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DATE: September 12, 2023
TO: Chair Tyrone Carter and Members of the House Regulatory Reform Committee
FROM: The Entertainment Software Association
RE: Opposition to HB 4562

The Entertainment Software Association (ESA) respectfully opposes House Bill 4562. ESA is the U.S. trade association representing video game publishers and console makers. 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 HB 4562 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's definition of "digital electronic equipment" would include a broad swath of devices, including video game consoles. 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 U.S. Copyright Act, part 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. Language in this bill would force companies to provide these sensitive tools to repair shops outside their preapproved networks. States who have passed broad right to repair laws, including New York and Minnesota, recognized the importance of these protections and worked to carve video game consoles out of their laws.

Notably, the bill fails to specifically address copyright protections, which are important to securing the safety of our consoles as well as the copyrighted works that are played on them. As the Federal Trade Commission ("FTC") 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." Lawmakers in Minnesota recognized the importance of these protections and passed a right to repair law which fully excluded consoles and ensured that our consoles would be protected. By passing this bill as written, 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.

Furthermore, Section 2(a) of the bill states that companies which do their own repairs without an arrangement with an outside authorized repair provider will be considered an authorized repair dealer. Because of the proprietary nature of the tools and software needed to make some repairs, console makers do not share the same tools and materials with authorized repair shops as they share with their internal repair teams. In some cases, manufacturer repair goes beyond what authorized repair shops are capable of doing. Thus, to define them in the same way would be inaccurate and could lead to significant unintended, harmful consequences.

Finally, 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

A bill to require certain manufacturers of certain digital electronic equipment to make diagnostic, maintenance, and repair parts, tools, and documentation available to independent repair providers and owners of that equipment; to provide remedies; to prescribe civil sanctions; and to provide for the powers and duties of certain state and local governmental officers and entities.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act may be cited as the "digital electronic equipment repair act".

Sec. 2. As used in this act:

(a) "Authorized repair provider" means a person that is unaffiliated with an original equipment manufacturer and that has an arrangement with the original equipment manufacturer, for a definite or indefinite period, under which the original equipment manufacturer grants to the person a license to use a trade name, service mark, or other proprietary identifier for the purposes of offering the services of diagnosis, maintenance, or repair of digital electronic equipment under the name of the original equipment manufacturer, or has another arrangement with the original equipment manufacturer to offer the services on behalf of the original equipment manufacturer. An original equipment manufacturer that offers the services of diagnosis, maintenance, or repair of its own digital electronic equipment and that does not have an arrangement described in this subdivision with an unaffiliated person is considered an authorized repair provider with respect to the equipment described in this subdivision.

(b) "Digital electronic equipment" means a product that depends, for its functioning, in whole or in part, on digital electronics embedded in or attached to the product. Digital electronic equipment includes agricultural equipment that depends, for its function, in whole or in part, on digital electronics embedded in or attached to the equipment. Digital electronic equipment does not include video game consoles.

(c) "Documentation" means a manual, diagram, reporting output, service code description, schematic, or other guidance or information used in effectuating the services of diagnosis, maintenance, or repair of digital electronic equipment.

(d) "Embedded software" means programmable instructions provided on firmware delivered with digital electronic equipment or with a part for the equipment for purposes of equipment operation, including all relevant patches and fixes made by the manufacturer of the equipment or part for these purposes.

(e) "Fair and reasonable terms" means costs and terms to which all of the following apply:

(i) For obtaining a part, tool, or documentation:

(A) Either of the following, as applicable:

(I) Are equivalent to the most favorable costs and terms under which an original equipment manufacturer offers the part, tool, or documentation to an authorized repair provider.

(II) If an original equipment manufacturer does not offer the part, tool, or documentation to an authorized repair provider, are at an equitable price.

(B) Account for any discount, rebate, convenient means of delivery, means of enabling fully restored and updated functionality, rights of use, or other incentive or preference that the original equipment manufacturer offers to an authorized repair provider, or any additional cost, burden, or impediment that the original equipment manufacturer imposes on an independent repair provider or owner.

(C) Are not conditioned on or do not impose a substantial obligation or restriction that is not reasonably necessary for enabling the independent repair provider or owner to engage in the diagnosis, maintenance, or repair of digital electronic equipment made by or on behalf of the original equipment manufacturer.

(D) Are not conditioned on an arrangement described in subdivision (a).

(ii) For obtaining documentation:

(A) For documentation that is requested in non-printed, non-physical form, the documentation must be provided at no charge to the requestor.

(B) For documentation that is requested in printed, physical form, the documentation may be provided at a charge that only accounts for the reasonable, actual costs of the preparation and sending of a copy of the documentation.

(iii) For software tools, the costs and terms must include that the tools must be provided at no charge to a requestor and, in the course of effectuating the diagnosis, maintenance, or repair and enabling full functionality of digital electronic equipment, the tools must be provided without requiring authorization or internet access or imposing impediments to access or use in a manner that impairs the efficient and cost-effective performance of any activity described in this subparagraph.

(f) "Firmware" means a software program or set of instructions programmed on digital electronic equipment or on a part for the equipment to allow the equipment or part to communicate within itself or with other computer hardware.

(g) "Independent repair provider" means a person operating in this state, that does not have an arrangement described in subdivision (a) with an original equipment manufacturer, and that is not affiliated with a person that has an arrangement described in subdivision (a), and that is engaged in the services of diagnosis, maintenance, or repair of digital electronic equipment, except that an original equipment manufacturer or, with respect to that

original equipment manufacturer, a person that has an arrangement described in subdivision (a) with that original equipment manufacturer or that is affiliated with a person that has an arrangement described in subdivision (a) with that original equipment manufacturer, is considered an independent repair provider for purposes of those instances in which it engages in the services of diagnosis, maintenance, or repair of digital electronic equipment that are not manufactured by or sold under the name of that original equipment manufacturer.

(h) "Manufacturer of motor vehicle equipment" means a business engaged in the business of manufacturing or supplying components that are used in the manufacture, maintenance, or repair of a motor vehicle.

(i) "Motor vehicle" means a vehicle that is designed for transporting individuals or property on a street or highway and is certified by the manufacturer under all applicable federal safety and emissions standards and requirements for distribution and sale in the United States. Motor vehicle does not include both of the following:

(i) A motorcycle.

(ii) A recreational vehicle or an auto home equipped for habitation.

(j) "Motor vehicle dealer" means a person to which all of the following apply:

(i) In the ordinary course of business, is engaged in the business of selling or leasing new motor vehicles to a person pursuant to a franchise agreement.

(ii) Has obtained a license under section 248 of the Michigan vehicle code, 1949 PA 300, MLC 257.248.

(iii) Is engaged in the services of diagnosis, maintenance, or repair of motor vehicles or motor vehicle engines pursuant to the franchise agreement described in subparagraph (i).

(k) "Motor vehicle manufacturer" means a business engaged in the business of manufacturing or assembling new motor vehicles.

(l) "Original equipment manufacturer" means a business engaged in the business of selling, leasing, or otherwise supplying new digital electronic equipment manufactured by or on behalf of itself to a person.

(m) "Owner" means a person that owns or leases digital electronic equipment purchased or used in this state.

(n) "Part" means a replacement part, either new or used, made available by an original equipment manufacturer for purposes of effecting the services of the maintenance or repair of digital electronic equipment manufactured by or on behalf of, or sold or otherwise supplied by the original equipment manufacturer.

(o) "Tool" means a software program, hardware implement, or other apparatus used for the diagnosis, maintenance, or repair of digital

electronic equipment, including, but not limited to, software or other mechanisms that provision, program, or pair a new part, calibrate functionality, or perform any other function required to bring the product back to fully functional condition.

(p) "Trade secret" means that term as defined in section 2 of the uniform trade secrets act, 1998 PA 448, MCL 445.1902.

(q) "Video game console" means a computing device, such as a console machine, a handheld console device, or another device or system, and its components and peripherals, that is primarily used by consumers for playing video games. "Video game console" does not include a general or an all-purpose computer, which includes, but is not limited to, a desktop computer, laptop, tablet, or cell phone.

Sec. 3. (1) Except as otherwise provide in this section, for digital electronic equipment and parts for the equipment, sold or used in this state, an original equipment manufacturer shall make available, for the purposes of the diagnosis, maintenance, or repair of the equipment, to any independent repair provider or to the owner of the digital electronic equipment manufactured by or on behalf of, or sold or otherwise supplied by, the original equipment manufacturer, on fair and reasonable terms, documentation, parts, and tools, inclusive of any updates to information or embedded software. This subsection does not require an original equipment manufacturer to make available a part if the part is no longer available to the original equipment manufacturer.

(2) Except as otherwise provided in this section, for digital electronic equipment that contains an electronic security lock or other security-related function, the original equipment manufacturer shall make available to independent repair providers and the owner, on fair and reasonable terms, any special documentation, tools, and parts needed to disable the lock or function and to reset it when disabled in the course of the diagnosis, maintenance, or repair of the equipment. The documentation, tools, and parts described in this subsection may be made available by means of an appropriate secure system.

(3) Except as otherwise provided in this section, when the original equipment manufacturer has made an express warranty with respect to digital electronic equipment and the wholesale price of the equipment is \$100.00 or more, the original equipment manufacturer shall provide documentation, tools, and parts to independent repair providers and owners as to enable the repair of the equipment during the warranty period under fair and reasonable terms, convenience of delivery, and of means enabling functionality, and shall take into account all of the following in providing the documentation, tools, and parts under this subsection:

(a) The actual cost to the original equipment manufacturer to prepare and distribute the documentation, tool, or part, exclusive of any research and development costs incurred.

(b) The ability of independent repair providers and owners to afford the documentation, tool, or part.

(c) The means by which the documentation, tool, or part is distributed.

Sec. 4. (1) A person that violates this act may be ordered to pay a civil fine of not more than \$500.00. A violation of this act may be prosecuted by the prosecutor of the county in which the violation occurred, or by the attorney general.

(2) An individual aggrieved by a violation of this act may bring a civil action against the person that violated this act and may recover actual damages and attorney fees.

Sec. 5. (1) This act does not require an original equipment manufacturer to divulge a trade secret to an independent service provider or owner except as necessary to provide documentation, parts, and tools on fair and reasonable terms as required under this act.

(2) Except as otherwise provided in this subsection, this act does not alter the terms of any arrangement described in section 2(a) between an authorized repair provider and an original equipment manufacturer, including, but not limited to, a performance or provision of warranty or recall repair work by an authorized repair provider on behalf of an original equipment manufacturer pursuant to the arrangement. A provision of an arrangement described in section 2(a) that purports to waive, avoid, restrict, or limit the original equipment manufacturer's obligations to comply with this act is void and unenforceable.

Sec. 6.

(a). This act does not apply to a motor vehicle manufacturer, manufacturer of motor vehicle equipment, or motor vehicle dealer, acting in that capacity, or to any product or service of a motor vehicle manufacturer, manufacturer of motor vehicle equipment, or motor vehicle dealer, acting in that capacity.

(b). This act does not apply to video game consoles.

Sec. 7. (1) This act applies with respect to digital electronic equipment sold or in use on or after the effective date of this act.

(2) This act applies to only an agreement that takes effect or is extended, renewed, or modified after the effective date of this act.

Enacting section 1. This act takes effect 90 days after the date it is enacted into law.