



March 11, 2020

Committee Chairperson Delores G. Kelley
Vice Chairperson Brian Feldman
Members, Senate Finance Committee

RE: Testimony in OPPOSITION to SB 723, Relating to the Model State Right-to-Repair Law

Dear Committee Chair Kelley, Vice Chair Feldman, and Members of the Senate Finance Committee:

On behalf of the Entertainment Software Association (ESA) and its members¹, we thank you for the opportunity to submit written testimony in opposition to SB 723, legislation that would create a “right to repair” mandate. The 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. Maryland, for example, is home to more than 40 video game companies, including Bethesda, an ESA member company.

We appreciate the opportunity to provide the video game industry’s prospective on “right to repair.” Our member companies share the desire for customers to get their broken game consoles repaired quickly and at a modest cost. Software sales are what drive our industry. Thus, our member companies have a compelling financial incentive to help their customers get their consoles repaired as quickly and affordably as possible because no one buys games for a broken console.

It is for that reason that all three major video game 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.

Large-scale, high-profile video games—what we in the industry call “Triple A” titles—take hundreds of artists, programmers, engineers, and other creative talent to bring new games to market. A new, original title can take two or more years to produce and cost as much as a Hollywood blockbuster.

¹ ESA’s members: 505 Games; Activision Blizzard, Inc.; Bandai Namco Entertainment Inc.; Bethesda Softworks, Bungie; Capcom USA, Inc.; CI Games; Deep Silver; Disney Interactive Studios, Inc.; Electronic Arts; Epic Games, Inc.; Focus Home Interactive; Gearbox Publishing; GungHo Online Entertainment American, Inc.; Intellivision Entertainment; Kalyпсо; Konami Digital Entertainment; Legends of Learning; Magic Leap; Marvelous USA, Inc.; Microsoft Corporation; Natsume Inc.; NCSOFT; Nexon America, Inc.; Nintendo of America Inc.; NVIDIA; Paracosma; Phosphor Studios; Rebellion; Riot Games; Sega of America; SixFoot; Sony Computer Entertainment of America; Square Enix, Inc.; Take-Two Interactive Software, Inc.; Tencent, Inc.; THQ Nordic; Ubisoft Entertainment, Inc.; Warner Bros. Interactive Entertainment Inc.; and Wizards of the Coast.

These highly popular video games are prime targets for illegal copying and distribution. To preserve the incentive to create, the video game industry uses security features known as technical protection measures (TPMs) to protect games. The TPMs involve a two-part system of protected software and an authentication mechanism on the game console. The game console checks the game to ensure that it is a legitimate copy. If it is not, then the console will not play that game, unless the console has been unlawfully modified with its security features disabled. Central to this system is the console “firmware”, the “nerve center” of the machine, and once third parties have access to an unencrypted version of the firmware, and can modify it, the security features become vulnerable to potential tampering. All in all, a video game console’s digital rights management systems are an effective deterrent against the use and play of illegally copied games.

ESA’s concern with “right to repair” is not with displacing industry revenue from repair services, as repairs are not a source of revenue for the game industry. Instead, ESA’s concern rests with permitting third parties, over which we have no control, from modifying the hardware and firmware in a way that could compromise the security features that are vital to providing a secure media environment for the playback of copyrighted games of various game publishers. We recognize 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.

In October 2018, the Librarian of Congress, upon the recommendation of the Register of the U.S. Copyright Office, published a rule permitting consumers to repair motor vehicles and home appliances under a new, expanded, exemption to the Digital Millennium Copyright Act (DMCA), a law related to copyright that protects digital locks from circumvention. However, the Librarian and the Register specifically excluded video game consoles from the newest repair exemption. The Librarian of Congress’ decision accords with another critical provision of the DMCA that is relevant to this proceeding: Section 1201(a)(2), which makes it illegal to traffic in devices designed to circumvent TPMs. This provision limits the extent to which any state actor may permit repair services to circumvent TPMs because no regulation can create a right to repair in a way that would purport to allow for the distribution of circumvention devices used to perform such repairs—a point the Copyright Office itself recognized.

The viability and success of the video game console business is dependent upon trustworthy and secure delivery platform. The industry’s ability to protect copyrighted works and those of developers and game creators provides a tangible benefit to consumers as high quality content can continue to be offered at a reasonable price. ESA believes that “right to repair” legislation – or any actions that weaken copyrighted protections – opens the floodgates of mass infringement, threatens the economic input that the video game industry provides to our nation, and could jeopardize the personal data of our players.

The ESA would gladly provide the Committee with any additional information they believe would be helpful in making an informed decision on this important matter.

Thank you for the opportunity to submit written testimony on this matter that is important to our members

Sincerely,



Kathryn P. Gunter
Director, State Government Affairs
Entertainment Software Association