

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Advanced Communications)	CG Docket No. 10-213
Provisions of the Twenty-First Century)	
Communications and Video)	
Accessibility Act of 2010)	
)	

COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION

The Entertainment Software Association (“ESA”) submits these comments in response to the recent Public Notice from the Consumer and Government Affairs Bureau with respect to aspects of the Twenty-First Century Communications and Video Accessibility Act (the “Act”).¹ The ESA is the 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.

The Act represents an important step in ensuring that individuals with disabilities have access to the video programming and advanced communications technologies needed to interact and communicate with others. The Act also reflects a congressional intent not to impose all of the Act's requirements on devices or services that may have only secondary or ancillary communication capabilities or that otherwise may be beyond the scope of the Act. Today, an increasing number of consumer electronics and appliances incorporate some degree of online connectivity, ranging from television sets with extensive web apps to smart appliances that share power-consumption information with utilities. The emergence of this “Internet of things” or the “embedded Internet” has tremendous growth potential. Roughly five billion devices connect to

¹ Public Notice, Consumer & Governmental Affairs Bureau and Wireless Telecommunications Bureau Seek Comment on Advanced Communication Provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010, CG Docket No. 10-213 (CGB, released Oct. 21, 2010) ("Notice").

the Internet today.² By 2015, that figure could reach 15 billion devices,³ and by 2020 it could hit 50 billion devices.⁴ While not all of these devices will include, as an ancillary or secondary element, messaging features, many of them will. If not implemented correctly, the Act's definition of "advanced communications services" ("ACS") could adversely affect dozens or hundreds of different types of devices and services that incorporate messaging functionality as a secondary or incidental feature. Additionally, such an expansive interpretation of the accessibility requirements would pose a formidable implementation challenge for the Commission; for example, applying the Act's "achievability" factors to hundreds of different devices and services would be an enormous undertaking. The Commission cannot be expected to develop and enforce guidelines for every product or service—or category thereof—that may have some ACS capability.

Apparently mindful of these and similar concerns, Congress tailored the Act to give the FCC flexibility in implementation, including authority to waive application of the Act's mandates for certain equipment, devices, and services. By using the waiver provisions to reasonably limit the scope of covered products and services, the Commission will preserve its ability to effectively implement the Act as to those products and services that are clearly within the scope of the Act. The Notice solicits feedback on appropriate factors to use when evaluating waiver requests from ACS accessibility requirements. The ESA welcomes this opportunity to comment.

² See "Internet Devices About to Pass the 5 Billion Milestone – IMS Research," *BusinessWire*, (released Aug. 16, 2010) (available at <http://www.businesswire.com/news/home/20100816005081/en/Internet-Connected-Devices-Pass-5-Billion-Milestone>).

³ See Michael Browne, "There will be 15 billion devices connected to the Internet by 2015," *digit Channel Connect*, (released July 13, 2010) (available at <http://www.digitchannelconnect.com/content/%E2%80%9Cthere-will-be-15-billion-devices-connected-internet-2015%E2%80%9D>).

⁴ See Ericsson Press Release, "CEO to Shareholders: 50 billion connections 2020" (released April 13, 2010) (available at <http://www.ericsson.com/thecompany/press/releases/2010/04/1403231>).

I. THE PRIMARY PURPOSE FOR USING GAMING HARDWARE OR ONLINE GAME SERVICES IS TO PLAY A GAME.

Although there is a remarkable variety of video and online games and associated platforms available today, all of these games have a common essential utility: they offer consumers an opportunity to play games. Online and console games have many other common characteristics, including the use of a complex mix of visual and audio cues and a player's responses, which routinely occur within seconds (or fractions of a second), to define the game. Whatever their genres, features, or other individual characteristics, however, the fundamental purpose of such games or gaming devices remains the game itself.

Today's game consoles and online game services are customized for this fundamental purpose. The typical home console or handheld device is focused on delivering to consumers an optimal gaming experience. Unlike other communications or video equipment, these video gaming devices—from their inner technology to their player controls and interfaces—are specifically designed to process and respond to the near-constant interaction between a player and the complex and rapidly changing audio and video cues that determine what happens in a game. Consumers of such specialized equipment expect no less; they buy such gaming hardware precisely because it offers prospective players the best environment in which to enjoy whatever video gaming software the consumer has chosen to play. Although video-gaming equipment, depending on how the consumer chooses to use it, may be able to be used for other purposes, including playing DVDs or accessing the Internet, its core function has remained the same since video-gaming devices first became available 30-plus years ago: to play games. Likewise, online games, such as those played on a PC, are optimized for the efficient play of the game. Though game services may offer ancillary functions, such as online marketplaces for in-game content or support forums, these features are secondary to playing the game.

Most video games can be played without the use of built-in ACS capabilities, such as when playing solo or with others in the room, and many games include no ACS capabilities at all. To the extent that a console or online game service may have ACS capabilities, that functionality supplements the gaming experience or provides secondary features in addition to the gaming experience. For example, an online game service may incorporate chat features that enhance the gaming or entertainment experience. Importantly, however, these messaging features are secondary or incidental to playing the game. Consumers do not play an online game as a means of accessing chat—a consumer in search of a general purpose messaging service will find simpler, more direct alternatives than navigating through the various features of a gaming device or online game service.

In light of this unique emphasis on gaming functionality, video game systems and online game services have long been part of a category distinct from equipment and services designed primarily to deliver advanced communications. Recent government findings corroborate that consoles and online game services are distinct from other categories of electronic media or communications services. For example, in the recent Child Safe Viewing Act proceeding, the FCC noted that “the majority of commenters” that addressed the issue thought that video games should not be grouped with other electronic media distribution platforms that were addressed in the proceeding, including wireless communications and television.⁵ In that context, the FCC did not suggest that such games should be considered as any sort of communications service,

⁵ See *Implementation of the Child Safe Viewing Act: Examination of Parental Control Technologies for Video or Audio Programming*, Report, 24 FCC Rcd 11413 (¶¶ 85-88) (2009) (the “CSVA Report”). The CSVA Report expressly identified the following separate categories of content or platforms: Television, Wireless Devices, Audio-Only Programming, Internet, Non-Networked Devices, and Video Games.

notwithstanding the Commission's awareness of secondary “chat” features of some games.⁶ To the contrary, parties to that proceeding recognized the practical reality that video games are their own separate category, including that they are subject to their own voluntary advertising guidelines and parental ratings system, which one commenter favorably noted as being “in many ways the most sophisticated, descriptive, and effective ratings system devised by any major media sector in America.”⁷

The Federal Trade Commission also has routinely treated video games as distinct from other forms of electronic media, including music and movies, in its periodic reviews of the marketing practices used by these three distinct categories.⁸ Like the FCC, the FTC recognized the Entertainment Software Rating Board (“ESRB”) rating system as being distinct from the rating systems used by other electronic media. In its most recent study, the FTC found that “the video game industry outpaces the movie and music industries in the three key areas that the Commission has been studying for the past decade: (1) restricting target-marketing of mature-rated products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children’s access to mature-rated products at retail.”⁹ Furthermore, the FTC has consistently noted the “high level of parental involvement in selecting and purchasing video games for their children.”¹⁰ The established role and scope of the ESRB rating system, which has been in effect for more than a decade and focuses solely on games, confirm what gamers

⁶ See *id.* at ¶ 88. The FCC has long been cognizant of the secondary “chat” elements in some video games. See, e.g., *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (¶ 19) (2004) (“Many of these games permit the gamers to speak with each other via the Internet as they play.”)

⁷ See *id.* at ¶ 87.

⁸ See, e.g., *Marketing Violent Entertainment to Children: A Sixth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, at 23-30 (FTC 2009) (available at <http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf>) (discussing video games as distinct category from other forms of electronic media).

⁹ *Id.* at 30.

¹⁰ *Id.* at 28.

know—video games, whatever secondary features they offer, have an essential purpose separate and apart from advanced communications.

II. CONGRESS GAVE THE FCC FLEXIBILITY IN APPLYING THE ACT’S REQUIREMENTS TO MULTIPURPOSE DEVICES AND SERVICES.

Congress did not intend that every device or service with ACS capabilities or that offers video programming should be subject to the Act’s accessibility requirements. In several sections of the Act, Congress provided the FCC authority to waive accessibility requirements for certain equipment or services. For example, under Title I of the Act, Congress granted the FCC authority to waive accessibility requirements:

for any feature or function of equipment used to provide or access advanced communication services, or for any class of such equipment, for any provider of advanced communications services, or for any class of such services, that: (A) is capable of accessing an advanced communications service; and (B) is designed for multiple purposes, but is designed primarily for purposes other than using advanced communications services.¹¹

Similarly, Congress afforded the FCC flexibility to waive certain accessibility requirements for new video programming requirements. For instance, with respect to apparatuses that may receive or play back video programming, the Commission is authorized to waive a number of the Act's requirements for equipment “primarily designed for activities other than receiving or playing back video programming” or “designed for multiple purposes . . . whose essential utility is derived from other purposes.”¹²

Taken together, these provisions demonstrate a clear congressional intent to circumscribe the range of devices and services subject to the Act. In particular, Congress did not intend that multiple use devices and services automatically be subject to the same panoply of regulations

¹¹ Act, Section 104 (to be codified as 47 U.S.C. § 616(h)).

¹² Act, Section 203 (to be codified as 47 U.S.C. § 303(u)).

that would apply to single-purpose devices and services. From a legal and practical perspective, this approach makes much sense. It is entirely reasonable for Congress or the FCC to want to first assess the effect of any new accessibility mandates on devices and services that clearly fall within the scope of the Act, such as products for which the primary purpose is to provide ACS, before considering whether to apply such obligations more broadly. Indeed, in light of the billions of consumer devices projected to have some ACS capabilities within the next ten years, the Commission cannot be expected to develop and enforce complicated accessibility guidelines for every product—or category of product—that may include some ACS capability or feature.

Additionally, the waiver provisions provide the FCC an important tool to calibrate the application of the Act to minimize any adverse impacts on innovation. The protection and promotion of technological innovation was one of the key rationales for why Congress created the multiple-purpose waiver, as demonstrated by the legislative history:

New section 716(h) provides the Commission with the flexibility to waive the accessibility requirements for any feature or function of a device that is capable of accessing advanced communication services but is, in the judgment of the Commission, designed primarily for purposes other than accessing advanced communications. For example, a device designed for a purpose unrelated to accessing advanced communications might also provide, on an incidental basis, access to such services. In this case, the Commission may find that to promote technological innovation the accessibility requirements need not apply.¹³

Practical considerations again affirm such clear congressional intent: the imposition of accessibility requirements upon devices that serve many functions, only one of which is to provide services arguably subject to the Act, may impose cost and engineering challenges that are disproportionate to the relative value of that feature to the overall product.

¹³ House Report No. 111-563, Twenty-First Century Communications and Video Accessibility Act of 2010, 111th Cong., 2^d Sess. 26 (July 26, 2010).

III. CONSISTENT WITH THE ACT, THE FCC SHOULD WAIVE THE ADVANCED COMMUNICATIONS SERVICES REQUIREMENT FOR DEVICES AND SERVICES FOR WHICH THE PRIMARY PURPOSE IS NOT TO PROVIDE ADVANCED COMMUNICATIONS SERVICES.

The Commission should consider waivers for defined categories of multipurpose products or services. Blanket waivers will help to drive innovation and reduce regulatory burden from individual applications.¹⁴ Factors for evaluating waiver requests should consider the primary intended uses of the product or service. In defining primary purpose, the Commission should look at how the product or service is designed and marketed.

A. Is the device or service designed primarily for its ACS features?

Equipment and services designed primarily for a purpose other than communicating with others are good candidates for a waiver. For example, a sports watch may have a communication feature for relaying short email messages to the user. But that function is ancillary to the device's primary purpose of informing the user of what time it is. A smart power meter may send a text alert to the consumer's phone when the refrigerator's water filter needs to be replaced or when the dryer cycle is complete. This use of the messaging function is secondary to the power monitoring and data-collection features of the device. In cases, such as these, where the embedded messaging function is secondary to the product's primary purpose, it makes sense for the Commission to weigh that factor in favor of granting a waiver.

B. Is the device or service marketed primarily for its ACS features?

How the manufacturer or service provider markets its product or service should be relevant to the waiver analysis. Often, the key selling point of a product or service is a good proxy for how consumers intend to use it. If the product or service is marketed primarily for some function other than any ACS capability, then it is probable that many consumers are buying

¹⁴ While the FCC should proceed with blanket waivers, if necessary the Commission can entertain individual waiver requests.

it for that stated purpose. For example, a vehicle navigation system may have the capability to display text messages sent to the user's mobile phone while he or she is driving. The manufacturer's marketing may note this feature, but as secondary to the device's navigation capabilities. In such case, it would be unreasonable to assume that large numbers of users are buying the navigation system primarily to review their text messages while driving.

C. Has the manufacturer of the device or the operator of the service designed the product or service for a specific class of users who are using the ACS features in support of another task?

Where the product or service caters to a specific class of users for whom the use of the ACS features is subordinate to another task, that fact should support a waiver. A product or service targeted to a specific class of users is less likely to be used as a general purpose messaging service, given the relatively narrow scope of users that service encompasses. Also, where the use of the ACS capability is not designed for general messaging purposes but is in service of a primary task or can be leveraged for both the primary and secondary experience, it suggests that the ACS capability is playing a secondary role. For example, an online sports site that hosts fantasy football teams may have social-networking features but those features are in service of the player selection and trading mechanics.

A device or service that requires a consumer to take significant additional steps before accessing ACS features should be more likely viewed as a multiple purpose device or service that qualifies for a waiver of the Act. Presumably, a device or service that is designed primarily for its ACS functionality would make the ACS functionality its predominant feature. If the ACS capabilities require the user to first perform other tasks unrelated to ACS—such as choosing a particular character, game or difficulty level—then these other tasks should be evidence that the device or service is not designed primarily for using ACS features.

CONCLUSION

We support the Commission's efforts to implement the Act in a manner consistent with its text and underlying congressional intent. In passing Title I of the Act, Congress intended to strike a balance: to improve access for persons with disabilities with respect to advanced communications while not imposing the full force of regulation on all manner of devices that include incidental messaging or communication features. Consumers and multiple governmental findings agree that video games are a distinct class of hardware and software, which have the unique purpose of allowing consumers to play games of their choosing. Most games may be enjoyed without invoking ACS functionality and, to the extent any ACS elements are available, they are secondary or incidental to playing the game. Within this context, we look forward to working with the Commission to develop factors for the appropriate consideration of waivers as well as other matters relating to the Act.

Respectfully submitted,

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