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March 24, 2010

The Honorable Victoria Espinel  
U.S. Intellectual Property Enforcement Coordinator  
Office of Management and Budget  
725 17th Street, N.W.  
Washington, DC 20503

RE: Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement: Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan (75 Federal Register 8137) (February 23, 2010)

Dear Ms. Espinel:

The Entertainment Software Association (ESA) submits these comments in response to the Federal Register Notice (FRN) cited above. The ESA is the U.S. association dedicated to serving the business and public affairs needs of companies publishing interactive games for video game consoles, handheld devices, personal computers, and the Internet. ESA members collectively account for the majority of the \$11.7 billion in entertainment software sold in the United States in 2008, and billions more in export and hardware sales. In addition to adding more than \$4 billion in value to the U.S. GDP, the entertainment software industry directly accounts for more than 80,000 American jobs.

The ESA appreciates the opportunity to submit the following comments on matters that the Office of the Intellectual Property Enforcement Coordinator (IPEC) should consider in developing a Joint Strategic Plan for enforcement against intellectual property infringement. In addition, ESA subscribes to the guidance contained in the filings of the International Intellectual Property Alliance, the U.S. Chamber's Global Intellectual Property Center, and the Copyright Alliance. ESA's comments address each part of the Federal Register Notice request in turn, with Part I focusing on the threats posed by piracy, and Part II detailing ESA's specific recommendations for addressing the objectives of the Joint Strategic Plan as well as the supplementary topics identified by the FRN.

### **Part I – Costs of Infringement**

Online piracy is a leading concern of our industry – specifically, the unauthorized downloading of game product through peer-to-peer (P2P) file sharing networks (such as BitTorrent and eDonkey) and “one-click” hosting sites (such as Rapidshare.com). The entertainment software industry has invested heavily into the development of technologies to combat online piracy. Game developers and console makers utilize “technological protection measures” (TPMs) that

aim to make it impossible for users to “burn and play” a pirated game. Notwithstanding the immense collective efforts of the industry, many of these TPMs have been compromised through technological hacks and, as a result, online piracy of entertainment software continues to grow at alarming rates. In an effort to document the extent of the problem, ESA studied the number of infringing downloads of 200 member game titles through popular P2P networks (BitTorrent, eDonkey, Gnutella, and Ares). The one-month study in December 2009 revealed a startling 9.78 million infringing downloads spread across more than 220 countries and territories.

It bears emphasizing that the methodology of this study under -represents the true scope of online piracy for three reasons: the study 1) accounted only for infringing downloads of a small selection of ESA member games; 2) that occurred through P2P networks; 3) in a single month. Were we able to determine the number of downloads occurring via both P2P and hosting sites, there is no doubt that the number would be much higher.

## **Part II - Recommendations**

As previously noted, the entertainment software industry utilizes technological protection measures to prevent the use of unlawful game product. TPMs enable game consoles to recognize and refuse to play pirated copies of games. However, the demand for pirated product has created a concomitant demand for devices capable of circumventing TPMs. Notwithstanding the fact that these devices are illegal in the U.S. and in approximately 80 other countries that have implemented the World Intellectual Property Organization’s (WIPO) “Internet” Treaties – the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty – circumvention devices remain widely available. Purveyors of these devices – who may or may not be involved in producing pirated game copies – profit immensely from their sale.

Given the fundamental role circumvention devices play in facilitating piracy, it is our hope that the Joint Strategic Plan will set as a priority not only encouraging our trading partners to enact TPM provisions consistent with the WIPO “Internet” Treaties, but also the promotion of best enforcement practices that are critical to meaningful efforts to combat the distribution of circumvention devices. Establishing and maintaining an effective enforcement regime in the U.S. and export markets requires engagement by a number of federal agencies – each with a significant role to play in preventing the proliferation of circumvention devices.

### **1. Department of Homeland Security (U.S. Customs & Border Protection (CBP)/U.S. Immigration and Customs Enforcement (ICE))**

The role of CBP and ICE are critical to an effective U.S. enforcement system aimed at reducing piracy and counterfeiting. ESA supports current and past efforts to strengthen CBP/ICE statutory and regulatory provisions, and trusts that these efforts will be continued as part of the U.S. strategy to combat IPR violations.

#### **a. CBP Statutory Authority: Circumvention Devices**

Clear statutory authority should be added to Title 19, United States Code, to specify CBP’s authority to stop the importation of circumvention devices. Although Customs has previously

issued a ruling on its legal authority to stop circumvention devices,<sup>1</sup> the ruling cites only the general statutory prohibitions against importations contrary to law. In 2004, CBP proposed to amend its regulations to explicitly provide procedures related to the detention and seizure of circumvention devices, but the regulations were never finalized.<sup>2</sup> In order to insulate against challenges to CBP authority and to strengthen its programmatic focus on enforcement against illegal circumvention devices, ESA strongly supports the current effort in the U.S. Senate (in S. 1631<sup>3</sup>) to provide explicit authority for CBP's enforcement against the importation of circumvention devices by amending language in the Customs Law. Such a measure would provide the added benefit of enabling CBP to maintain statistics specific to seizures involving circumvention devices, which will in turn aid CBP in evaluating the sufficiency of its resource allocations, and help rights holders as they pursue investigations up the supply chain.

#### b. Training and Technology

ESA recognizes the challenges and difficulties that may exist in identifying suspect devices that are imported to the U.S. ESA supports the provision in S. 1631 that requires CBP to promulgate regulations that would allow CBP to accept donations of hardware, software, equipment and other technologies and support services in order to assist it to identify suspect devices.<sup>4</sup> ESA members have worked with CBP in the past and are prepared to continue their efforts to support future enforcement efforts through training and the identification of suspect devices.

#### c. Samples and Disclosure

S. 1631 also includes several provisions supported by ESA members that would strengthen U.S. intellectual property rights enforcement. Related to the explicit legal authority empowering CBP to stop importations of circumvention devices, the bill would permit CBP to provide parties the opportunity to inspect samples of the imported circumvention devices that are suspected of violating the import prohibition.<sup>5</sup> This provision would enable CBP to streamline its enforcement efforts by seeking assistance from industry experts in the process of verifying the illegality of suspect devices.

Similarly, S. 1631 contains information sharing provisions<sup>6</sup> that would greatly enhance the ability of injured parties to initiate legal actions and investigations into activities occurring in export countries as well as expand domestic investigations. Information sharing is essential in order for rights holders to identify the manufacturers, exporters, importers and middle-men who traffic in illegal circumvention devices. Section 239(b) of Senate Bill 1631 requires CBP to post information about a seizure of illegal circumvention devices in sufficient detail to allow affected rights holders to come forward and request additional information. CBP would then disclose, to qualified individuals, important investigative details about the seizure, including the date of

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<sup>1</sup> U.S. Customs Service Headquarters Ruling HQ 471202 (December 20, 2001). Rulings are accessible at <http://rulings.cbp.gov/>.

<sup>2</sup> Recordation of Copyrights and Enforcement Procedures To Prevent the Importation of Piratical Articles 69 Fed. Reg. 59562 (October 5, 2004).

<sup>3</sup> Customs Facilitation and Trade Enforcement Reauthorization Act of 2009, S. 1631, 111<sup>th</sup> Cong. §239(a) (2009).

<sup>4</sup> *Id.* at §236(c).

<sup>5</sup> *Id.* at §238(b).

<sup>6</sup> *Id.* at §239(d).

importation, the port at which the merchandise was seized, the quantity seized, the country of origin of the merchandise, and the names and addresses of the relevant manufacturer, exporter and importer.

ESA members report that several U.S. trading partners have already implemented similar information sharing protocols. They give industry investigators the head start they need to trace illegal shipments back to their source, and to supplement, and make more efficient, further civil and criminal law enforcement actions. The U.S. should encourage its trading partners to engage in similar information sharing practices, to the extent they do not do so already, as this can improve the efficiency and effectiveness of enforcement actions undertaken in the U.S.

#### d. Resources

CBP has reported that the number of intellectual property-based seizures has risen from slightly over 8,000 in 2005 to just under 15,000 seizures in 2009.<sup>7</sup> This significant increase requires a greater allocation of resources to effectively assess risks, inspect shipments, and take action against the increasing number of violations. S. 1631 proposes the dedication of increased human resources to combat intellectual property rights violations.<sup>8</sup> ESA supports the legislative language to increase the staffing dedicated to IPR enforcement, but believes that more specificity is necessary and that several different offices within CBP and ICE would benefit from augmentation in view of the significant increases in seizures during recent years. ESA recommends that the Strategic Plan propose increased resources for DHS, CBP and ICE that will increase the number of import specialists, inspectors, fines -penalties and forfeiture officers, investigative agents, laboratory scientists/technicians and attorneys at headquarters components as well as field components.

## 2. Department of Justice: Reporting Cases

The Department of Justice is statutorily required<sup>9</sup> to issue a report to Congress regarding intellectual property related criminal cases initiated under sections 2318, 2319, 2319A and 2320 of the Federal Criminal Code.<sup>10</sup> ESA believes that criminal cases initiated under section 1204 of the Copyright Act for violations of section 1201(b) involving the prosecution of persons for the manufacture, importation, or distribution of circumvention devices should also be included in these annual reports. By reporting these cases, the Department would direct greater attention to this form of illegal activity and, hopefully, increase criminal investigations and prosecutions. Reporting these cases in its annual report would also aid CBP, ICE and the FBI in their efforts to investigate and carry forward for prosecution violations of the DMCA and to allocate its own resources appropriately.

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<sup>7</sup> U.S. Customs and Border Protection, Intellectual Property Rights Seizure: Fiscal Year 2009 Statistics, *available at* [http://www.cbp.gov/linkhandler/cgov/trade/priority\\_trade/ipr/pubs/seizure/fy09\\_stats.ctt/fy09\\_stats.pdf](http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/pubs/seizure/fy09_stats.ctt/fy09_stats.pdf)

<sup>8</sup> Customs Facilitation and Trade Enforcement Reauthorization Act of 2009, S. 1631, 111<sup>th</sup> Cong. § 235(b), (c) (2009).

<sup>9</sup> 18 U.S.C. § 2320(g); *see also* <http://www.justice.gov/ag/annualreports/pr2009/appd/app-e.pdf>

<sup>10</sup> 18 U.S.C. §§ 2318, 2319, 2319A, and 2320.

### 3. Free Trade Agreements (FTAs)

Free Trade Agreements are vital to achieving the high levels of intellectual property protection and high degrees of market access that enable our members to maximize export sales and profits. We favor inclusion in the Joint Strategic Plan of mechanisms designed to encourage U.S. trading partners to implement strong IPR protection and enforcement measures to better combat domestic and international piracy. The IPR protection and enforcement provisions in the U.S. - South Korea (KORUS) FTA reflect the level of IPR protection that ESA hopes the U.S. will continue to obtain from trading partners, including in the Trans-Pacific Partnership. ESA believes that the KORUS provisions establish a clear level of IPR protection, one that should not be weakened in future FTAs or other agreements that would include IPR enforcement standards. The following are specific features of the FTAs and other agreements that ESA has found to be beneficial to our members and that help to reduce the demand for infringing goods.

#### a. Technological Protection Measures

One critical component of prior FTAs is the inclusion of specific obligations governing the protection of technological protection measures. By preventing users from playing unauthorized copies of entertainment software, TPMs are central to any coherent strategy designed to reduce the demand for infringing video games. Although the WIPO "Internet" Treaties require members to implement and enforce robust TPMs provisions, the U.S. has utilized past Free Trade Agreements to specify the precise nature of the required protections. The specificity of the FTAs has prompted compliance and enforceability where, in certain instances, the WIPO Treaties standing alone had not. Peru provides an excellent case in point. Despite joining the WIPO Treaties in 2002, Peru did not adequately implement the obligations of the treaties until it signed the Trade Promotion Agreement (TPA) with the U.S. in 2006. Singapore has also proven to be a case in point as the anti-circumvention provisions of the U.S.-Singapore FTA have now prompted clear laws and robust enforcement against circumvention services and device dealers in Singapore, all to the benefit of legitimate industry interests.

#### b. e-Commerce

The growth of e-commerce creates opportunities for exciting new business models, but it also creates opportunities for nations to impose fees or restrictions on digital transactions, in the form of duties or other charges. USTR has recognized the importance of providing greater certainty and has therefore used FTAs as a vehicle for securing online market access. ESA members strongly value the ability to supply games and other digital products online to markets abroad. Freedom of access to cross-border trade helps to discourage piracy by ensuring broad availability of desirable products at competitive prices. ESA members consider that a strong e-commerce chapter is an essential element in any agreement with trading partners.

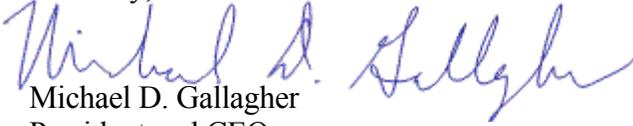
#### c. Optical Media Production

Optical disc laws that require facility licensing, monitoring and related enforcement of production facilities are critical to combating copyright piracy. In countries that have high rates

of optical disc manufacturing and piracy, these laws are a valuable enforcement tool to combat infringement.

We thank you for the opportunity to share these views, and pledge our continuing support to you and your office as you undertake this vitally important strategic planning mission.

Sincerely,

A handwritten signature in blue ink that reads "Michael D. Gallagher". The signature is fluid and cursive, with the first name being the most prominent.

Michael D. Gallagher  
President and CEO