

February 2, 2024

Joel Christie  
Acting Secretary of the Commission  
Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW, Ste. CC-5610  
Washington, District of Columbia 20580

**RE: Comments of ACT | The App Association to the Federal Trade Commission on a Petition for Rulemaking of PIRG and iFixit (Docket No. FTC–2023–0077)**

Dear Secretary Christie:

ACT | The App Association (“App Association”) appreciates the opportunity to submit comments concerning a petition to the Federal Trade Commission (FTC) for rulemaking of PIRG and iFixit, identified by docket number FTC–2023–0077.<sup>1</sup>

The App Association is a policy trade association for the small business technology developer community. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. The small businesses and startups we represent both participate and seek to participate in the international standard setting process to contribute and build on important technical standards. App Association members are active in new platforms, like Web3, develop using indispensable technologies (i.e., artificial intelligence), and innovate on top of technical standards. Our member companies are part of a \$6.3 trillion industry globally, supporting about 6.1 million jobs in the United States alone.<sup>2</sup> They rely on strong cybersecurity protections, patenting, and copyright to protect their valuable intellectual property (IP). The Digital Millennium Copyright Act (DMCA) is a foundation of many of those protections.

The FTC should not adopt any broad rulemaking on consumers’ right to repair that would invite serious security, privacy, and intellectual property risks for U.S. businesses. For small businesses, like App Association members, mandates to allow open access to

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<sup>1</sup> 89 FR 286.

<sup>2</sup> The App Association, State of the U.S. App Economy 2020, 7th Ed., <https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL-1.pdf>.

otherwise protected software involves legalizing a “market for exceptions” that can lead to increased cyberattacks. This type of security risk is especially prominent when the software in question deals with encryption or other vital security tools, referred to in the copyright context as technological protection measures (TPMs).

To date, the App Association has observed three kinds of proposals that seek to set aside current copyright protections to facilitate repair by end users of software or devices or independent third parties:

1. Via the DMCA’s existing triennial review process, which requires the Copyright Office—the federal agency tasked with interpreting the law—to consider every three years whether to adopt exceptions to its general prohibition on the use of circumvention measures to bypass TPMs used to protect copyrighted work.
2. State-level efforts to require manufacturers of devices with copyrighted software to proactively provide manuals, physical tools, and other means for a wider class of independent third-party repair shops to service the manufacturer’s products. This category tends to stem from an interest in creating bargaining leverage for local independent repair shops to extract more favorable or cheaper terms from major device manufacturers in copyright license negotiations—or possibly to negate the need to obtain a license at all. New York enacted a law along those lines that appears to balance the interests of wider access to smart device repair capabilities while also protecting security. However, other legislatures have struggled to find the mark.
3. Federal legislative proposals which lack consideration for serious threats to U.S. business by widening the scope of exemptions to the DMCA Section 1201 prohibition against the circumvention of technological measures.

The App Association has concerns with each of these three proposals, but welcomes constructive discussions about how to achieve the shared goals of protecting IP and optimizing the utility of software and devices, particularly for end users.

The DMCA is not without its flaws, but the Section 1201 circumvention prohibition and its exemptions have proven to be effective and flexible tools that enable continued innovation in the tech sector and promote consumer choice. While the DMCA has only two prohibitions to prevent unauthorized access to digital content, Congress included 10 key exemptions that allow the circumvention or breaking of digital locks on copyrighted works and the creation of tools to allow these activities. These safety valves—intended to balance copyright rights with the public interest in accessing and using copyright protected content—actually work. Developers rely on these exemptions to innovate, which in turn provides consumers with access to a wide range of products and services in a variety of business models.

The DMCA exempts security testing, encryption research, and reverse engineering activities from the prohibition on circumvention within certain parameters. These activities are important and necessary parts of developing software products and services that entertain and meet the needs of consumers. For example, there is a

considerable record of published results from security testing on automotive security, medical devices, voting systems, and consumer devices. Likewise, reverse engineering allows developers to create new interoperable and competing products and services. And encryption research is critical to improving technology to protect most internet traffic—everything from commercial transactions to social interactions. Our members like to say, “Just tell us the rules so we can build our business.” The exemptions in the DMCA provide clear guidelines for app developers as they create and bring their products to market. The “chilling effect” on innovation that is often raised in the debate about the DMCA simply has not materialized in the app economy. The obvious success of American software-driven industries—which create millions of jobs and leave analogous sectors in other countries perpetually playing catch-up—is strong evidence that the DMCA protections under current law are working.

App Association members—inventors and entrepreneurs themselves—understand and appreciate the desire to reconfigure the software on a device, create new functionalities, and repair hardware. However, the DMCA exemptions and those adopted by the Copyright Office’s triennial rulemaking process must maintain the balance of interests in protecting copyrighted works while allowing users to access and use those works. Before considering a Section 5 rulemaking addressing consumers’ right to repair, it is important to know that developers, inventors, tinkerers, and repair services who want to build their own solutions or fix their own device have plenty of options available to them. Both closed and open-source systems are flourishing, giving innovators and consumers the ability to choose the ecosystem that works best for them. For example, Apple has developed four streams of options for consumers. Malfunctioning technology can be brought to an Apple Store or mailed to Apple, customers can use an Authorized Service Provider like Best Buy, they can find an Independent Repair Provider in the network, or they can utilize Apple’s Self Service Repair. Apple Repair is a private industry solution that provides customers with flexible options and at the same time protects the content and the integrity of the software. Apple has set up a certification program for independent repair shops where providers can get trained and certified. Apple Repair is just one example of many where private industry is providing users with the tools to use and enjoy their products safely.

TPMs protect layers of software in devices. Licensed software is a part of most products with digital content embedded in them. The system of licensed software is a crucial component to the investment and distribution in existing products and future innovations. The benefits to consumers across a wide variety of products and services at every price point cannot be understated. Exemptions that allow circumvention of TPMs protecting embedded device software compromise the protections afforded to other licensed software, putting consumers and their personal information at risk when products malfunction. It also allows software competitors access to product codes, which is a disincentive to innovation. Fortunately, there are alternative options to address many of the concerns expressed regarding access to software. Notices to consumers about restrictions and allowable uses along with offering certified third-party repair services can protect consumers and software developers. Our members and those of other content and tech industries rely on licensed software to continue to offer

low-cost, consumer friendly products across a growing range of business models. Consumers' access to third-party repair services is important from the App Association members' perspective. But enabling wider availability of these services via a suspension of copyright protections carries with it serious risks to security, privacy, and App Association members' reliance on IP protections.

The App Association strongly discourages the FTC from pursuing new trade regulations that would create overlaps or conflicts with the mechanisms discussed above provided by the Copyright Act. The App Association notes that the FTC itself has plainly recognized that "the assertion of IP rights does not appear to be a significant impediment to independent repair."<sup>3</sup> In addition, the Copyright Office has stated that "faithful application of existing copyright law doctrines should provide no barrier to legitimate uses" such as those related to independent repair.<sup>4</sup> Therefore any FTC action on the petitions at issue must preserve and support the anti-circumvention and anti-trafficking prohibitions (and the triennial rulemaking process for exemptions) provided by Section 1201 have widely benefitted the American public and economy.

It is also important that the FTC consider the current state of the "right to repair" in the United States under existing frameworks, and the impact of market effects. As discussed above, market pressures have resulted in voluntary action from numerous companies to provide the ability for end users to repair products while protecting intellectual property and end user safety. These developments speak to the necessity of the petitions at issue and the potential for FTC action and demonstrate that voluntary efforts driven by market demand have (and continue to) support the mission of the FTC.

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<sup>3</sup> Federal Trade Commission, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, 26 (May 2021), [https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-reportcongress-repair-restrictions/nixing the fix report final 5521 630pm-508 002.pdf](https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-reportcongress-repair-restrictions/nixing%20the%20fix%20report%20final%205521%20630pm-508%20002.pdf).

<sup>4</sup> U.S. Copyright Office, *Software-Enabled Consumer Products: A Report of the Register of Copyrights* (2016) at ii, <https://www.copyright.gov/policy/software/software-full-report.pdf>.

In conclusion, the App Association urges the Federal Trade Commission to consider the unique needs of small businesses in the app economy as it considers the petitions at issue. Before granting the petition at issue, the FTC should carefully consider the state of U.S. copyright law in coordination with the Copyright Office and impacts stakeholders such as the App Association's membership.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. Scarpelli', written in a cursive style.

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