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July 27, 2021

Mr. Mark Gray
Ms. Rachel Counts
U.S. Copyright Office
Washington DC 20001

Submitted via email to mgray@copyright.gov and rcounts@copyright.gov
CC: Kyle Wiens, David Metzger, Robert Kerwin, Steve Inacker, Jason Schultz.

RE: Docket No. 2020-11, Summary of Ex Parte Meeting with Copyright Office Staff Regarding Exemption to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works – Class 12: Computer Programs – Repair.

Dear Mr. Gray and Ms. Counts,

On July 23, 2021, the following individuals participated in an ex-parte meeting to discuss the petitions for newly proposed exemptions under Class 12: *Computer Programs - Repair*:

- Kerry Maeve Sheehan, US Policy Lead for iFixit
- Kyle Wiens, CEO of iFixit, and Chairman of the Board for the Repair Association.
- David Metzger, Counsel for Translate Equipment Company, Inc. (Transtate).
- Robert Kerwin, General Counsel for The International Association of Medical Equipment Remarketers and Servicers.
- Steve Inacker, President and COO for Avante Health Solutions, parent company of Transtate.
- Jason Schultz, Professor of Clinical Law and Co-Director for the Engelberg Center on Innovation Law & Policy, NYU School of Law.
- Kevin Amer, Acting General Counsel and Associate Register of Copyrights for the United States Copyright Office.
- Nicholas Bartelt, Attorney-Advisor for the United States Copyright Office.

In the meeting we discussed the proposed exemptions for the repair of software enabled devices, video game consoles, and medical devices.

In response to a question from the Copyright Office about what has changed since the Office addressed a petition for a similar exemption in 2018, we discussed how the an increasing number and variety of software enabled devices are now encumbered by Technological

Protection Measures, often for reasons unrelated to copyright protection, including as default security measures, and to restrict independent repair so that device owners are bound to use the manufacturer's own repair services (where available). We also discussed how, in the intervening years, the use of TPMs for such purposes has become a virtual industry standard, with unencumbered devices increasingly in the minority. In addition, we discussed that security justifications for such measures are not necessarily backed by evidence, as the United States Federal Trade Commission found in their report, Nixing the Fix: A Report to Congress on Repair Restrictions, and because in some cases, TPMs hinder device security by obstructing device owners and repair technicians from patching vulnerabilities or installing security updates when the manufacturer has not provided them in a timely manner. We also discussed an example from iFixit and the Repair Association's initial comments that highlighted this issue - a School's Facility Management System. When the maintenance technician with the password for the system passed away, the School was unable to change the password or restore it to a default setting, and was locked out of their system, with their only option being to reset the system to the original factory settings and lose all stored database information. It is also worth noting that the past several years under the existing exemptions for repair have demonstrated that exemptions enabling diagnosis, maintenance, and repair have not significantly increased infringement or negatively impacted the market for copyright works.

Steve Inacker and Rob Kerwin discussed how although some original equipment manufacturers in the medical device arena purport to allow "basic" repair, this "basic" repair is insufficient. Steve Inacker analogized this situation to a car manufacturer allowing a car owner to do basic service such as oil changes and tire rotations, but disallowing repair of the electronic controls for the engine or the fuel system.

In response to the Office's question about who is being adversely impacted by the lack of an exemption for repair, participants discussed the difficulties encountered by hospitals and medical providers in seeking to repair their own equipment, by remarketers to bring used systems in to compliance with applicable specifications, by personal and commercial device owners unable to fix their own devices and forced to wait out significant delays and pay higher prices for repairs - if those services are available at all.

In response to the Office's question about whether there is a difference between industrial and personal uses of software enabled devices, the participants reiterated that the underlying technology serves the same function in each category, that the same devices (and the same underlying software) perform similar functions in each setting, and that the line between an industrial device (for example, a refrigerator), and a personal device (for example, a refrigerator) is so blurred as to be a completely unreliable and inoperable distinction. Participants also reiterated that they had met their statutory burden for entitlement to an exemption, and that such a distinction is irrelevant to that burden and to the Office's duties. Further, participants noted that in most modern software enabled devices, the software and hardware are so intertwined that such devices are all, in essence, computers.

Participants also discussed various types of TPMs and how pervasive they are including the requirement for a manufacturer-issued service key or password to access service or diagnostic terminals on medical devices in order to conduct maintenance or repairs, as well as dongles needed for medical devices like ventilators to gain access to the service terminals to conduct the repair.

Asked about the extent to which modification is necessary for repair, participants discussed that in some cases, for example where a particular part of a device, like sensor, malfunctions, the repairer may need to modify the software on the device to route around the malfunctioning part in order to restore it to functionality. Such modifications may be temporary or permanent, depending on the malfunction in question. However, in the medical device arena, the software is not modified. Overcoming a TPM is needed to access non-protected functional information or to access diagnostic and device setting software. The software is not changed.

Responding to the Office's question regarding iFixit's petition (with Public Knowledge) for an exemption to repair game consoles with optical drives, representatives for iFixit and the Repair Association reiterated that the scope of the proposed exemption (like the scope of the broader exemption for repair of all software enabled devices) would apply only to the device's software and firmware, not to any other copyrighted content that might be played on the device, and would only apply to circumventions for the purpose of repair. Any unauthorized access to expressive content on the device or circumvention for the purpose of copyright infringement of media would necessarily fall outside the scope of that exemption, a fact the acting register acknowledged in her 2018 recommendation with regard to vehicle infotainment and telematics systems.

Participants also discussed how the Office may consider President Biden's Executive Order on Promoting Competition in the American Economy, President Biden's Executive Order on America's Supply Chains and the findings of the Federal Trade Commission in their May 2021 report, "Nixing the Fix: A Report To Congress on Repair Restrictions," and the FTC's July 21st Policy Statement "on Repair Restrictions Imposed by Manufacturers and Sellers" under statutory factor (v).

Rob Kerwin discussed how during the April 20, 2021 Hearing, Morgan Reed from ACT | The App Association providing misinformation by stating: "[A]ccording to the FDA's MDR review was 40 deaths, 294 serious injury, 38,500 patients and/or operators exposed to potential harm." Section 1201 Rulemaking Hearing Before the Library of Congress, page 813, lines 20-22. Mr. Kerwin then corrected this misinformation by noting that The FDA's Medical Device Review ("MDR") states since 1992 ". . . only 3 contained sufficient information to definitively conclude that servicing caused or contributed to the death, and none of these was linked to issues relating to access to or use of the embedded software. While no one wishes to celebrate harm to any patient of any type, this statistic over a 26- year period provides a more appropriate context as to the laudatory record of medical device servicing.

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In response to the Office's question about differences between information in manuals and the machines, David Metzger noted that in many cases, the manuals or the relevant information is in the machines, and pointed to the example of information pertaining to error codes and event logs.

Respectfully submitted,

Kerry Maeve Sheehan
US Policy Lead, iFixit