



July 18, 2021

RE: ESA Written Comment Re: Right to Repair for FTC July 21, 2021 Open Commission Meeting

To Whom it May Concern:

The Entertainment Software Association¹ is pleased to submit these comments in connection with the Federal Trade Commission's ("FTC") consideration of a policy statement on the right to repair. As the FTC is aware, video game console makers, publishers, and copyright owners, rely on the content protection systems built into consoles to protect against sophisticated piracy efforts. We therefore appreciated the FTC's recognition in its report "Nixing the Fix: An FTC Report to Congress on Repair Restrictions" ("FTC Report" or "Report") that protecting intellectual property ("IP") rights benefits consumers and that any limitation on repair restrictions cannot be one-size-fits-all. Indeed, the Report makes a special effort to recognize that IP rights play a valuable role in encouraging and rewarding innovation, and that "any action taken by industry or regulators to enable independent repair should seek input from such entities [*i.e.*, the USPTO and the US Copyright Office] and other stakeholders and be mindful of existing law and policy supporting IP protection." For the reasons outlined below, we urge the FTC to ensure that its policy statement reinforces the importance of IP protection and that any repair mandate is not so broad as to undermine critical IP rights.

The Importance of Technological Protection Measures ("TPMs") to the Video Game Industry. Video games are protected under federal copyright law, including the anticircumvention provisions found in Section 1201 of title 17 of the U.S. code. Video game consoles employ TPMs to protect creative works and prevent illegal and unauthorized device modifications that could result in the ability to play pirated games.² Delivering consumers the best gameplay environment depends upon a trustworthy and secure delivery platform. Once a console's TPMs are disabled, two worrisome results can occur: (1) the game experience for players is diminished, sometimes dramatically, which could be seen as a flaw in the console or game, and (2) any number of illegally copied games from the internet could be played on the console. Piracy is of particular concern to smaller video game publishers who may be acutely affected by mass infringement and its impact on their livelihoods. To prevent compromising the integrity of consoles and to ensure that players have access to safe and enjoyable game experiences, console makers are committed to providing consumers with easy, reliable, and affordable repair service whenever repairs are necessary.

¹ The ESA serves as the voice and advocate for the U.S. video game industry. Its members are the innovators, creators, publishers and business leaders that are reimagining entertainment and transforming how we interact, learn, connect and play. The ESA works to expand and protect the dynamic marketplace for video games through innovative and engaging initiatives that showcase the positive impact of video games on people, culture and the economy. For more information on the ESA and its membership, please visit <https://www.theesa.com/about-esa/>.

² Recently, for example, "[t]hree members of an international criminal organization known as Team Xecuter were indicted on charges related to the development and sale of 'illegal devices that hacked popular video game consoles so they could be used to play unauthorized, or pirated, copies of video games,' according to a federal indictment filed in Seattle." Brooke Wolford, International hackers accused of pirating Xbox, Nintendo, PlayStation games, feds say, THE NEWS TRIBUNE (Oct. 2, 2020).

The U.S. Copyright Office Recognizes the Role of TPMs in Helping Protect Video Game Content. Section 1201 of the Copyright Act, as highlighted above, makes it illegal to bypass TPMs and to distribute tools to assist in that effort. This law ensures that copyrighted works remain secure. While Section 1201 makes it illegal to circumvent TPMs, Congress did create a regulatory safety valve when it authorized the Librarian of Congress (“Librarian”), based upon the recommendations of the Register of the U.S. Copyright Office, to codify temporary exemptions every three years that were supported by evidence collected in a rulemaking. In 2018, the Librarian granted exemptions to allow repair of motor vehicles, home appliances, and other categories of devices, but she specifically *excluded* video game consoles from the lot because of the vital role TPMs play in safeguarding games and the harms that could arise were third parties allowed to circumvent such protection measures. Unfortunately, those trafficking in circumvention devices continue to operate despite best efforts of the console makers, and the risks to the industry remain as they did in 2018. Consistent with the directives in the FTC Report, copyright law and policy, as well as the practical enforcement risks noted above, should be taken into account in any right to repair actions taken by regulators or others.

Repair Mandates Present a Unique Risk to the Video Game Industry. Given the video game industry’s strong concerns about piracy, as detailed above, granting unauthorized repair shops access to hardware along with tools and knowledge to modify TPMs would compromise the safeguards that protect *all* copyrighted content played on consoles. It would expose video game console makers – and the game developers and publishers who rely upon the secure media environment of game consoles – to content theft. Bad actors may attempt to modify (or “crack”) consoles to enable piracy and to sell their services to consumers both online and in physical storefronts. While most repair shops might not seek to use their repair methods for illegal purposes (such as the unauthorized removal of a device’s security features), publication of a console’s security roadmap could undermine the entire console ecosystem. Accordingly, a right to repair mandate that undermines the critical TPMs that safeguard games could have a rapid and severely detrimental impact to the video game industry and to consumers alike.

We therefore urge the FTC to acknowledge the importance of IP rights to the video game industry when considering repair restrictions. Thank you again for the opportunity to submit these short comments.

Sincerely,



Gina Vetere
Senior Vice President & General Counsel
Entertainment Software Association