

January 17, 2025

Chair C.T. Wilson
House Economic Matters Committee
231 Taylor House Office Building
Annapolis, Maryland 21401

Re: House Bill 208 (Digital Goods) – Oppose Unless Amended

Dear Chair Wilson and Members of the House Economic Matters Committee,

On behalf of the video game industry, the Entertainment Software Association (ESA)¹ writes to share our concerns regarding House Bill 208 which prohibits advertising or offering for sale a digital good unless certain conditions are met. While we appreciate the sponsor's intent, states should not mandate requirements related to the digital reproduction, display and distribution of copyrighted works, and the bill presents significant operational challenges for little consumer benefit. Additionally, HB 208 is in conflict a recent passed California law which also regulates conditions for the sale of digital goods. We urge you to consider amending this legislation to address copyright and marketplace concerns as well as consumer confusion that may result from the bill's provisions.

ESA opposes House Bill 208 in the current form for the following reasons:

- **States should not mandate requirements related to the digital reproduction, display and distribution of copyrighted works.**
- **Consumers are already provided information on how the games they purchase can be used and where, and provisions of this bill may lead to consumer confusion.**
- **California has already passed a similar law and implementing differing requirements for customers on a state-by-state basis is not workable and will negatively impact the purchase flow process.**

ESA appreciates the opportunity to provide our industry's perspective House Bill 208 and further detail our concerns for your consideration.

House Bill 208 Creates Significant Operational Challenges and Will Negatively Impact User Experience

ESA members provide comprehensive notice of licensing terms to consumers in the platform's terms of service and in the terms of sale when a digital work is purchased and are not receiving complaints or inquiries from consumers regarding the clarity or visibility of that information. Consumers may have their access to a digital work revoked for reasons detailed in the terms of service such as banned players, safety, etc. HB 208 will not change those scenarios or make consumers more likely to read the full terms of service where those provisions are detailed.

Additionally, HB 208 requires disclosures prior to each transaction. A consumer who is provided the required information when purchasing a game would still need to be provided separate disclosures

¹ The Entertainment Software Association (ESA) represents the innovators, creators, publishers, and business leaders that are transforming the video game industry: <https://www.theesa.com/about-esa/>. The industry now has a domestic impact of over \$90 billion, providing high-skilled jobs and other economic benefits across the United States
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that they are purchasing a license to a digital good for any in-game purchases they might choose to make. This provision would impact millions of transactions every month and disrupt the user experience.

HB 208 Impacts Buy Flow Across States and May Impact Advertising of Physical Goods

HB 208 will be a significant challenge to implement in the digital marketplace. Companies who have their storefront will need to have a purchase flow for California-based users due to a similar law passed in 2024 and a different purchase flow for Maryland-based users, if HB 208 passes. Additionally, companies whose digital works are sold through a third-party storefront do not exercise control over those purchase flows.

Additionally, ESA is concerned that HB 208 as written may impact marketing of digital works not just purchase flow since it is common practice to use the terms “buy” or “purchase” in marketing as calls to action for a game without making a distinction between the physical version and digital version of the game. “Buy” and “purchase” are the most appropriate terms for marketing and having a separate marketing plan for digital works in Maryland would be overly burdensome, if possible, and likely to cause consumer confusion.

House Bill 208 Impedes on Copyright Protections

Video games are not just “digital goods” they are copyrighted “works” licensed to consumers when purchased online. Federal copyright law protects creative works such as video games and makes clear that the copyright owner has exclusive rights with respect to the reproduction, display, and distribution of its works online. House Bill 208 seeks to make it unlawful to advertise or offer for sale a digital work with “buy,” “purchase,” or other terms understood to confer an “unrestricted ownership interest” in the digital work unless the seller provides to the consumer before executing each transaction a clear and conspicuous statement and receives an affirmative acknowledgment of terms.

In copyright law, there is no “unrestricted ownership interest” in digital content (nor in physical copies of creative works either²) because of the easy reproduction and distribution of digital works on the internet, which may easily result in mass piracy. To encourage the availability and the safe distribution of copyrighted works online, Congress and the U.S. Copyright Office recognized over two decades ago that the ability of copyright owners to grant licenses. The terms of those licenses for digital works may restrict what a purchaser may do with the work with respect to copying (downloading) and distribution. Doing so safeguards the marketplace for copyrighted works as Congress intended and should not constitute false advertising, which means untrue or misleading advertising.

ESA member companies are committed to providing consumers with clear and accurate information regarding usage rights and terms of service for our digital products. If there is consumer confusion related to digital works that needs to be addressed, we would like to identify a solution that doesn’t interfere with copyright protections, negatively impact the user experience or create consumer confusion and is manageable to implement in the digital marketplace. Please do not hesitate to

² A copyright owner has exclusive rights enumerated under the U.S. Copyright Act at 17 U.S.C. 106(1)-(6). A copyright owner has the exclusive right to reproduce or authorize the reproduction of its work or distribute or authorize the distribution of its work. When a purchaser buys a physical work, such as a book or a video game on disc, the copyright owner may no longer prohibit the further distribution of the work (this is known as the first sale doctrine) but the copyright owner may still prohibit an unauthorized reproduction of the work. This means that a purchaser may sell a used book on an online platform but may not make copies of the book without infringing copyright. Therefore, even purchasers of physical works do not have an “unrestricted ownership interest.”

contact us with any questions or if we can provide any additional information.

Sincerely,

Jennifer Gibbons
Vice President, State Government Affairs