



August 12, 2021

Mark Gray
Rachel Counts
US Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000
via e-mail to mgray@copyright.gov and rcounts@copyright.gov

Re: Ex Parte Meeting Summary -- [Docket No. 2020–11] Exemptions to Permit Circumvention of Access Controls on Copyrighted Works

Dear Ms. Counts and Mr. Gray:

On August 9, 2021, Gina Vetere and Ben Golant of the Entertainment Software Association (ESA), accompanied by their counsel Matthew Williams from Mitchell Silberberg & Knupp LLP, met with Kevin Amer and Nicholas Bartelt of the US Copyright Office. We discussed ESA's opposition to Proposed Class 12 (Repair). Specifically, we discussed why any expanded repair exemption should not permit circumvention of access controls on video game consoles.

ESA summarized why Section 1201's protections for access controls on consoles are a critical tool in the video game industry's arsenal for protecting the copyright interests of console manufacturers, video game publishers, and other creators and distributors of content. ESA opposes any expansion of a repair exemption to cover third party service providers or tools. In response to claims made during the hearing on this proposed class that the video game industry does not enforce its Section 1201 rights, we also suggested that the Copyright Office refer to the US Department of Justice indictment in the Team Xecutors case. That indictment, which the Joint Creators and Copyright Owners discussed in their comments, is demonstrative of the types of threats faced by the video game industry and of the harm that results from hacking consoles. ESA members take such threats very seriously and pursue legal actions to enforce their rights and to protect the video gaming community, including the millions of players who seek a safe, secure, enjoyable, and legitimate experience.

ESA also emphasized that it is important for the Copyright Office to reiterate the significance of access controls on consoles to the protection of copyright interests during the ongoing policy discussions concerning repair of vehicles and devices. The FTC has acknowledged that protecting intellectual property rights benefits consumers and that any limitation on repair restrictions cannot be one-size-fits-all. Intellectual property rights play a valuable role in encouraging and rewarding innovation, and the FTC's *Nixing The Fix* report stated that "any action taken by industry or regulators to enable independent repair should seek input from [the USPTO and the US Copyright Office] and other stakeholders and be mindful of existing law and policy supporting IP protection."

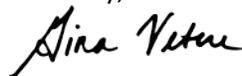
During the *ex parte* meeting, ESA focused on the fact that the record in the current rulemaking proceeding is very similar to prior records from 2012, 2015, and 2018. In those prior proceedings, the Registers did not recommend an exemption to permit circumvention to repair video game consoles, including for the purpose of replacing or repairing optical disc drives (ODDs). ESA cited that the prior records all reflected – as does the current record – contentions by proponents that ODDs were tied to console motherboards and that some older consoles were no longer repaired by manufacturers. Given there is nothing significant that distinguishes the current record from those prior records, no expansion of an exemption covering repair should cover video game consoles.

The Copyright Office asked us if a hypothetical exemption for repair of console optical disc drives were granted, whether including language that requires any circumvention to access computer programs (i.e., console firmware) not be “accomplished for the purpose of gaining access to other copyrighted works” (e.g., video games) as well as importing the definition of “repair” from § 117 would alleviate ESA’s concerns about the proposal. We responded that such language is very important to constrain the scope of exemptions to avoid unintended, unauthorized access to content, infringement, and the proliferation of hacked consoles capable of playing pirated game discs and downloads. We also explained, however, that such limiting language does not resolve our objections to the inclusion of video game consoles in a repair exemption. Policing use of the exemption to ensure compliance with its parameters would be resource intensive and very difficult as a practical matter. Inclusion of consoles with a repair exemption could also alter marketplace expectations regarding tampering with access controls on consoles. Moreover, proponents of the repair exemption expansions have not submitted specific evidence concerning how they intend to restore consoles to their normal specifications, which include authentication and other anti-piracy protections. Indeed, iFixit appears to continue to seek to engage in not only repair of consoles, but also in modification of their code and functionality. This continues to be a major concern for video game console makers.

Finally, we discussed that the record indicates that alternatives to circumvention exist. Console manufacturers continue to provide in-warranty and post-warranty repairs at affordable prices. These are not profit generating business models. Instead, they are central to providing a great experience for players of video games and to protecting the copyright interests of game publishers and console manufacturers. During the hearing on this proposed class, as well as during prior proceedings, iFixit discussed that it is able to replace an ODD with a connected motherboard without circumvention. Prior records have also indicated that it is possible, without circumvention, to pair an ODD with a new motherboard in some circumstances. Given the record here resembles closely the records from prior proceedings, the Register should again decline to recommend an exemption for repairing video game consoles. It is important to note here that while the type of entertainment content accessed via consoles is worthy of protection, repairing consoles is distinguishable from the repair of other kinds of devices more associated with everyday work/life matters, such as transportation (automobiles), farming (tractors), and household tasks (home appliances).

We thank the Copyright Office for its time and for its careful consideration of these issues.

Sincerely,



Gina Vetere
Senior Vice President & General Counsel
Entertainment Software Association