

June 29th, 2015

Re: Docket No. 2014-7

Exemptions to Prohibition Against Circumvention of
Technological Measures Protecting Copyrighted Works

Dear Ms. Charlesworth,

Thank you for giving me the opportunity to take part in the hearing regarding Class 23. The following is my response to your post-hearing questions.

- 1. Please explain whether, and under what circumstances, video game publishers reissue or repackage games where the publisher or developer has previously ended support for a server that enables single-player and/or multiplayer play. Please provide illustrative examples, including an explanation of the similarities and differences between the original and reissued products and the role of technological protection measures. How frequently does this occur?**

Several games being sold today have effectively been digitally reissued and no longer have the core online multiplayer functionality available to the customer. Nintendo's *Mario Kart DS* (2005), as discussed during the public hearing, was re-released for purchase on the Nintendo Wii U on April 23rd, 2015 through their online marketplace (Nintendo eShop). The menus to access the game's multiplayer features that use the Nintendo Wi-Fi Connection, Nintendo's online multiplayer service, are fully visible within the game. However, trying to access them spits out a generic error that, when searched online, only states that the game console was not able to successfully connect to the internet. In truth, the user cannot play online because the Nintendo Wi-Fi Connection has been discontinued since May 20th, 2014. Despite this being a significant component of the game, nowhere on either Nintendo's eShop website¹ or within the Wii U's eShop listing does Nintendo acknowledge that the game's online multiplayer has been discontinued.

Saints Row 2 (2008), a major title released by the now-defunct THQ (and re-released by Deep Silver), is currently available for purchase on both Valve's Steam store, an online marketplace for video games on the PC, and Sony's PlayStation Network store, an online marketplace for PlayStation devices. Despite the game's online functionality having been discontinued on May 31st, 2014, the game continues to be sold digitally by Deep Silver through Valve and Sony, without any mention of the online multiplayer no longer being functional. In fact, on the Steam page for *Saints Row 2*, it still advertises the ability to play the game online.² Moreover, on the PlayStation Network store page, it lists that the game supports 2-12 players in

¹ https://www.nintendo.com/games/detail/nM01yT_Zfcv7o2FRYYgwFAyUO4I3zYAw

² <https://store.steampowered.com/app/9480/>

online multiplayer.³ These are pages that publishers have full and immediate access to, yet they choose not to update to reflect the changes they have made to their products. This title has also been part of several different sales and promotions organized by Deep Silver on both Steam⁴ and the PlayStation Network⁵, demonstrating that the publisher continues to issue digital copies of the title to consumers and distributors without online functionality.

The PlayStation 3 version of Epic Games and EA's *Bulletstorm* (2011) also had its online functionality discontinued on May 31st, 2014. Much like *Saints Row 2*, the publisher has made no effort to update their store page on the PlayStation Network to reflect that the title no longer has proper online multiplayer functionality.⁶

All three of the titles provided exemplify games that continue to be digitally issued by their respective publishers / manufacturers; yet, the publishers do not communicate in any capacity that core online components of those games have been discontinued. Otherwise, they are identical in nearly every way to their original issue counterparts. As was the case with the *Saints Row 2* and *Bulletstorm*, some games still explicitly list online multiplayer as game features on their respective digital store pages, even though server support has long been discontinued.

Halo 2 (2004) on the original Xbox saw its online multiplayer discontinued on April 15th, 2010. On November 11th, 2014, the game was re-released as part of a compilation called *Halo: The Master Chief Collection* for Xbox One. The compilation served to give players the opportunity to play many of the older *Halo* games at a higher resolution and better framerate. Moreover, it opened the door for fans of *Halo 2* to play the online multiplayer again, albeit on a much newer game console. While this title was well intentioned, *Halo: The Master Chief Collection* released in a functionally broken state.⁷ By all accounts, anyone who wanted to re-experience the artistry of the original *Halo 2* multiplayer simply could not. Even as of this past month, *Halo: The Master Chief Collection* continues to have bugs and glitches that were not present in the original games, despite continued efforts by Microsoft and its partners.⁸ These are issues that dramatically change how the game is played and the overall player experience. It exemplifies how repackaged games do not substitute for the original experience in any meaningful way.

Killzone (2004) for the PlayStation 2 kick-started one of Sony's largest video game franchises. It represented the company's first legitimate attempt at challenging Microsoft's

³ https://store.playstation.com/#!/en-us/games/saints-row-2/cid=UP1005-NPUB30575_00-SAINTSRW2DIGITAL

⁴ <http://www.hardcoregamer.com/2014/10/23/deep-silver-weekend-sale-hits-steam/113495/>

⁵ <http://www.playstationlifestyle.net/2015/05/26/playstation-store-sales-week-include-playstation-plus-exclusive-deals/>

⁶ https://store.playstation.com/#!/en-us/games/bulletstorm/cid=UP0006-NPUB30544_00-BOOTGAME00000001

⁷ <http://www.forbes.com/sites/insertcoin/2015/02/20/100-days-after-release-continued-mourning-for-halo-the-master-chief-collection/>

⁸ <http://www.designntrend.com/articles/53264/20150604/halo-the-master-chief-collection-update-multiplayer-halo-5-guardians-343.htm>

monolithic *Halo* franchise. *Killzone*'s online multiplayer played an incredibly important role in that regard. However, as of early 2012, server support has been discontinued. On October 23rd, 2012, Sony repackaged the game as *Killzone HD* for the PlayStation 3. The gameplay and content in *Killzone HD* is almost identical to *Killzone*. The major difference is that *Killzone HD* plays at a higher resolution and includes added audio-visual effects to make the game look sharper and sound better. Additionally, Sony chose not to include *Killzone*'s online multiplayer mode in *Killzone HD*.⁹ As a result, there is presently no way to play *Killzone*'s online multiplayer in any capacity. Even more concerning is the fact that Sony lists online multiplayer as a feature in *Killzone HD*, on the game's PlayStation Network store page.¹⁰ This is another example of publishers not properly communicating the immediate and long term state of the server support for their games; however, in this case, it is even more disingenuous because the repackaged version lists an online multiplayer mode that was deliberately cut with its release.

2. Please provide information concerning the disclaimers or other information, if any, that manufacturers provide (or have provided in the past) to alert purchasers that server support for a game may someday be discontinued.

Many older titles which featured online multiplayer functionality did not include any warning on the box or in the manual that online functionality would be removed. Electronic Arts is one of the only publishers to definitively state on the boxes of their titles, like *Madden NFL 2005*, that they could exercise the right to "retire" the game's respective online features within thirty days' notice. On the other hand, titles like *Amped 2* (2003), *MechAssault* (2002), *Halo 2*, *Animal Crossing: City Folk* (2008), *Super Smash Bros. Brawl* (2008), *Mario Kart Wii* (2008), and *SOCOM: U.S. Navy SEALs* (2002) made no such effort to make this clear to customers. Despite that, all of the following games have had their online multiplayer servers discontinued. These titles have collectively sold over 63 million copies worldwide, yet they represent only a fraction of the games that did not clearly communicate to purchasers that the online functionality could essentially be removed. The server support for those aforementioned titles, along with many more, was discontinued regardless.

In the case of many of the games released by Microsoft for the original Xbox during the early to mid-2000s, the publisher appeared to be selective about which games would and would not include a disclaimer about server support on the back of the box. For example, in order of release, from May 2004 to November 2004, Microsoft published *Rallisport Challenge 2* (2004), *Kingdom Under Fire: The Crusaders* (2004), *Outrun 2* (2004), *Halo 2*. Of the titles listed, only two of the games—*Outrun 2* and *Kingdom Under Fire: The Crusaders*—included disclaimers to the vague effect that server support may be discontinued ("Online features subject to change without notice"). This demonstrates either one of two things: Microsoft very deliberately chose which titles would include the disclaimer—and thus gave no reason for customers to believe

⁹ <http://blog.us.playstation.com/2012/09/27/killzone-hd-re-developer-interview-part-1/#comment-761471>

¹⁰ https://store.playstation.com/#/en-us/games/killzone-hd/cid=UP9000-NPUA80856_00-GKILLZONE100001

Halo 2 and *Rallisport Challenge 2* were at risk of having their server support discontinued—or they were incredibly inconsistent about their messaging to customers that all original Xbox titles were subject to this disclaimer and erroneously did not include the disclaimer in many of their bestselling games. Regardless, Microsoft, along with many other video game publishers, has done an incredibly poor job of setting consumer expectations and communicating with their user base. Ultimately, every original Xbox game with online features had their server support discontinued on April 15th, 2010.

This issue is not limited to games on older generations of video game hardware either. Nintendo's *Mario Kart 8* (2014) and *Super Smash Bros. for Wii U* (2015) are titles with substantial online multiplayer modes. Both have been released on the Nintendo Wii U, Nintendo's current video game console. Additionally, they were released after the online multiplayer for their predecessors, *Mario Kart Wii* and *Super Smash Bros. Brawl* respectively, were shut down. And like their predecessors, *Mario Kart 8* and *Super Smash Bros. for Wii U* do not communicate to the customer, or would-be buyer, that Nintendo may discontinue server support. Nintendo, the publisher of these titles, still refuses to provide any kind of disclaimer, despite having discontinued server support previously.

While some companies have included disclaimers with their games, there has been an established history of many developers and publishers releasing games without having any such warning or disclaimer at the time of purchase; however, they have, and still continue to, discontinue server support *carte blanche*.

Consumers are almost universally dependent upon gaming news outlets and fan blogs for announcements related to the discontinuation of server support. Publishers traditionally post these details on their respective customer support web pages and official forums. As an owner of several titles that have had their online multiplayer modes shut down (EA's *Battlefield 2: Modern Combat*, SEGA's *Chromehounds*, and Nintendo's *Advance Wars: Days of Ruin*, among others), I have never received any direct notice from those publishers via phone call, email, text, or any other mode of communication. My knowledge of which games have that their server support discontinued is entirely dependent on the press monitoring these support websites and forums. I can confidently say the same is true for the overwhelming number of casual and core video game players.

Please let me know if you have any questions or concerns.

Sincerely,

Parham Gholami