

Via Electronic Filing

February 2, 2024

Ms. April Tabor
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: Petition for Rulemaking (Docket No. FTC-2023-0077)

Dear Secretary Tabor:

The Entertainment Software Association (“ESA”) is pleased to again have the opportunity to address the repairability of video game consoles. ESA represents members of the U.S. video game industry, including creators, publishers, and business leaders. Our membership includes makers of the three major game consoles: Microsoft, Nintendo of America, and Sony Interactive Entertainment (“Console Makers”). The ESA and its members have a strong interest in ensuring that consumers have a positive experience with their products—including when seeking repairs—while continuing to offer consumers their choice of a wide variety of innovative content.

Sweeping statements in the Petition fail to capture the nuance and variability of the repair landscape across different industries. Evidence in the Petition is also insufficient to warrant a rulemaking because it fails to fully consider consumer benefits and Console Makers’ constraints. Finally, existing law provides enforcement mechanisms sufficient to protect consumers from repair restrictions that may harm consumers’ interests.

I. Video Game Consoles are Reliable, Long-Lasting Products and Console Makers Have Strong Market Incentives to Ensure They Can be Repaired.

Over the past several decades, video game consoles from the three major Console Makers have typically been released in product cycles (“generations”) lasting at least six years, and often longer.¹ Millions of gamers also continue to use their older consoles well after a new console has been released. Indeed, even consoles released *over twenty*

¹ For example, Microsoft’s Xbox Series X and S were released in 2020, succeeding 2013’s Xbox One. Nintendo’s Switch was released in 2017, succeeding 2012’s Wii U. Sony Interactive Entertainment’s PlayStation 5 was released in 2020, succeeding 2013’s PlayStation 4.

years ago are still enjoyed by some gamers and a liquid resale market for those products continues to exist. This long usable lifespan stands in stark contrast with other consumer electronic product categories.²

As a result, gamers have high expectations that they are purchasing reliable products and that their current or recent-generation products can be repaired if necessary. Console Makers have no economic interest in making repairs more difficult to perform—for themselves, customers, or other parties. Indeed, Console Makers do not generate a substantial profit from repairs. To the contrary, some Console Makers subsidize some repairs, effectively performing them at a loss. Console Makers also go to great lengths to help consumers resolve problems on their own, helping ensure that repairs are actually necessary before any cost is incurred.³

ESA is thus concerned that the Petition does not accurately describe the current repair landscape or repair policies of ESA members. The Petition claims that “[r]epair restrictions make repairs more costly for consumers and independent repair shops while increasing profits for manufacturers.”⁴ This sweeping and sensational statement is simply inaccurate with respect to video game consoles, which have, in the repair context, unique considerations.

II. Repair Regimes for Video Game Consoles Protect Consumer Interests and Intellectual Property Rights Recognized Under Federal Law.

The Petition fails to consider the ways in which the repair regimes established by Console Makers actually protect consumers’ interests. Certain repair restrictions are implemented, in part, to ensure that consumers have a safe, positive, and effective experience seeking repairs. For example, establishing a network of authorized repair providers ensures that consumers will receive safe, effective, and secure repair of their products. Companies can ensure that authorized repair technicians are properly trained to perform complicated repairs that, in some cases, may be dangerous for technicians and consumers. Establishing such networks also better enables members to protect consumers’ data security and privacy, which is particularly important when devices contain sensitive, personal data. Independent repair services may not have the same level of compliance and oversight, which may result in compromise of consumers’ data.

Importantly, the Petition also ignores Console Makers’ legitimate need to protect intellectual property, a concern that some Commissioners acknowledge “may provide

² One example is smartphones, which are now said to have a lifespan of 2.5 years (or less) and have little-to-no resale value even a few years beyond that mark.

³ See PlayStation Repairs at https://repairs.playstation.com/s/?locale=en-us&language=en_US; Set Up a Repair for a Nintendo Product at https://en-americas-support.nintendo.com/app/answers/detail/a_id/8261/~set-up-a-repair-for-a-nintendo-product.

⁴ Petition at 11.

legitimate justification for some repair restrictions.”⁵ Console Makers specifically have a strong need to use certain tools—such as adopting technological protection measures (“TPMs”)—to protect the intellectual property rights that enable the video game industry to be a key economic sector that creates jobs, develops innovative technology, and keeps the United States competitive in the global market. While Console Makers do not have an economic interest in making repairs difficult to perform, some incidental repair restrictions are unavoidable in safeguarding copyrighted material, the protection of which is vital to the industry as a whole.

For example, the video game industry relies on Console Makers’ use of digital locks designed to protect their game consoles to provide a secure media environment for players and other video game publishers and developers, which ensures that they can continue to provide a wide variety of innovative content to consumers. These TPMs are so important that international treaties adopted by the World Intellectual Property Organization in 1996 prohibit their circumvention. Since then, over 100 countries have implemented this treaty provision in their own laws.

Additionally, Section 1201 of the Digital Millennium Copyright Act (“DMCA”) prohibits circumvention of TPMs except in limited circumstances, as well as the trafficking in tools that would permit someone to circumvent the TPMs that copyright owners use to protect this software. The 2021 Section 1201 triennial rulemaking confirmed that video game consoles raise unique concerns in the repair context. Indeed, the U.S. Copyright Office has specifically recognized that while DMCA exemptions for repair purposes may be appropriate under some circumstances for consumer devices, this exemption only applies very narrowly for video game consoles.⁶ In multiple rulemaking cycles going back over a decade, the Copyright Office has reaffirmed that the risks of piracy involved with console repairs make these products significantly different from other types of consumer electronics.

Permitting console access to independent repair providers, over whom ESA members have no oversight, could result in the modification of hardware and firmware that could compromise the vital security features that provide a secure media environment for the playback of copyrighted games of various game publishers. ESA recognizes that the vast majority of repair shops would not use the provided tools and documentation for any illegal purposes (e.g., removal of security features). However, at the rate at which knowledge is spread via social media and other online communication channels, it would only take a few bad actors to have a rapid and severely detrimental impact on the industry.

⁵ Fed. Trade Comm’n, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions* at n.18 (2021).

⁶ See 37 CFR § 201.40(b)(14)(ii) (specially recognizing video game consoles).

III. Petitioners' Specific Proposals Are Unworkable.

The Petition includes some specific proposals that would be difficult to implement for Console Makers.

A. Government-Mandated Repairability Scores Would Distort Design Considerations and Ultimately Harm Consumers.

Repairability scoring by private entities does not have to be based on standard and objective criteria but a government scoring system would have to be, at minimum. Developing objective standards for repairability scores across a wide array of consumer electronics would be quite challenging at best for the government.

In addition, mandating a repairability score would introduce costs and compliance burdens that disrupt the balance of other considerations such as safety, security, sustainability, durability, portability, reliability, and cost. Indeed, the security undertaken to protect console firmware, games, and other creative content—a vitally important mechanism to maintain the console's secure ecosystem for the playback of the creative content of other copyright holders—could have a negative impact on a repairability score. This could in turn lead to consumer reluctance to purchase a console based on a misleadingly low score incurred in part to protect the security of their information and the rights of IP holders.

As explained above, ESA members have strong incentives to support the easy repairability of gaming consoles,⁷ because a customer's satisfaction with their console is vital to our industry. All three Console Makers—Microsoft, Nintendo, and Sony—are committed to providing consumers with repairs that are quick, reliable, and secure. And they offer a variety of repair options for consoles that include repair services beyond the warranty period to ensure that their consoles remain in good working order because their respective success depends on consumers having reliable, versatile, and engaging platforms on which to play video games and enjoy digital content.

B. Providing Wiring and Circuit Diagrams for Video Game Consoles Would Not Lead to Meaningful Repair Options and Would Undermine IP Rights.

The Petition invokes the repairability of products sold in the 1960s and indeed makes references to schematics back to 1931.⁸ This nostalgia for archaic analog products that predate the wide adoption of integrated circuits—that is, chips—ignores the march of technological progress over the past *sixty* years. To state the obvious, a modern video

⁷ For those customers supremely concerned with repairability, some third parties—including petitioner iFixit—provide publicly available repairability scores. *See, e.g., Smartphone Repairability Scores*, iFixit, <https://www.ifixit.com/repairability/smartphone-scores>.

⁸ Petition at 40-41.

game console is orders of magnitude more complex than a 1960s-era transistor radio. The notion of the average consumer repairing a malfunctioning video game console by, for example, soldering in a new capacitor or potentiometer (i.e., the tuning or volume dial) may not be practical as they would be attempting a repair that would be difficult even for a trained technician. The miniaturization of chips and circuit boards over time means that any attempt to solder in a new part would be likely to do far more damage to a video game console than actually restore it to working condition. Sometimes, both custom and non-custom parts may be attached in particular ways to enhance that resiliency (e.g., soldered component vs. modular component). Despite these design decisions, consoles generally do not require proprietary tools to open or repair them. In fact, compatible tools, such as tri-wing screwdrivers, are inexpensive and widely available.⁹

The fact that some modern manufacturers – those in the position to know best – often simply replace products rather than attempt to repair them should be revealing. Indeed, a video game Console Maker would likely be unable to attempt the type of repair envisioned by the Petition even if it wanted to. One reason is: that unlike the 1960s, many modern electronics products incorporate components and subassemblies that are procured from numerous third parties through global supply chains, and the components and subassemblies in turn rely on those supply chains.¹⁰ And in those cases where the consumer would rather not repair a game console, Console Makers run console recycling programs for returned products or repair parts that cannot be reused.¹¹

If anything, requiring video game Console Makers to provide more information would actually cause *new* harm by undermining cybersecurity and the IP rights of games played on the consoles (see above). Indeed, the Petition’s suggestion that Console Makers allow security updates through an open-source community-driven model¹² is inherently incompatible with maintaining those protections, especially for intellectual property. The video game industry invests significant effort to combat the piracy of games worldwide, and—to state the obvious—opening up gaming console firmware to the public would be fundamentally at odds with those efforts.

⁹ For example, on Amazon.com, a search for “tri-wing screwdriver” lists hundreds of results. See Amazon.com, https://www.amazon.com/s?k=tri-wing+screwdriver+set&crd=2J9398WAANBQD&sprefix=tri-wing+screwdriver+set%2Caps%2C245&ref=nb_sb_noss_1 (last visited Feb. 1, 2024).

¹⁰ See, e.g., GAO, *IT Supply Chain*, March 2012, GAO-12-361, at 5, <https://www.gao.gov/assets/gao-12-361.pdf> (illustrating how components of a single laptop might come from suppliers in numerous countries).

¹¹ See Microsoft, “End-of-life management and recycling” at <https://www.microsoft.com/en-us/legal/compliance/recycling>; See Sony Interactive Entertainment, “PlayStation & the environment” at <https://www.playstation.com/en-us/corporate/playstation-and-the-environment/>; and see Nintendo, “Nintendo Product Recycling” at https://en-americas-support.nintendo.com/app/answers/detail/a_id/10276/.

¹² Petition at 40.

C. Petitioners’ Other Proposals Reflect a Similar Lack of Understanding of the Challenges of Video Game Consoles.

The Petitioners’ other suggestions, such as for example, proposing that the Commission should prohibit glued-in or soldered-in batteries in order to make them more accessible and (presumably) replaceable would create difficulties for Console Makers. These design mandates would instead limit the types of consoles Console Makers could safely manufacture.¹³

IV. Federal and State Governments Already Have Robust Enforcement Frameworks to Address Repairability Issues and Recognize that Video Game Consoles Present Unique Issues.

Additional rules on repairability are unnecessary to protect consumers and competition. The FTC already has several enforcement mechanisms with which it can, and does, pursue action against manufacturers for repair restrictions that may be unfair to consumers or anticompetitive. The Commission has already considered the issues raised by petitioners in connection with its report, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, and has issued a Policy Statement outlining several ways in which it will use its existing authority to address repairability issues. The Commission can use the identified authorities it identified in the report to pursue action against those who misuse repair restrictions without engaging in a time and resource-intensive rulemaking process.

State legislatures have also carefully considered and addressed repairability issues under state laws. New York, Minnesota, and California passed right to repair laws in 2023, all of which recognize the need for video game consoles to be exempted from blanket right to repair obligations,¹⁴ in part due to Console Makers’ need to protect

¹³ See, for example, Congress recently enacted Reese’s Law to reflect a concern that small-cell batteries in consumer electronics had *too much* accessibility, leading to a swallowing hazard for young children. Pub. L. No. 117-171 (2022). The Consumer Product Safety Commission is currently implementing the law in a manner that would, among other things, require manufacturers to take greater steps to secure batteries in products, in direct opposition to what the Petitioners request here.

¹⁴ See New York Digital Fair Repair Act, § 3(f) (“Nothing in this section shall be construed to require any original equipment manufacturer or authorized repair provider to make available any parts, tools, or documentation required for the diagnosis, maintenance, or repair of digital electronic equipment in a manner that is inconsistent with or in violation of any federal law, such as gaming and entertainment consoles, related software and components.”), Minnesota Digital Fair Repair Act, Subd. 6(d) (“Nothing in this section shall be construed to require any original equipment manufacturer or authorized repair provider to make available any parts, tools, or documentation required for the diagnosis, maintenance, or repair of a video game console and its components and peripherals.”), California Right to Repair Act § 42488.2(j)(3)(B) (““Electronic or appliance product” or “product” does not include any of the following: . . . [a] video game console.”).

against piracy and safeguard intellectual property.¹⁵ The lengths that criminal organizations will go to disarm console security can be seen in a recent case prosecuted by the Department of Justice involving the notorious hacking group Team Xecuter.¹⁶ Should the FTC choose to engage in a rulemaking, it should not override these state laws.

V. The Commission’s Authority to Impose a Repair Rule Under Section 5 of the FTC Act is Questionable.

The Petition suggests that the Commission undertake the proposed rulemaking under Section 5 of the FTC Act, which prohibits “unfair or deceptive acts or practices,” rather than continuing to implement more on-point laws such as the Magnuson-Moss Warranty Act.¹⁷ However, a rule that would fundamentally transform the modern electronics industry by requiring government-mandated repairability scores, open-sourcing of software upgrades, and/or provision of circuit diagrams – all of which the Petition requests – would be difficult to justify under the Commission’s authority to prevent “unfair or deceptive” acts.

At the least, such an expansive view of the Commission’s rulemaking authority under Section 5 would be a significant departure from established practice. In addition, the Supreme Court’s major questions doctrine articulated in *West Virginia v. EPA* (2022) and the Court’s active review of *Chevron* deference in the current term should also prompt the Commission to think very carefully before acting as the Petition proposes.

* * *

Our members have no interest in making the repair process more burdensome for video gamers and strive to find sustainable solutions to make repairability easier without sacrificing other essential features such as security, durability, portability, and cost. A one-size-fits-all federal repairability mandate would hamstring Console Makers’ ability to thoughtfully balance these considerations in product design, and may make it more difficult for businesses to deliver on other features that consumers want. We thank the Commission for the opportunity to discuss this important issue, and welcome further dialogue.

¹⁵ See California Senate Judiciary Committee, Senator Thomas Umberg, Analysis of Proposed Changes to SB 244, at 15.

¹⁶ In October 2020, the Department of Justice indicted the leaders of Team Xecuter, one of the world’s most notorious videogame hacking and piracy groups, that developed, distributed and sold circumvention devices that could be used to play unauthorized, or pirated, copies of video games. Team Xecuter targeted popular consoles such as the Nintendo Switch, the Nintendo 3DS, the Nintendo Entertainment System Classic Edition, the Sony PlayStation Classic, and the Microsoft Xbox. The group’s illegal activities generated at least tens of millions of dollars and caused between \$65 million and \$150 million in losses to Console Makers. One of the prominent members of Team Xecuter was arrested, pled guilty to two federal felonies and was sentenced to 40 months in prison. See *U.S. v. Bowser*, No. 18-3055 (D.C. Cir. 2020).

¹⁷ See Petition at 5 (“a rule passed [sic] under Section 5 would empower the Commission...”).