



David O. Carson
General Counsel
U.S. Copyright Office
P.O. box 70400
Washington, DC 20024

Re: Docket No. RM 2011-7
Exemptions to Prohibition on Circumvention of Technological
Measures that Control Access to Copyrighted Works

Dear Mr. Carson:

The Entertainment Software Association (“ESA”) appreciates the opportunity to respond to answers provided by the Electronic Frontier Foundation (“EFF”) in response to the following questions posed in your letter of June 20, 2012.

- 1. The proposed class of works for video game consoles appears to be broad enough to encompass all past, present, and future video game systems. Is there any evidence that scientists and homebrewers need an exemption to circumvent technological protection measures on the original Playstation, the Playstation 2, XBOX, all iterations of Nintendo’s video game consoles prior to the Wii, and any other legacy videogame console?***
- 2. The proposed class of works may be read to encompass handheld gaming platforms such as the Playstation Vita and all iterations of Nintendo’s Game Boy and DS systems. Is there any evidence that scientists and homebrewers have a need to circumvent technological protection measures on such devices?***

As the Copyright Office’s first and second questions make clear, proposed Class 3 is extremely broad, potentially covering “all past, present, and future video game systems,” including handheld gaming devices. Despite the breadth of the proposed class, EFF sought to build an evidentiary record with respect to only three individual game consoles: the *Wii* by Nintendo, Microsoft Xbox 360, and Sony PlayStation 3.¹ EFF now seeks to supplement the record by providing a smattering of new evidence of allegedly non-infringing uses of a range of additional game consoles allegedly stymied by access control measures. But this new evidence only further illustrates EFF’s inability to carry its burden as to any game consoles, past or present. As to future consoles, EFF surely cannot meet the heightened burden required for an exemption premised on “likely” future adverse impacts.²

¹ Moreover, as noted in ESA’s opposition filing and during its testimony before the Office, EFF offered only a patchwork quilt of support for the alleged need to circumvent as to each of those three consoles, identifying “research uses” only in connection with the PlayStation 3, for example, and limiting its homebrew examples nearly exclusively to the Wii. With respect to the Xbox 360, EFF failed to provide specific evidence regarding any homebrew applications or research efforts that EFF contends have been adversely impacted as a result of the console’s access control measures. See Comments of Entertainment Software Association pgs. 9-14.

² See *Staff of House committee on the Judiciary, 105th Cong., Section-by-Section Analysis of H.R. 2281* as Passed by the United States House of Representatives on August 4, 1998, at 6, (an exemption based on “likely” future adverse

First, EFF concedes that the types of research uses discussed in its earlier filing with respect to Playstation 3 are *non-existent* with respect to any of the other consoles discussed in its letter. Given that the purported “research” uses discussed in EFF’s initial filing amount to little more than a desire to access inexpensive processing power, it is of course unsurprising that legacy consoles are of little interest to researchers.

Second, EFF’s offering on alleged homebrew uses suffers the same infirmities as those raised in EFF’s initial comments.³ Namely, the two examples provided again demonstrate that EFF seeks a sweeping exemption that would gut video game consoles’ piracy protections in order to enable a narrow sliver of uses on game consoles that can be accomplished without circumvention, through use of readily available, alternative technologies as well as through opportunities the console makers make available for small developers.⁴

EFF alleges that several consoles, including the Nintendo Entertainment System and Game Boy, can be used as musical synthesizers, which involves either the “direct manipulation of the console’s hardware or running independently designed software.”⁵ EFF also suggests that artists can use the Sega Genesis to create “real-time audio-visual displays.” EFF makes no attempt, however, to demonstrate that hacked game consoles are the only viable alternative to accomplish these objectives. And, of course, they are not. Just as EFF conceded at the hearing that the homebrew uses detailed in its initial filing are readily accomplishable on a PC, the uses in EFF’s most recent letter can also be achieved without circumventing game console access controls. For example, musicians composing “chiptune” music generally do so by using “tracker software” on a PC, obviating the need to use original game console hardware.⁶ At most, then, EFF provides two examples of alternate uses of prior generation consoles, with no suggestion that consumers are being denied the ability to accomplish these uses through equivalent means, much less that they are being substantially harmed by an inability to do so using game consoles.

Third, even if an exemption were necessary to facilitate the uses discussed in EFF’s letter, the Copyright Office must nonetheless reject the proposed Class 3 exemption given the countervailing piracy concerns discussed in detail in our earlier filing and at the May hearing. Simply put, the stakes could not be any higher for the video game industry. The very same hacking methods that permit the uses discussed by EFF also enable game consoles to play pirated content. EFF appears to concede that the Class 3 exemption, if approved, would result in an escalation of piracy, as the very article it cites in support of

impacts during the applicable period should only be made “in extraordinary circumstances in which the evidence of likelihood is highly specific, strong and persuasive.”).

³ Beyond these two examples, EFF in its recent letter appears to concede that a jailbreaking exemption is unnecessary for purposes of utilizing homebrew on certain game consoles (“Our research shows the vast majority of hacking projects involving the Nintendo DS, DS Lite, DSi, and DSi XL can be accomplished without altering the firmware on the handheld device.”) With respect to these consoles, EFF certainly cannot meet its burden of demonstrating “that a measure protecting access was the cause of the harm.” 2011 NOI, 76 Fed. Reg. 60398, 60400.

⁴ See Comments of Entertainment Software Association pgs. 14-16.

⁵ EFF neglects to explain how the “direct manipulation” of a console’s hardware is germane to the proposed Class 3 exemption. If users may, in fact, utilize a game console as a chiptune device without jailbreaking, it is unclear how this proffered example demonstrates that an access control measure is having a substantial adverse impact on the alleged non-infringing use.

⁶ See Tim Brookes, *Making 8bit Music: An introduction to Free Chiptune Music Trackers*, February 3, 2012, <http://www.makeuseof.com/tag/making-8bit-music-introduction-free-chiptune-music-trackers/> (“Thanks to software emulation, there’s no need for original hardware any more. . .”) (last visited July 9, 2012).

extending the Class 3 exemption to handheld game consoles suggests that interest in “jailbreaking” such devices is largely spurred by a desire to “pirate video games.”⁷

3. Please state for the record whether, and under what circumstances, videogame console repair requires an act of circumvention.

Mr. Huang’s statement regarding the need to circumvent access controls to perform certain console repairs makes clear that such conduct falls outside the scope of the proposed exemption. Each example offered by Mr. Huang relates to the replacement of game console *hardware*. Neither EFF nor Mr. Huang articulate, however, how replacing a damaged hardware component of a game console would fall within the scope of the proposed Class 3 exemption, which is intended to permit “jailbreaking” for purposes enabling interoperability of *software*. Hacking a console to enable hardware interoperability is not the same as hacking a console to facilitate software interoperability.

Notwithstanding the fact that “jailbreaking” for purposes of performing a console repair is outside the scope of Class 3, EFF and Mr. Huang cannot in any event identify a substantial adverse impact that would justify an exemption to permit circumvention undertaken to facilitate console repairs. Indeed, the Copyright Office would have to reject such an exemption for the very same reasons that it must reject the proposed Class 3 exemption. First, alternatives to circumvention exist. Each console maker offers authorized repair options.⁸ Such services are available free of charge for consoles that remain under warranty and for a nominal fee thereafter. In light of such alternatives, the mere inability to personally perform the repairs discussed in Mr. Huang’s submission cannot rise to the level of a substantial adverse impact. Second, the hacking methods nominally used for purposes of performing a console repair are overwhelmingly used to facilitate piracy. An exemption would encourage conduct which strikes at the heart of the console manufacturer’s anti-piracy protections.

ESA appreciates the opportunity to respond to the Copyright Office. Please let us know if you have any additional questions.

Sincerely,



Christian Genetski
Senior Vice President & General Counsel

cc:

Marcia Hofmann, Esq.
Steven Metalitz, Esq.

⁷ *Can Sony’s PS Vita be Jailbroken to play free pirated games? Not if the PSVita card can help it*, Informal Gadget, Feb. 22, 2012, http://www.informalgadget.com/files/sony_ps_vita_stop_piracy_with_playstation_flash_card.html (“Sony’s latest hand held gaming system, the Sony PSVita, is already in the eyes of hackers wanting to crack its code to pirate video games. Sony’s first PSP has been plagued by piracy, which has pushed away both developers and publishers alike. Sony wants to prevent history from repeating and is taking actions to change history with the new PS Vita.”) (last visited July 9, 2012).

⁸ See *Xbox 360 repair: Frequently asked questions*, <http://support.xbox.com/en-US/xbox-360/repair/warranty-faq>; *PlayStation Support: Service*, <https://service1.us.playstation.com/>; *Nintendo Repair Information*, <http://www.nintendo.com/consumer/repair/index.jsp>.