



DATE: March 27, 2023  
TO: Chair Zack Stephenson and Members of the House Commerce and Finance and Policy Committee  
FROM: Andrew O'Connor  
RE: HF 2680 – Oppose

The Entertainment Software Association (ESA) respectfully opposes House File 2680, specifically the provisions regarding “Digital Fair Repair” and the Age-Appropriate Design Code. 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.

### **“Digital Fair Repair”**

ESA respectfully opposes the “Digital Fair Repair” provisions in HF 2680 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.

### **“Age-Appropriate Design Code”**

The Entertainment Software Association (ESA), the trade association representing video game publishers and console makers, respectfully opposes the provisions in House File 2680 regarding the Minnesota Age Appropriate Design Code Act.

The video game industry has long supported efforts and complied with laws to keep all gamers—specifically, with respect to children and teens—safe online. ESA and its members have been at the forefront of promoting privacy and safety of consumers, including minors, for nearly three decades. For nearly 30 years, the Entertainment Software Rating Board (ESRB), a non-profit founded by ESA has independently assigned age ratings for video games and mobile apps; educated parents about age ratings, parental controls, and privacy-related topics; enforced industry-adopted ad guidelines; and worked with major retailers to help children access appropriate content. In addition, each video game console produced by our members has robust parental controls to empower parents (and all players) to create the online experience most suitable for their child. These controls include choices to limit screen time, spending, and communication features, among others. These member companies also provide mobile apps and other educational resources to make it easy for parents to learn about and set controls.

The provisions in HF 2680 related to the AADC- is not the proper vehicle for creating safe, productive online environments for the following reasons: 1) the bill’s core components mirrors a California law that is currently being challenged as unconstitutional in federal court; 2) portions of the bill set forth unclear, unworkable legal standards for which it will be difficult for companies to comply; and 3) both this bill and the California law trace back to the UK AADC, and there are challenges with porting over that framework into U.S. law.

#### **1. *The pending litigation***

The provisions in HF 2680 related to the AADC roughly aligns with California’s recently enacted Age Appropriate Design Code law (CA AADC), which is the subject of ongoing federal litigation – *NetChoice LLC v. Bonta*. Accordingly, we oppose any “age appropriate design” bills until the constitutional arguments are resolved in court. Those challenging the California law have cited First Amendment and other constitutional defects. In *NetChoice*, the plaintiffs allege, among other points, that the requirement to perform Data Protection Impact Assessments, also included in HF 2680, would chill protected speech by requiring businesses to identify and eliminate potentially harmful content before product launch. The complaint alleges that these requirements, coupled with other mandates in the bill, amount to a prior restraint of speech for several reasons, including that: (i) it requires businesses to promote users’ well-being as decided by the State; (ii) it requires states to enforce their moderation

policies to the State's satisfaction; and (iii) it restrains providers from serving content to users unless the provider has verified the age of each user or tailored that content to an age-appropriate level.<sup>1</sup>

## **2. *Unclear Legal Standards***

The provisions in HF 2680 related to the AADC diverges from widely adopted privacy concepts and norms in its operative provisions and definitions. The definitions section is key for determining which entities and segments of data are within scope. Unfortunately, multiple definitions set forth broad standards which fail to provide businesses clarity on their compliance obligations.

For example, the bill would include personal information if "capable of being associated with" a household. Yet, the "household data" concept has not been widely adopted in the data privacy context because privacy protections are designed to be applied to information only when it is linked to a specific individual. Under the Child Online Privacy Protection Act, the federal children's privacy law, a business is required to provide heightened privacy protections if it has "actual knowledge" the individual is a child. It is impractical to adopt a "household data" standard because a business cannot determine which individual is under 18. Further, the protections contemplated in this bill should only apply to children under 18 years old as set forth in this bill, not adults. By applying a household data concept, businesses will be forced to adopt one of two approaches to minimize risk of noncompliance. Businesses may apply the most restrictive protections to a broader audience (which is not the intent of this bill); or alternatively, businesses would need to collect additional information from consumers to determine to whom additional protections should apply. Privacy regulations should not adopt a standard that would require businesses to collect additional information from consumers to determine whether additional protections apply.

## **3. *There are key process differences with absorbing aspects of the UK AADC into U.S. law***

Both the California law and the provisions in HF 2680 related to the AADC track key features of the UK AADC. That statutory code is intended to apply principles of the UK GDPR to children/teen data and is enforced by the Information Commissioner's Office (ICO), to date mostly through audits and largely in the capacity of a regulator. In contrast, here, both HF 2680 and the California law would be enforced by the states' respective AGs. Passing a law to be enforced by an AG, which is law enforcement authority, is a different undertaking with different incentives and purposes.

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

Sincerely,

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

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<sup>1</sup> *NetChoice LLC v. Bonta*, Case No. 5:22-cv-08861-BLF, (N.D. Cal.), motion for prelim. inj. filed Feb. 17, 2023.