

House of Commons Standing Committee on Industry and Technology (INDU)
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House of Commons
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Sent via Email: INDU@parl.gc.ca

Re: Bill C-244 – An Act to amend the Copyright Act (diagnosis, maintenance and repair)

Dear Chair and Committee Members,

We are writing to inform you of significant concerns regarding the potential impact of Bill C-244 *An Act to amend the Copyright Act (diagnosis, maintenance, and repair)* on the game console industry. Right-to-repair mandates present a unique risk to the video game industry because they may undermine the security mechanisms that protect users, the integrity of the gaming experience and the intellectual property of game developers. Legislation that permits the circumvention of technological protection measures (TPMs) that protect video game consoles presents a unique security and piracy risks to the video game ecosystem.

While we recognize the good intentions driving C-244, the proposed bill could result in unintended consequences for both our industry and our players. To prevent this, we are requesting the inclusion of the following amendment to the bill to exclude video games consoles and their related peripherals:

Recommendation - Insert the following amendment into Bill C-244:

Embedded computer programs

41.121 (1) Paragraph 41.1(1)(a) does not apply to a person who circumvents a technological protection measure that controls access to a computer program if the person does so for the sole purpose of diagnosing, maintaining or repairing a product in which the computer program is embedded. **This section does not apply to video game consoles, related components and peripherals.**

Technology, device or component

(2) Paragraph 41.1(1)(c) does not apply to a person who manufactures, imports or provides a technology, device or component for the purposes of circumventing a technological protection measure that controls access to a computer program if the person does so for the purpose of diagnosing, maintaining or repairing a product in which the program is embedded and **(a)** uses that technology, device or component only for that purpose; or **(b)** provides that technology, device or component to another person solely for that purpose. **(c) Nothing in this section shall be construed to require any person, original equipment manufacturer or authorized repair provider to make available any parts, tools, or documentation required for the diagnosis, maintenance, or repair of video game consoles and related components and peripherals.**

Add to “definitions section” of *Copyright Act* – **Video Game Console**

A “Video Game Console” means a computing device, such as a console machine, a handheld device, or another device or system primarily designed for consumers to use for playing video games. Video Game Consoles may include other secondary features such as optical disc players, digital video and picture viewing, digital music playback, web access, and other content access.

Rationale:

TPMs Protect IP, Support Player Privacy and Security

Since 1997, Canada has recognized that adequate legal protections for TPMs are indispensable to protect copyright. In 2012, Canada solidified TPM’s as law within Canada’s Copyright Modernization Act. As digital technology has improved and business models have evolved, reliance on TPMs has become integral to the digital economy and the video game industry is no exception. Video game consoles rely upon a secure platform to protect players, the integrity of the gaming experience and the intellectual property of game developers. Allowing repair shops or consumers to bypass the specialized software that protects video game consoles for purposes of repair creates significant potential for security and piracy risks.

The video game industry employs robust digital protections for consoles and video game software. The integrity of the video game ecosystem relies on these specialized protections to prevent console hacking, deter unauthorized access to consumer information, and protect video game content and intellectual property. TPMs also allow a console to be securely updated with software that provides consumers with new game levels, extended storylines, and other improvements to the game experience. TPMs are also relied on for safety and security. For example, TPMs help to ensure data integrity and cyber security are maintained once products are in the hands of consumers.

TPMs Prevent Piracy

While some creative industries have struggled to fight piracy, the video game industry has embraced technological measures to combat the multi-million-dollar black market of illegal video games on the internet. Video game consoles employ TPMs to protect creative works and prevent illegal and unauthorized device modifications that could result in the ability to play pirated games from the internet.

Providing our players with the best gameplay experience possible is dependant on a trustworthy and secure delivery platform. Unfortunately, millions of unauthorized copies of video games are made available through the internet. The protections afforded under Section 41 of the *Copyright Act* are intended to protect the security rights holders use (both on the hardware and software) to ensure those illegal copies on the internet cannot be played on game consoles. Any proposal that enables a consumer or repair shop to circumvent TPMs, such as the changes proposed in C-244, could create a scenario where the piracy and illegal downloading and/or sale of video

games proliferate in Canada, putting Canada's video game industry at risk. Once a console's TPMs are disabled, two worrisome results can occur:

1. The game experience for players is diminished, sometimes dramatically, which could be seen as a flaw in the console or game, and;
2. Any number of illegally copied games from the internet could be played on the console.

Piracy is of particular concern to smaller video game publishers who may be acutely affected by mass infringement and its impact on their livelihoods. To prevent compromising the integrity of consoles and ensure that players have access to safe and enjoyable game experiences, console makers are committed to providing consumers with easy, reliable, and affordable repair service whenever repairs are necessary.

Granting repair shops and consumers access to hardware, along with the tools and knowledge to modify TPMs, would compromise the safeguards that protect all copyrighted content played on consoles. It would expose video game console makers – and the game developers and publishers who rely upon the secure environment of game consoles – to content theft. Bad actors may attempt to modify consoles to enable piracy and to sell their services to consumers both online and in physical storefronts. While most repair shops might not seek to use their repair methods for illegal purposes (such as the unauthorized removal of a device's security features), publication of a console's security roadmap could undermine the entire console industry. Accordingly, right-to-repair legislation that undermines the critical TPMs that safeguard games, such as C-244, could have a rapid and severely detrimental impact to the video game industry.

Federal Court Legal Precedent Established Importance of TPMs for Game Consoles

The critical importance of protecting TPMs for game console manufacturers is not a theoretical concern - it has been validated by the courts through litigation. In a precedent-setting decision issued in 2017, [Nintendo of America Inc v King et al, 2017 FC 246](#), the Canadian Federal Court awarded \$12,760,000 in damages for circumvention of TPMs and copyright infringement under the Copyright Act.

This is the first time the Federal Court has considered circumvention of TPMs on the merits. Although the anti-circumvention provisions of the *Copyright Act* have been in force since 2012, the Court acknowledged that they have never been substantively tested to date. This case addressed several novel and important issues in Canadian copyright law, including the scope of TPM protection and remedies available to copyright owners.

The case concerned TPMs used by Nintendo on three of its popular video game consoles (Nintendo DS, 3DS, and Wii) to protect against piracy. The Respondent, Go Cyber Shopping (2005) Ltd. sold and installed various circumvention devices including Game Copiers that mimicked Nintendo 3DS and DS game cards and mod chips designed to circumvent Wii consoles. These devices enabled users to play potentially hundreds of illegally downloaded video games without having to purchase a genuine copy.

On the issue of TPM circumvention, the Court recognized the importance of TPMs to the creative industry and copyright owners. Several novel points of law were discussed, including the scope of the TPM provisions, the applicability of the “interoperability” exception, and whether “replicating” a TPM amounts to “circumvention. The Court found in favour of Nintendo on each point:

- TPM includes physical configuration: the Court held that the physical shape and configuration of Nintendo’s game cards and corresponding slots on its DS and 3DS consoles were “effective technologies” within the definition of TPM in s. 41, since they were specially designed by Nintendo for its consoles and acted like a “lock and key”. The Court also accepted that the principle of technological neutrality is relevant to defining a TPM. Go Cyber did not dispute that the other TPMs employed by Nintendo were “effective” TPMs.
- Circumvention includes replication of TPM: The Court rejected the Respondent’s argument that its Game Copier devices merely “replicated” (and did not “circumvent”) Nintendo’s TPMs, for example by copying the physical shape or the encryption circuits from a genuine Nintendo game card. Instead, the Court accepted that the definition of “circumvention” is broad. The words “to otherwise avoid, bypass, remove, deactivate or impair” in s. 41 are exemplary, non-exhaustive, forms of circumvention. Thus, akin to a burglar duplicating a key, “replication” of a TPM also constitutes “circumvention.”
- Interoperability defence not established by mere existence of “homebrew” software: Go Cyber raised the “interoperability” defence to TPM circumvention under s. 41.12 of the Act, by alleging that its devices could be used for “homebrew” software (non-licensed third-party software in which Nintendo did not own copyright). However, the Court found that Go Cyber had not met its evidentiary burden, as it could not prove that any user in fact used the devices for “homebrew”. To the contrary, Court found that the primary purpose of the devices was for circumvention, and the alleged market for “homebrew” software was dwarfed by the availability of pirated video games.

The Court therefore held that Go Cyber was liable under s. 41.1 of the Act for trafficking and installation of TPM circumvention devices. These TPMs are the very kind of security mechanisms C-244 will allow to be circumvented for purposes of repair. In fact, C-244 will allow for circumvention services to be legal, opening the door for the trafficking in services that will circumvent video game console security for purposes of repair.

Precedent for Video Game Console Exclusion

Video game consoles have rightfully been provided with exclusions from other right-to-repair bills, including the most advanced legislation on the right-to-repair issue in the United States, [New York State Bill S4104A](#): “Nothing in this section shall be construed to require any original equipment manufacturer or authorized repair provider to make available any parts, tools, or documentation required for the diagnosis, maintenance, or repair of digital electronic equipment

in a manner that is inconsistent with or in violation of any federal law, such as gaming and entertainment consoles, related software and components.”

In the state of [Washington Bill HB 1392](#), excludes video game consoles through its limited definition of “digital electronic equipment”: ““Digital electronic equipment” or “equipment” means a desktop computer, laptop computer, tablet computer, cell phone, or smart phone containing a microprocessor and originally manufactured for distribution and sale in the United States for general consumer purchase.”

Section [1201 of the Digital Millennium Copyright Act](#) (DMCA), 17 U.S.C. § 1201, makes it illegal to bypass TPMs or to distribute tools to assist in that effort. Section 1201 pre-empts state mandates that would permit TPMs to be bypassed through direct means or through the sale of tools that would enable such activity. In passing the DMCA, Congress created a regulatory safety valve. It authorized the Library of Congress, in consultation with the U.S. Copyright Office, to create a list of temporary exemptions based upon evidence submitted in a rulemaking proceeding. In 2018 and 2021, the Library of Congress considered proposed exemptions for repair. Although it granted an exemption for repair of motor vehicles and home appliances, it specifically excluded video game consoles because of the vital role TPMs play in safeguarding games and the harms that could arise if third parties were able to circumvent such protection measures.

Game Consoles Have an Excellent Repair Record and Customer Service Satisfaction

It is clear from the debate and discussion on C-244 to date that video game consoles have not been an area of concern for consumer advocates, constituents, or stakeholders. The lack of vocal consumer concern over video game repairs is likely due to the excellent track record the industry has when it comes to consumer satisfaction on ability to repair their consoles. For example, the popular consumer repair website [iFixit](#) hosts repair guides for thousands of consumer products, including game consoles. It also provides devices with ratings on a ten-point scale based on their ease of repairability, with 10 being “easiest to repair”. As you can see in the table below, video game consoles are consistently highly rated for their repairability.

Microsoft	Nintendo	Sony
Xbox One - 8 /10	Switch - 8 /10	PlayStation 4 - 8 /10
Xbox One X - 8 /10	Switch OLED - 7 /10	PlayStation 4 Pro - 8 /10
Xbox Series X - 7 /10		PlayStation 5 - 7 /10

TPMs in consoles exist to protect the software and data that is most critical to the IP and security of the console, and do not prevent consumers from fixing the majority of issues that may require repair.

Finally, the three major video game console makers—Microsoft, Nintendo and Sony—remain committed to providing consumers with easy, reliable and affordable repair services. All three offer free warranty repairs and affordable post-warranty repair options to ensure that their consoles remain in good working order. They also provide comprehensive online and offline support networks that help consumers remotely troubleshoot issues that limit the need to send in devices for repairs.

International Treaty Obligations

Through various copyright treaties, Canada has not only agreed to protect TPMs, but has agreed that any exceptions to TPM protections should be very carefully crafted, supported by evidence to ensure TPMs remain effective. Because Bill-C-244 amends the Section 41 of the *Copyright Act*, which is a provision in the *Copyright Act* enacted to meet Canada's obligations under international law – the WIPO Internet Treaties – it is incumbent upon the members of the INDU committee to analyze the proposed changes in the context of international treaty law. In addition to the WIPO Internet Treaties, both the EU-Canadian Trade Agreement and the U.S.-Mexico-Canada Agreement (USMCA) also contain explicit provisions on TPMs.

Since C-244 proposes drastic changes to the Canadian provisions that meet current obligations under these two trade agreements, it must be further analyzed to ensure the proposed provisions do not alter a carefully crafted law.

Conclusion

Video game console makers, publishers, and copyright owners, rely on the content protection systems built into consoles to guard against piracy efforts, protect IP rights, support consumer safety and data security, and play a valuable role in encouraging and rewarding innovation in Canada's video game sector. As well, consumers satisfaction in video game console repair is very high. For the reasons outlined above, we urge the Standing Committee on Industry and Technology to ensure that Bill C-244 includes a clear amendment to exclude video game consoles, their components and peripherals from the list of consumer products subject to TPM circumvention for the purposes of repair.

Thank you for considering our proposal. If you have any questions or require further information, please contact Paul Fogolin, our VP of Policy and Government Affairs, at pfogolin@theesa.ca.

About ESAC

The Entertainment Software Association of Canada ([ESAC](#)) represents major video game console makers, publishers, large and small independent developers as well as national distributors. Canada is home to close to 1000 game studios from coast-to-coast, employs over 32,300, and contributes \$5.5 billion to Canadian GDP.

As the voice of Canada's entertainment software industry, we work on behalf of our member-companies to ensure that Canada remains a great place to innovate, create and publish video games. We work with decision-makers on regulatory issues that impact our members at the provincial and federal levels, and regularly conduct and publish original research highlighting the impact of our industry in Canada.