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June 29, 2015

By Electronic Mail

Jacqueline C. Charlesworth
General Counsel and Associate Register of Copyrights
U.S. Copyright Office
Library of Congress
101 Independence Ave SE
Washington, DC 20559-6000

Re: Docket No. 2014-7, Proposed Class 19: Jailbreaking— Video Game Consoles

Dear Ms. Charlesworth:

On behalf of the Entertainment Software Association (“ESA”), this letter responds to the questions in your June 3, 2015 letter regarding Proposed Class 19.

- 1. Please address whether it is necessary to circumvent one or more technological protection measures in order to replace or “reflash” an optical drive for a Sony Playstation 3 or Microsoft Xbox 360 video game console and, if so, provide a description of that process.*

PlayStation 3

The Optical Disk Drive (“ODD”) is the part of the PlayStation 3 system that reads Blu-ray, DVD, and CD format discs. It is possible to replace certain component parts of the ODD that are not related to the device’s or the system’s technological protection measures (“TPMs”)—such as the optical pick-up assembly, capacitors, and resistors—without circumventing any TPMs. However, if these types of repairs are not done by a qualified technician with proper diagnostic tools, the ODD may not function according to specifications after these repairs.

Some of the component parts of the ODD, however, are integrated with the PlayStation 3 system’s security measures, and if these components fail, the entire ODD must be replaced because the system’s security measures will not recognize the new ODD. As a result, when a qualified Sony Computer Entertainment technician replaces

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an ODD, the technician must restore the entire system and have a new console ID assigned to the device by performing an operation that can only occur in a Sony Computer Entertainment factory or repair facility.

If a third-party technician replaces the entire ODD, the PlayStation 3 system will not recognize the ODD and the ODD will not function because the third-party technician does not have the tools to create a new console ID, which is part of the system's security mechanisms. Attempts to circumvent these security mechanisms through a "reflashing" of either the ODD firmware or the PlayStation 3 system software to get the ODD to function would necessarily require circumvention of the PlayStation 3 console's TPMs. The TPMs used to integrate components like the ODD and the motherboard and other system components are part of the security system of TPMs designed to prevent pirated software from running on the PlayStation 3 system. Consequently, Sony does not believe that this sort of "reflashing" is effective without access to Sony's console-ID-creation technology, and such circumvention (if permitted) is unlikely to benefit consumers who intend to play legitimate copies of video games (as opposed to pirated copies).

In addition, as described below, Sony Computer Entertainment America ("SCEA") currently offers repair services for all PlayStation 3 systems except for three discrete models. Therefore, if an ODD fails in any manner, consumers are able to have that drive repaired by SCEA or, in the case of the models not being repaired, obtain an entirely new console for a price comparable to the cost of repairs and shipping.

Microsoft Xbox 360

The ODD is the part of the Xbox 360 video game console that reads physical game disks. It is possible to replace certain component parts of the ODD that are not related to the device's TPMs, such as capacitors and resistors. Microsoft does not offer these replacement parts, but if the ODD malfunctions it is possible for third-party technicians to provide and replace these parts without circumventing any TPMs.

Some of the component parts of the ODD, however, are integrated with the console security system. This security system consists of TPMs designed to prevent pirated software from running on the console. If the component of the ODD that malfunctions is coupled with the console security system, the entire ODD must be replaced because the console's security measures will not recognize the new ODD. As a result, when Microsoft replaces an ODD, it must restore the entire console to a new security state by performing an operation that can only occur in an Xbox 360 factory or Microsoft repair facility for console security reasons. If a third party replaces the entire ODD or replaces the components of the ODD integrated with the console security system, the Xbox 360 console will not recognize the ODD and the ODD will not function. The third party therefore would need to hack the console's TPMs to "reflash"

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either the ODD firmware or the console software in order to allow the ODD to function. This step would necessarily require circumvention of the Xbox 360 console's TPMs.

2. *Please state for the record whether, and under what circumstances, Sony and Microsoft offer repair services, respectively, for the Playstation 3 or Xbox 360 video game consoles. Please note whether console repair services are available for consoles that are under warranty, out of warranty, or both.*

PlayStation 3

It is incorrect that SCEA does not service PlayStation 3 systems. SCEA offers repair services for PlayStation 3 systems whether or not they are under warranty. Warranty repair services are offered at no charge to the customer. PlayStation 3 systems are supported by a standard one-year warranty and system accessories carry a 90-day warranty. See <http://us.playstation.com/support/warranties/ps3/>.

For PlayStation 3 systems that are out of warranty, SCEA still offers repair services and an exchange program for all PlayStation 3 models except for three early models: CEHA01, CEHB01, and CEHE01. Even for these three models, SCEA repaired and serviced them until April 1, 2015. SCEA discontinued repair and servicing of these early models because many components are no longer available and because the costs of repair and service became unreasonably high. For these early models, SCEA offers a replacement model for \$149 where the consumer is not required to send in the older unit, or \$99 exchange for a newer model. Of course, used replacement systems are frequently available in used markets such as eBay.

Not only does SCEA already provide extensive repair services, but iFixit's testimony estimating that 20 million PlayStation 3 systems will fail and need to be repaired is grossly exaggerated. See Testimony, Proposed Classes: 19, 20, 23, 6, at 315 (May 20, 2015). Mr. Wiens' testimony concedes that he has no evidence whatsoever to support this claim and that his figures were made up only "for the sake of argument." *Id.* SCEA believes based on the number of repairs it has performed on PlayStation 3 systems that the actual number of affected PlayStation 3 consoles is a tiny fraction of what Mr. Wiens claims.

Microsoft Xbox 360

Microsoft repair services are provided to Xbox 360 consoles whether or not they are under warranty. Any Xbox 360 console that remains under warranty is provided repair services at no charge to the customer for a standard exchange. Expedited shipping and advance exchange options are available at an extra charge. The Xbox 360

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E console currently is supported with a one-year warranty for the console and a 90-day warranty for accessories. See <http://support.xbox.com/en-US/xbox-360/repair/xbox-360-e-new-warranty>.

For Xbox 360 consoles that are not under warranty but that are still supported by Microsoft, Microsoft provides repair services at a charge. Out-of-warranty Xbox 360 models dating back to the model S that shipped in 2008 are supported by Microsoft repair services for a current flat fee of \$99 for any hardware-related issues, including parts and labor. Older legacy models of the Xbox 360 console are no longer supported and repair services are not provided by Microsoft for these consoles. Used replacement consoles, even for newer than legacy models, are frequently sold for well under \$99 (e.g., on eBay).

* * *

While the environmental and device lifecycle issues that are at the core of proponents' exemption request raise important societal concerns, it is worth emphasizing that these are not the types of interests that are appropriate for consideration in this proceeding. Congress authorized the Copyright Office to create limited exceptions to Section 1201's general prohibition on circumvention, but directed the Copyright Office to make this determination based on the limited question of whether users "are, or are likely to be in the succeeding 3-year period, adversely affected by the [circumvention] prohibition . . . *in their ability to make noninfringing uses under this title of a particular class of copyrighted works.*" 15 U.S.C. § 1201(a)(1)(C) (emphasis added). In enacting the Section 1201 anti-circumvention provisions, Congress already made the judgment that copyright interests—so fundamental that our nation's founders explicitly recognized their importance in the U.S. Constitution—outweigh other public interests that could be implicated by TPMs, including the environmental issues raised by proponents.

The testimony and evidence regarding video game console repairs was entirely unrelated to Section 1201's statutory factors. See 15 U.S.C. § 1201(a)(1)(C). Proponents of an exemption for console repairs are not concerned about the availability of copyrighted works; copyrighted video games can be played on any number of new or used PlayStation 3 or Xbox 360 consoles. Proponents also are not concerned about the availability of copyrighted works for nonprofit archival, preservation, or educational purposes; they are interested only in lowering the cost of device *equipment* repair, not preserving or improving access to copyrighted video game software. Likewise, because proponents are concerned about the device *equipment*, there is no evidence of an impact on the use of the copyrighted video games for purposes of criticism, comment, news reporting, teaching, scholarship or research. Proponents also provide no evidence that there has been an adverse effect on the market for or value of any copyrighted works; rather, users remain able to purchase replacement Sony PlayStation 3 or Microsoft Xbox

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360 consoles to play the copyrighted video games for these consoles, often for a price lower than the cost of repair charged by proponents.

The only adverse effects that proponents identified are the entirely unrelated issues of alleged environmental harm from consoles entering the waste stream and the additional expense that either the repair person must incur to repair a malfunctioning console or the user must incur to purchase a replacement console. But proponents' testimony concedes (as it must) that any environmental benefit resulting from the console repair is only temporary. Because proponents' repair efforts do not affect the number of PlayStation 3 and Xbox 360 consoles that have been manufactured, these repairs do not change the number of consoles that eventually will be discarded. Based on iFixit's testimony, the primary concern appears to be that—absent an exemption from Section 1201's protections—it is economically impractical for a person with a malfunctioning PlayStation 3 or Xbox 360 to pay to have the console repaired by a third-party technician instead of purchasing a replacement console in the marketplace. The Section 1201 rulemaking process was not intended to make the device repair business more economically viable.

We hope this additional information is useful. Please let us know if you have any further questions.

Respectfully submitted,



Simon J. Frankel
*Counsel for the
Entertainment Software
Association*

cc: Stan Pierre-Louis, ESA
Cory Fox, ESA
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