



DATE: March 24, 2023
TO: Chair Matt Klein and Members of the Senate Commerce and Consumer Protection Committee
FROM: Andrew O'Connor
RE: SF 2219 – Oppose

The Entertainment Software Association (ESA) respectfully opposes Senate File 2219, specifically the provisions in Section 23 regarding “Digital Fair Repair”. 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.

ESA respectfully opposes Section 23 of SF 2219 based on 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 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.

This bill fails to specifically address copyright protections. As the Federal Trade Commission has acknowledged, video game console makers, publishers, and copyright owners, rely on the content protection systems built into consoles to protect against sophisticated piracy efforts. We therefore appreciated the FTC’s recognition in its report “Nixing the Fix: An FTC Report to Congress on Repair Restrictions” (“FTC Report” or “Report”) that protecting intellectual property (“IP”) rights benefits consumers and that any limitation on 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. Patent and Trademark Office and the U.S. Copyright Office] and other stakeholders and be mindful of existing law and policy supporting IP protection.” By passing this bill, video game consoles and the games that are played on them, would be subject to an overbroad bill with potentially harmful unintended consequences to consumer and company protections.

Importantly, our 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 important to copyright industries that international treaties concluded in 1996 ensured these digital locks were protected, and since then over 100 countries have implemented this protection in their own laws. Additionally, Section 1201 of the Digital Millennium Copyright Act (“DMCA”), prohibits trafficking in tools that would permit someone to circumvent the digital locks that copyright owners use to protect this software.

ESA is also concerned with the effective date provision of this section and the omission of liability protections for manufacturers. The provisions of this section would go into effect on January 1, 2024, but it is unclear what products are covered. Given the provisions of this bill, manufacturers could be expected to make parts available for older-generation video game consoles that are no longer in production. Manufacturers would also be expected to keep these parts stockpiled indefinitely – contributing to e-waste and creating a difficult compliance issue for console makers who are constantly innovating. Additionally, the bill does not include any provisions that would protect manufacturers from liability for work done outside of warranty or outside an approved repair network. Without protections explicitly outlined for manufacturers, their reputation and products could be at risk due to work done by independent repair shops who lack the training and expertise to handle sensitive and intricate devices such as gaming consoles.

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.

We appreciate the opportunity to provide testimony and would be happy to follow-up with any additional information as needed.

Sincerely,

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