

DATE: March 25, 2024
TO: Pennsylvania House Commerce Committee
FROM: The Entertainment Software Association
RE: General Comment – Right to Repair

Dear Members of the House Commerce Committee:

The Entertainment Software Association (ESA) is the U.S. trade association representing the publishers of computer and video games for play on consoles, personal computers, mobile devices, and the Internet. The video game industry is a key economic sector that creates jobs, develops innovative technology, and keeps the United States competitive in the global marketplace. Not only do 75 percent of United States households have at least one gamer in their home, our industry has a footprint that creates jobs in every state.

ESA asks that Pennsylvania lawmakers exempt video game consoles from the scope of any digital right to repair proposals due to concerns that permitting console access to independent repair providers, over whom we have no oversight, could result in the modification of hardware and firmware that could compromise the vital security features that provide a secure environment for the playback of copyrighted games. While the vast majority of repair shops would likely not use the provided tools and documentation for any illegal purposes (e.g., removal of security features) it would only take a few bad actors sharing information on social media for this bill to have a rapid and severely detrimental impact on the industry. Notably, similar legislation that passed in California and Minnesota in 2023 recognized these concerns and the importance of copyright protection to video game consoles by exempting consoles from the scope of their laws. Several other states have introduced similar carveouts in 2024 legislation, including Oregon’s proposal which is expected to be signed into law.

ESA is also concerned with right to repair proposals which fail to specifically address copyright protection and potential conflicts with well-established technologies to protect intellectual property. ESA video game console makers employ digital locks designed to protect their game consoles and provide a secure media environment for players and other video game publishers and developers. These protections, known as technological protection measures (“TPMs”), are so critical to copyright holders that they have been protected by international treaties since 1996. Since then, over 100 countries have implemented protection for TPM in their own laws. Moreover, in October 2021, the U.S. Copyright Office (the “Office”), in the context of statutorily mandated administrative rulemaking, reviewed whether TPMs can be circumvented for the purpose of repairing consumer electronics. As in earlier rulemakings, the Office stated that video game consoles are unique in the consumer electronics marketplace because of the valuable copyrights content available to play on them and that there is a real threat of piracy if game console TPMs were modified. Given the circumstances, the Office recommended that a very limited exemption should be adopted that would allow circumvention *only* to repair broken optical drives on consoles *and* that the circumvented TPMs must be restored to their original functionality after repair of those optical drives.

In addition to the Copyright Office, the Federal Trade Commission (FTC) has also acknowledged that video game console makers and game publishers, rely on the content protection systems built into consoles to protect against sophisticated piracy efforts. In fact, in its report, “Nixing the Fix: An FTC Report to Congress on Repair Restrictions” (“FTC Report” or “Report”), the FTC recognized that protecting intellectual property (“IP”) rights benefits consumers and that regulation regarding 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 U.S. Copyright Office) and other stakeholders and be mindful of existing law and policy supporting IP protection.” Accordingly, if adopted, broad Right to Repair laws would reverse established Copyright Office and FTC precedent, with potentially harmful unintended consequences to consumer and company protections.

Finally, ESA is also concerned that Right to Repair proposals may be burdensome and unnecessary, as ESA console makers’ success depends on consumers having reliable, versatile, and engaging platforms on which to play video games and enjoy digital content. For that reason, ESA’s video game console makers —Microsoft, Nintendo, and Sony—are committed to providing consumers with repairs that are quick, reliable, and secure. In addition, they also 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

We appreciate the opportunity to provide testimony and your consideration of our concerns regarding Right to Repair legislation in Pennsylvania. We would be happy to follow-up with any additional information as needed.

Sincerely,

Andrew O’Connor
Director, State Government Affairs Entertainment Software Association