are fraudulent and consumers receive nothing for their money; sometimes consumers reach out to the member company whose NFT they thought they were purchasing to register their dissatisfaction and demand a resolution.

In addition, the value of tradeable NFTs attached to players' accounts can increase the motivation for hacking customer accounts, particularly if the assets are non-recoverable. High-value digital items also increase motivation for other types of attacks against game platforms such as market manipulation schemes and fraud aimed at obtaining the items. However, notwithstanding these challenges, ESA members are treating the problem of illegitimate NFTs as they would unauthorized digital goods (UDGs).⁵ They have been successfully leveraging partnerships with NFT marketplaces and other types of platforms to take down listings of copyright-infringing NFTs utilizing the notice-and-takedown procedure in Section 512 of the Digital Millennium Copyright Act ("DMCA"). With respect to NFT listings that infringe trademarks, some of the major NFT marketplaces and other platforms also have procedures to remove those listings based on policies protecting intellectual property rights in their terms of service.

In their experience, most ESA members believe that platforms are working with rightsholders to stem the tide of NFT-associated copyright and trademark infringement. Such collaboration is and will continue to be a key component in combatting infringement. Market-based solutions involving voluntary cooperation by platforms with rights holders will be one important path forward when enforcing intellectual property rights as new technologies continue to emerge. So, while we think that platforms can and should do more to proactively police their platforms, ESA does not recommend that the government intervene in the NFT marketplace to amend or change any intellectual property laws at this time.

⁵ Unauthorized sales of in-game digital items have become a growing concern for the video game industry. Closely related to these in-game items are software products (bots, hacks, and "cheats" collectively known as "cheat software") that tilt the scales in favor of one player over another such as enabling the unfair and rapid collection and aggregation of virtual goods. The rise of UDGs and cheat software have had a negative impact on video game companies and consumers in the following ways: (1) sellers of UDGs and cheat software divert revenue away from video game developers and publishers; (2) sales of digitally-delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; and (3) video game publishers and developers are forced into a perpetual virtual "arms race" to update their products and security technology before the sellers can update theirs.

Conclusion

In sum, we thank the agencies for conducting this study into NFTs and intellectual property. We recommend that the agencies continue careful study and analysis of the responses from stakeholders and the state of the NFT marketplace, which has undergone remarkable changes this year. Lastly, we would like to express our appreciation to the agencies for their sustained collaboration with industry stakeholders in these and other matters involving emerging technologies. We are available to answer any additional questions you may have.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Bijou Mgbojikwe', with a stylized flourish at the end.

Bijou Mgbojikwe
Senior Counsel, Policy