



September 16, 2019

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave, NW
Washington, DC 20580

**Re: *Nixing the Fix* Workshop — Docket No: FTC-2019-0013
Reply Comment from Entertainment Software Association**

The Entertainment Software Association (“ESA”) is pleased to submit these additional comments in connection with the Federal Trade Commission’s above-referenced workshop. ESA is the U.S. trade association serving companies that manufacture video game equipment and create software for game consoles, handheld devices, personal computers, and the internet.¹

All three of the major video game console makers (hereinafter, “console makers”) in the United States—Microsoft, Nintendo, and Sony Interactive Entertainment—are committed to providing consumers with repairs that are quick, reliable, and safe. They offer a variety of options if a console needs to be repaired. Indeed, they all offer repair services beyond the warranty period to ensure that their consoles remain in good working order because their respective platforms’ success depends on providing a reliable, versatile, and engaging platform on which to play video games and enjoy digital content.

As explained in ESA’s comments filed on April 30, 2019, repairability is only one of many important considerations that console makers must consider when designing a console.² These considerations include cost, portability, energy efficiency, and durability, and determining which of these to prioritize often requires tradeoffs. Console makers also must consider infringement of video game software and digital content, and to that end, they incorporate technological protection measures (“TPMs”)—digital locks that are protected by copyright law—into their consoles. TPMs are vulnerable to tampering if a console’s hardware undergoes repair. That is why, as a practical matter, the use of TPMs may result in limitations on certain types of repair by third parties—tampering with the consoles can enable the use of illegal circumvention devices, which is associated with copyright infringement.

Any repair limitations, however, are incidental to the main purpose of using TPMs—protecting the safety, integrity, and trustworthiness of video game consoles and each console’s ecosystem. Specifically, console makers use TPMs to protect their consoles against tampering or

¹ A complete list of ESA’s member companies is available at <http://www.theesa.com/about-esa/members/>.

² See generally Letter to April Tabor, Federal Trade Commission, from Stanley Pierre-Louis, ESA, *Re: Nixing the Fix – The Federal Trade Commission’s Workshop on Repair Restrictions* (April 30, 2019) (“ESA Comments”), <https://www.regulations.gov/document?D=FTC-2019-0013-0018>.

hacking, which enhances the safety of these devices. TPMs also ensure that video game consoles deliver a secure media environment by verifying that only legal content is playable.

None of the panelists discussed these important issues at the workshop. Instead, many of the arguments asserted by panelists (largely based on anecdotes rather than empirical data and directed to other devices) were premised on a flawed view that repair trumps all other considerations and that any limitation on the ability of a third party to repair a device necessarily results in consumer harm. At least with respect to video game consoles, these views ignore the reality that console makers use a variety of systems—including some that may limit third-party repairs—to ensure that their devices are safe, secure, and reliable throughout their lifecycles.

In considering the record for this workshop, we urge the Commission to keep in mind the recent federal proceeding led by the Copyright Office and the Library of Congress, which considered video game consoles' use of TPMs in the repair context. That proceeding concluded with the determination that circumvention of TPMs for the purpose of video game console repairs should not be allowed.³

I. There Is No Evidence That TPMs Cause Consumer Harms in the Video Game Console Ecosystem.

The record in this proceeding contains no evidence that limitations on repairs stemming from TPMs harm consumers in the video game ecosystem. Neither the panel discussions at the workshop nor the evidentiary submissions in the record have discussed video game consoles in any depth. Thus, there is no basis in the record for taking any action that would limit the use of TPMs in video game consoles.

The Commission's workshop featured many panelists arguing against restrictions on repair, and the discussion that ensued touched on many different industries. Notably, there was no mention of video game consoles, aside from a passing reference by one of the Commission staff moderators, which did not generate any discussion from the panelists. Instead, the workshop participants focused on smart phones, vehicles, appliances, and batteries. Without expressing any opinion as to those industries, at a minimum, the workshop record suggests that the use of TPMs in video game consoles is not generating consumer complaints.

This point is reinforced by the larger record in this proceeding, which similarly lacks any evidence of consumer harms resulting from the use of TPMs in video game consoles. The only commenter to discuss repair restrictions with respect to video game consoles focused on the alleged practice of some console manufacturers of conditioning warranty coverage on the use of

³ Following the release of the Librarian's latest Section 1201 exemptions in 2018 (see more below) repair proponents accepted the fact that video game consoles should be treated differently than other devices. *See* Jason Tashia, *With New Rules, Legally Fixing Consumer Electronics Just Got Easier*, ABA Journal (Oct. 30, 2018) ("Notably left out of the rule changes are video game systems, such as Xbox and PlayStation. Noting the legitimate concerns around piracy in video games, Gordon-Byrne says: 'If that's the only thing in the world people can't fix, I think that's an OK deal.'"), http://www.abajournal.com/news/article/with_new_rules_legally_fixing_consumer_electronics_just_got_easier.

specified parts or services.⁴ The FTC staff has already addressed this particular issue through a series of letters sent in February 2018, which did not result in any FTC enforcement action.

II. Console Makers Secure Their Platforms Using TPMs to Provide Consumers a Wealth of Content Choices.

ESA's member companies are leaders in bringing creative and innovative entertainment products and services into American homes, thanks to the protection their works receive from copyright law. However, without effective enforcement, the economic value of a copyright is substantially diminished.⁵ Console makers rely on TPMs because they are an effective method of thwarting digital infringement. Moreover, Section 1201 of the Digital Millennium Copyright Act ("DMCA") prohibits tampering with TPMs.⁶ Indeed, the Librarian of Congress has noted that the "jailbreaking" of consoles (which involves the circumvention of TPMs) was closely associated with massive infringement of video games and undermined the "value of console software as a secure distribution platform."⁷

Combatting copyright infringement and providing a reliable and secure distribution platform is especially important for console makers because it encourages software developers and content creators to make their works available on these platforms. Modern video game consoles provide consumers with more than just video games. ESA's members and a wide network of content partners provide a vast range of valuable content, including movies, television, music, and live-sports programming.⁸ These third-party partners make their content available because they trust that video game consoles will protect their copyrighted works. As the Register of Copyrights has said: "[TPMs] protect not only the integrity of the console code, but the copyrighted works that run on the consoles. In so doing, they provide important incentives to create video games and other content for consoles, and thus play a critical role in the development and dissemination of highly innovative copyrighted works."⁹

In sum, console makers rely on TPMs to protect their copyrighted works and those of third-party developers and creators. This provides tangible benefits to consumers because more high quality content can be offered at reasonable prices. Conversely, actions that weaken copyright protections open the floodgates of mass infringement and threaten the economic input that the video game industry contributes to our nation.

⁴ See Nathan Proctor, *Warranties in the Void*, U.S. PIRG Education Fund, at 3 (filed Jun 25, 2019), <https://www.regulations.gov/document?D=FTC-2019-0013-0031>.

⁵ See ESA, *Comments on the Global Digital Trade Study Report #1*, at 6–7 (Apr. 21, 2017), https://www.theesa.com/wp-content/uploads/2019/03/FINAL-ESA-Comments-on-ITC_s-Global-Digital-Trade-Study.pdf.

⁶ See ESA, *Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201*, at 4–5 (Feb. 12, 2018) ("ESA Seventh Triennial Repair Comment"), https://cdn.loc.gov/copyright/1201/2018/comments-021218/class7/Class_07_Opp'n_ESA.pdf.

⁷ U.S. Copyright Office, Library of Congress, *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 80 Fed. Reg. 65944, 65961 (Oct. 28, 2015).

⁸ ESA Seventh Triennial Repair Comment at 4.

⁹ U.S. Copyright Office, Library of Congress, *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 77 Fed. Reg. 65260, 65274 (Oct. 26, 2012).

III. The Copyright Office Considered and Rejected a Temporary Repair Exemption for Video Game Consoles.

During the most recent Section 1201 triennial rulemaking process,¹⁰ the Copyright Office analyzed the impact that TPMs built into video game consoles have on repair and declined to restrict their use. Repair advocates had sought an exemption to Section 1201's prohibition on circumventing TPMs for the purposes of repair and related activities, asserting many of the same arguments that have been raised in this proceeding.¹¹ However, the Copyright Office noted that there was "compelling, uncontradicted evidence" that circumventing video game console TPMs would harm the market for such consoles because they would no longer be able to serve as secure distribution platforms. In light of these "console-specific concerns," the Copyright Office recommended against allowing for the circumvention of video game console TPMs.¹² The Librarian of Congress adopted this recommendation, permitting consumers, for the purpose of repair, to circumvent TPMs used in certain devices (e.g., motorized land vehicles, smartphones, and home appliances) but not video game consoles because: (1) there was insufficient evidence in the record to support an exemption that would allow the unauthorized repair of video game consoles, and (2) permitting such an exemption with respect to video game consoles could expose video game software to mass infringement.¹³

The Librarian of Congress' decision accords with another critical provision of the DMCA that is relevant to this proceeding: Section 1201(a)(2), which makes it illegal to traffic in devices designed to circumvent TPMs.¹⁴ This provision limits the extent to which any federal agency may permit repair services to circumvent TPMs because no regulation can create a right to repair in a way that would purport to allow for the distribution of circumvention devices used to perform such repairs—a point the Copyright Office itself recognized.¹⁵

As the expert agency charged with interpreting copyright law, the Copyright Office's determinations merit deference. The 2018 triennial rulemaking confirms that video game consoles raise unique concerns in the repair context. The FTC should take these considerations into account when examining repair issues, and it should promote consistency across the federal government's approach to these issues. Even the sponsors of state repair legislation that

¹⁰ Section 1201 of the DMCA provides for a triennial rulemaking process by which the Librarian of Congress, based on the Copyright Office's recommendation, may adopt temporary exemptions to the prohibition on circumventing TPMs. See generally U.S. Copyright Office, *Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Acting Register of Copyrights*, at 1 & nn.1–2 (Oct. 2018) ("2018 Copyright Office Recommendations"), https://cdn.loc.gov/copyright/1201/2018/2018_Section_1201_Acting_Registers_Recommendation.pdf.

¹¹ See *id.* at 3, 184–195.

¹² *Id.* at 206.

¹³ U.S. Copyright Office, Library of Congress, *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 83 Fed. Reg. 54010 (Oct. 26, 2018).

¹⁴ See 17 U.S.C. § 1201.

¹⁵ 2018 Copyright Office Recommendations at 222–25.

participated at the workshop acknowledged that this is an issue best handled at the federal level in a consistent manner.¹⁶

IV. Conclusion

Video game consoles are unique in the repair context. Console makers use TPMs in order to enhance the safety and integrity of their consoles, which ensures a secure ecosystem on which content creators and software developers can rely. There is a lack of record evidence that TPMs cause consumer harms in the video game console ecosystem. Accordingly, we respectfully request the Commission ensure that any action it takes in this proceeding is consistent with the actions taken by Copyright Office and Library of Congress, and in no way weakens or restricts the use of TPMs in video game consoles.

Sincerely,

/s/ Benjamin Golant

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¹⁶ See Workshop Recording at 3:54–55 (Senator David Osmek stated that the issue of repair “shouldn’t happen in states ... it’s a federal issue,” and Senator Chris Pearson stated that “clearly federal action would be better.”), <https://www.ftc.gov/news-events/audio-video/video/nixing-fix-workshop-repair-restrictions>.