Submission on behalf of ESA, MPA, and RIAA
Class 6(a): Computer Programs – Preservation
Class 6(b): Video Games – Preservation

UNITED STATES COPYRIGHT OFFICE

Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

[ ] Check here if multimedia evidence is being provided in connection with this comment.

ITEM A. COMMENTER INFORMATION

The Entertainment Software Association ("ESA") is the United States trade association serving companies that publish computer and video games for video game consoles, handheld video game devices, personal computers, and the internet. It represents nearly all of the major video game publishers and major video game platform providers in the United States.

The Motion Picture Association, Inc. ("MPA") is a trade association representing some of the world's largest producers and distributors of motion pictures and other audiovisual entertainment for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the internet. The MPA's members are: Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

The Recording Industry Association of America, Inc. ("RIAA") is a nonprofit trade organization that supports and promotes the creative and financial vitality of recorded music and the people and companies that create it in the United States. RIAA's several hundred members—ranging from major American music companies with global reach to artist-owned labels and small businesses—make up the world's most vibrant and innovative music community. RIAA's members create, manufacture, and/or distribute the majority of all legitimate recorded music produced and sold in the United States. In supporting its members, RIAA works to protect the intellectual property and First Amendment rights of artists and music labels.

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ITEM B. PROPOSED CLASS ADDRESSED

Class 6(a): Computer Programs – Preservation

Class 6(b): Video Games – Preservation

ITEM C. OVERVIEW

ESA, MPA, and RIAA support legitimate, lawful preservation efforts and once again did not oppose the renewal of the existing exemptions applicable to circumvention for preservation of video games and computer programs. The motion picture, recorded music, and video game industries all participate in preservation efforts and work with selected non-profit institutions focused on preservation, including the Library of Congress, the Smithsonian, the Strong National Museum of Play, and various universities. However, the two efforts to expand the existing preservation exemptions are unjustified by the record. We therefore oppose the proposed exemptions.

First, the expanded exemptions requested by the Harvard Law School Cyberlaw Clinic on behalf of Software Preservation Network ("SPN"), and Library Copyright Alliance ("LCA") (collectively, "SPN/LCA") would permit circumvention by an undefined set of self-proclaimed libraries, archives, and museums seeking to provide off-premises access. In the case of software, SPN/LCA seeks to "eliminate the requirement [in the current exemption] that a program only be provided to one eligible user at a time."[1] In the case of video games, SPN/LCA seeks to "eliminate the requirement that the program not be distributed or made available outside of the physical premises of an eligible institution if appropriate safeguards are taken to ensure users are engaged in scholarship or other permitted uses."[2] The Copyright Office considered and rejected these proposed expansions in the prior rulemaking cycle,[3] and should do so again in this cycle.

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[1] SPN/LCA Petition (#1), Computer Programs – Preservation (Aug. 25, 2023), https://www.copyright.gov/1201/2024/petitions/proposed/New-Pet-Software-Preservation-Network-and-Library-Copyright-Alliance-1.pdf; *see also* SPN/LCA Long Comment, Class 6(a),Computer Programs – Preservation (Dec. 22, 2023), https://www.copyright.gov/1201/2024/comments/Class%206(a)%20-%20Initial%20Comments%20-%20%20Software%20Preservation%20Network%20and%20Library%20Copyright%20Alliance.pdf ("SPN/LCA Class 6(a) Long Comment").

[2] SPN/LCA Petition (#2), Video Games – Preservation (Aug. 25, 2023), https://www.copyright.gov/1201/2024/petitions/proposed/New-Pet-Software-Preservation-Network-and-Library-Copyright-Alliance-2.pdf; *see also* SPN/LCA Long Comment, Class 6(b), Video Games – Preservation (Dec. 22, 2023), https://www.copyright.gov/1201/2024/comments/Class%206(b)%20-%20Initial%20Comments%20-%20%20Software%20Preservation%20Network%20and%20Library%20Copyright%20Alliance.pdf ("SPN/LCA Class 6(b) Long Comment"). Petitions related to video game preservation were also filed by two individuals, Thomas Sullivan and Ken Austin. Sullivan's proposal is similar to the SPN/LCA proposal. *See* https://www.copyright.gov/1201/2024/petitions/proposed/New-Pet-Thomas-Sullivan.pdf (last visited Feb. 15, 2024). Neither Mr. Austin nor Mr. Sullivan submitted short or long form comments in support of their petitions.

[3] *See* SECTION 1201 RULEMAKING: EIGHTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS, 279 (2021), https://cdn.loc.gov/copyright/1201/2021/2021_Section_1201_Registers_Recommendation.pdf ("2021 Rec."); *see also* Notice of Proposed Rulemaking, 88 Fed. Reg. 72,013, 72,026 (Oct. 19, 2023), https://www.govinfo.gov/content/pkg/FR-2023-10-19/pdf/2023-22949.pdf.

Second, the petition submitted by Ken Austin ("Austin Petition") seeks a new "circumvention exemption for individual owners of video games which have DRM (digital rights management) that no longer functions due to incompatibility…with modern operating systems."[4] Neither Mr. Austin nor any other party submitted short or long form comments in support of the Austin Petition. Accordingly, any proponents of the Austin Petition have not met their burden of proof to establish that the requirements for granting an exemption have been satisfied,[5] and the Copyright Office should reject the proposed exemption at the earliest opportunity.

We incorporate by reference the separate comments of ESA opposing proposed Class 6(b), which address many of the same points, and with which we fully agree.[6]

ITEM D. TECHNOLOGICAL PROTECTION MEASURE(S) AND METHOD(S) OF CIRCUMVENTION

Petitioners seek to circumvent access controls (i) protecting non-game computer programs; (ii) protecting video games distributed as complete products in physical or downloaded formats; and (iii) on video game consoles used by eligible organizations in authorized preservation activities. As a result, the technological protection measures and methods of circumvention at issue vary dramatically.

It is important to understand that eliminating the single user and on-premises requirements from the existing exemptions would significantly expand the scope of who could perform circumvention. Although the comments at times discuss the proposed expanded exemptions as if they are available only to nonprofit libraries, archives, and museums with a mission to promote research and scholarship, and with public reading rooms in which to carry out that mission, Petitioners' proposed regulatory language would not limit the proposed off-premises exemptions to only these nonprofit institutions.[7] Absent a requirement that preservation be conducted by an organization with physical premises and a requirement that access be limited (and in the case of video games, only be provided in physical premises), any organization or person purporting to have a preservation purpose could potentially circumvent and make works available to the public for any purpose.

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[4] Austin Petition at 2 (Aug. 25, 2023), https://www.copyright.gov/1201/2024/petitions/proposed/New-Pet-Ken-Austin.pdf.

[5] 2021 Rec. at 7-8.

[6] *See* ESA Long Comments, Class 6(b), Video Games – Preservation (Feb. 20, 2024) ("ESA Comments"). While our comments focus on why it would be misguided to recommend the proposed exemption for off-premises access to video games, the proposed scope of the exemption in proposed Class 6(a) for other programs is also troubling and unprecedented. For example, motion pictures and sound recordings are often distributed in digital formats accessible via computer programs. Class 6(a) would seem to permit circumvention of access controls on such computer programs to copy and provide public access to the motion pictures and sound recordings. Such access is infringing, just as in the case of video games.

[7] *See* SPN/LCA Class 6(a) Long Comment at 2 (proposed expanded exemption would apply to an "eligible library, archives, or museum"); 37 C.F.R. § 201.40(b)(18)(iv)(E) (not limiting the definition of an "eligible" library, archives, or museum to nonprofit institutions); SPN/LCA Class 6(b) Long Comment at 2 (proposed expanded exemption would apply to an "eligible library, archives, or museum"); 37 C.F.R. § 201.40(b)(17)(iv)(E) (not limiting the definition of an "eligible" library, archives, or museum to nonprofit institutions).

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

A. SPN/LCA Petition

In the last rulemaking cycle, the Copyright Office found that SPN/LCA "had met their burden of showing that the proposed off-premises uses are likely to be fair with respect to software, but not with respect to video games."[8] In the case of software, the Copyright Office imposed two important limitations on the expanded exemption: "any off-premises distribution, display, or performance must be solely for the purposes of private study, scholarship, or research; and only one user will be able to access the preserved software at a time, and for a limited time."[9] In the case of video games, the Copyright Office did not allow the proposed exemption, expressing concern that "the exemption, as proposed, does not contain appropriately tailored restrictions to ensure that uses would be limited to bona fide teaching, research, or scholarship uses and would affect the market for the original works."[10]

The Copyright Office should reach the same conclusions in this cycle. Preservation is a desirable goal; allowing third parties to satisfy marketplace demand for works during or after periods of time in which copyright owners elect not to commercially exploit their works is not. The provision of unlimited, unauthorized access is contrary to copyright law's fundamental principles because it would strip copyright owners of the ability to decide when, if, and how, to exercise their exclusive rights.[11]

This is especially true of video games, which are considered audiovisual works and are primarily played for entertainment purposes.[12] As such, they are distinct from many other types of software-based works. While there may be a limited potential future market for older word processing programs, architectural design software, or operating systems, there is substantial evidence that older "retro" and legacy video games are in increasing demand and are available in the marketplace at consumer-friendly price points.[13]

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[8] 2021 Rec. at 276.

[9] *Id.* at 279.

[10] *Id.* at 279.

[11] "The owner of the copyright, if [it] pleases, may refrain from vending or licensing and content [itself] with simply exercising the right to exclude others from using [its] property." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). Indeed, "nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright." *Stewart v. Abend*, 495 U.S. 207, 228–29 (1990).

[12] *See* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 807.7(A) (1) (3d ed. 2021), *available at* https://www.copyright.gov/comp3/chap800/ch800-performing-arts.pdf ("Generally, a videogame contains two major components: the audiovisual material and the computer program that runs the game.").

[13] *See* ESA Comments at 6-7, *see also* Michael Akuchie & Kyle Bell, *Best Retro Game Consoles in* 2024, GAMERANT.COM (Jan. 19, 2024), https://gamerant.com/best-retro-game-consoles/; Katherine Daly, *Konami Brings Back Retro Games In 2024,* MXDWN.COM (Jan. 13, 2024), https://games.mxdwn.com/news/konami-brings-back-retro-games-in-2024/; *Retro Gaming: Unmasking the Nostalgic Charm in 2023*, PLARIUM.COM (Dec. 27, 2023), https://plarium.com/en/blog/the-rise-in-popularity-of-retro-games/ (analysis of top retro games available on modern consoles); Brian Ashcraft, *Game Consoles and Famous Franchises Get Spruced-Up*, THE JAPAN TIMES (Feb. 7, 2021), https://www.japantimes.co.jp/life/2021/02/07/digital/switch-mario-nioh/ (explaining that legacy games are often remastered to take advantage of the graphic capabilities of new consoles); Jenni Lada, *Mega Man Switch Sale*

As the separately-filed ESA Comments also address, the proposals are not focused on access controls that impede preservation of works for researchers, teachers and future generations.[14] The existing exemptions address those needs. In contrast, the proposed expansions instead focus on allowing the exemptions' beneficiaries to use works without limitation and without compensation to copyright owners, including as a means to generate publicity for the preservationists and to raise money for their own parochial interests.

To the extent that the proposed expansion related to video games would permit circumvention of access controls on video game consoles other than by responsible organizations under tightly controlled conditions, it would also increase the threat that consoles could be used to play unauthorized copies of games or make unauthorized copies of other kinds of media available on consoles, including motion pictures and sound recordings and, as a result, undermine the value of copyrighted works.

The proposals to allow off-site access have little to do with traditional notions of preservation and are not limited to nonprofit libraries, archives and museums with physical premises. While the Copyright Office has previously concluded that preservation is a legitimate or "favored" activity within certain parameters, the proposed language lacks such parameters and enables copying for the sake of copying to obtain works in formats that enable institutions, and perhaps individuals, to reproduce and disseminate works that remain under copyright, without permission from copyright owners. Using the word "preservation" in the submission does not *ipso facto* render the activities at issue either lawful or desirable.

The proposed classes would apparently allow a physical *and* a *virtual* "library," "museum," or "archive" to circumvent access controls on all computer programs that are not at the time being commercially exploited, to create unauthorized copies of those programs and potentially all materials rendered accessible through them in a collection, and to utilize those copies to provide authorized users (both in-person and remotely) with the ability to use the works for free, regardless of whether they do so for entertainment purposes or for academic research or teaching.[15]

Discounts Legacy Collections, SILICONERA (Feb. 6, 2021) https://www.siliconera.com/mega-man-switch-sale-discounts-legacy-collections/ (an example of a legacy game collection available in the marketplace at a low price); Will Daniel, *Activision Blizzard Spikes 12% As The Gaming Giant Gives Strong Guidance Following A Surge In Holiday Sales*, BUSINESSINSIDER.COM (Feb. 5, 2021), https://markets.businessinsider.com/news/stocks/activision-blizzard-stock-spikes-q4-earnings-report-guidance-sales-2021-2-1030048965 ("The company's Blizzard unit also outperformed in 2020, buoyed by the now 17-year-old "World of Warcraft" MMORPG. The game saw strong engagement, increasing net bookings by 40% year-over-year in large part due to the continued success of Classic-a retro version of the now nearly decades-old game").

[14] ESA Comments at 3-5.

[15] *See* ESA Comments at 5, recognizing that the proposed "primary purpose" test would permit 49% usage for recreational purposes; *see also* Tripp Ceyssens Comment (Dec. 26, 2023), https://www.copyright.gov/1201/2024/comments/Class%206(b)%20-%20Initial%20Comments%20-%20Tripp%20Ceyssens.pdf (supporting the proposed exemption "for the purposes of historical preservation and public enjoyment" and explaining that the broadened exemption would "allow the general population to experience the history of games without massive inconveniences.").

Moreover, given the lack of definitions for the terms "library, museum or archive," a potentially broader class of users could be claiming such a status. The proposed language does not on its face limit the covered libraries, museums, and archives to nonprofit institutions or those with a physical presence, and the requirement that preservation have no "commercial advantage" does not clearly prevent institutions from engaging in uses of preserved works that are arguably noncommercial but nonetheless generate revenue by making organizations eligible for grant funding, providing publicity, or promoting donations and memberships. The proposal for unlimited remote public access is more akin to space- and format-shifting services of the kind rejected in prior proceedings than to true preservation uses.[16]

The fair use analysis is crucial here, as the Copyright Office already concluded that the proposed Class 6(b) exemption is not targeting conduct allowed under Section 108.[17] Petitioners apparently seek to create new copies for which they never paid. In any event, they propose to use the copies obtained through circumvention in ways in which lawful copies could never have been used. The fact that one library acquired one copy of a video game 20 years ago does not entitle the entire world in perpetuity to use that work without the copyright owner's permission and without compensating the copyright owner.

Moreover, productivity software is quite distinct from video games, which are far more expressive and primarily played for entertainment purposes. Not only that, copyright owners have the right to engage in a distribution strategy whereby all video games are not commercially available at all times to avoid market dilution. Enabling exemption beneficiaries to create internet arcades featuring access to playable video games, simply because those games were not being commercially exploited at the time of the circumvention, would constitute a significant and troublesome shift in the scope of permitted circumvention.

As discussed in the ESA Comments, the Section 107 factors weigh against a conclusion that the proposed conduct is generally lawful.

- ***First factor***: As the Supreme Court in *Warhol* made clear, "the first fair use factor… focuses on whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference must

[16] *See* 85 Fed. Reg. 65,293, 65,305, https://www.govinfo.gov/content/pkg/FR-2020-10-15/pdf/2020-22893.pdf ("[I]n the 2006, 2012, 2015, and 2018 rulemakings, the Librarian rejected proposed exemptions for space-shifting or format-shifting, finding that the proponents had failed to establish under applicable law that space-shifting is a noninfringing use.").

[17] 2021 Rec. at 275-76. In 2018, the Joint Creators and Copyright Owners provided in their opposition comments an overview of the Copyright Office's treatment of preservation/obsolescence issues throughout prior rulemaking cycles. *See* Joint Creators and Copyright Owners, Class 9 Opposition (Feb. 12, 2018), https://cdn.loc.gov/copyright/1201/2018/comments-021218/class9/Class_09_Opp'n_Joint_Creators_II.pdf. We incorporate that overview here by reference. In short, the Copyright Office initially insisted on a focus upon conduct covered by Section 108, but then in 2015 and 2018, the Copyright Office strayed from this approach to apply a fair-use-oriented approach that remains untested in judicial precedents or blessed by legislative action. Predictably, that has led us to the type of broad proposals put forward during this current proceeding. Section 108 should remain central to the analysis, and this rulemaking proceeding should not provide a means for Petitioners to avoid its application.

be weighed against other considerations, like commercialism."[18] If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying."[19] The use sought in the proposed exemption is both commercial and non-transformative: the exemption beneficiaries would simply create new copies of works and provide access to them to authorized users who would view them in their entirety, all without payment to copyright owners. That makes the copies perfect substitutes for the underlying works, something the *Warhol* Court disfavored.[20] This renders the copying commercial even if consumers do not pay nonprofit institutions for access or use because it supplants marketplace transactions.[21] And even assuming *arguendo* that the use could be considered somewhat transformative, *Warhol* and other cases have made clear that such fact is not determinative.[22] Here, the use's commercial and competitive purpose would outweigh its transformative character.

- ***Second factor***: The works at issue would include thousands of highly creative video games of the kind at the heart of the Copyright Act's objective to protect expressive works, as well as other kinds of creative works accessible with productivity software or playable on game consoles. These works are not functional.

- ***Third factor***: The proposed reproductions/public performances/distributions would be of entire works. Although Petitioners would have the Copyright Office ignore this fact as unimportant, this factor remains a key part of the fair use analysis—especially when the use contemplated is substitutional.[23]

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[18] *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 531-36, 143 S. Ct. 1258, 1276-79, 215 L. Ed. 2d 473 (2023).

[19] *See Warhol* at 532-33 ("In sum, the first fair use factor considers whether the use of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of difference must be balanced against the commercial nature of the use.").

[20] *Id.* 531-36.

[21] The copying remains commercial even if consumers do not pay nonprofit institutions for access or use. *See Hachette Book Group, Inc. v. Internet Archive*, 664 F. Supp. 3d 370, 383-84 (S.D.N.Y. 2023) (on appeal) (finding that Internet Archive's unauthorized dissemination of eBooks was commercial in nature); *Wall Data Inc. v. Los Angeles Cty. Sheriff's Dep't*, 447 F.3d 769, 781–82 (9th Cir. 2006) ("We believe that 'widespread use' of hard drive imaging in excess of one's licenses could seriously impact the market for Wall Data's product."); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001), *as amended* (Apr. 3, 2001) ("Having digital downloads available for free on the Napster system necessarily harms the copyright holders' attempts to charge for the same downloads.").

[22] *See Warhol* at 532-33. *See also Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 179 (2d Cir. 2018) (commercial use that was "modestly" transformative did not render the use lawful).

[23] *See Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 268 (4th Cir. 2019) ("[U]nless the use is transformative, the use of a copyrighted work in its entirety will normally weigh against a finding of fair use.").

- ***Fourth factor***: In the 2021 rulemaking cycle, the Copyright Office found that the fourth factor weighed against fair use because "there is a substantial market for legacy video games" and "the exemption as proposed does not include appropriate safeguards to prevent users from further distributing or making entertainment uses of video games."[24] While SPN/LCA argues that their current proposal has addressed this concern, as the ESA Comments point out, the proposed exemption does not actually require such safeguards, and thus provides illusory protection.[25] Moreover, the proposed exemption would negatively impact existing and potential markets for the works: more than 300,000 institutions could now provide free or reduced-cost access to video games and other creative works using methods of digital dissemination.[26] The proposal's limitation to software titles not commercially available at the time of circumvention should not alter this analysis.[27] There is a vibrant market for retro games, legacy games, and reissues, which ESA members and others actively embrace, as explained in detail in the ESA Comments. And copyright owners of motion pictures and sound recordings regularly make their creative works available, even as game software that can be used to access them comes and goes.[28] Congress intended, and the courts have held, that the copyright owner has the right to determine when, if, or how to reissue their works during the term of copyright.[29]

The Copyright Office's prior considerations of space- and format-shifting proposals are also highly instructive.[30] Indeed, in the proposed expansion, the end users need not even own copies of the video games to gain access to the games that would be reproduced. The libraries may own or lawfully possess copies, and then let others remotely enjoy them. As the Copyright Office has repeatedly concluded, this proceeding was not created to "break new ground on the scope of fair use."[31] By proposing extremely broad exemptions, Petitioners have ignored this cautionary instruction.

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[24] 2021 Rec. at 275.

[25] ESA Comments at 13-14.

[26] LCA states that its members alone constitute "over 300,000 information professionals and thousands of libraries of all kinds throughout the United States and Canada." SPN/LCA Class 6(b) Long Comment at 1.

[27] *See Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000) ("Even an author who had disavowed any intention to publish his work during his lifetime [is] entitled to protection of his copyright . . . because he has the right to change his mind.").

[28] We reiterate that the existing exemption for computer program preservation should not be read to allow for unauthorized uses of motion pictures and sound recordings. *See* note 6, *supra*.

[29] *See* cases cited in note 11, *supra*.

[30] *See, e.g.*, 2018 Rec. at 120-23 (discussing prior analyses of Section 107 factors).

[31] SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS, 109 (2015), https://cdn.loc.gov/copyright/1201/2015/registers-recommendation.pdf.

Neither have Petitioners established that access controls are the cause of their purported problems. Their comments instead focus on demand for remote access to copyrighted works.[32] But a researcher's unwillingness to travel to a library is an impediment unrelated to access controls. Petitioners' proposal also arises out of additional choices that institutions make having nothing to do with access control – for example, a university's decision to provide little or no classroom space within libraries, thereby rendering it difficult for on-premises instruction (not preservation) to occur.[33]

A balancing of Petitioners' identified concerns against the potential market harm to copyright owners weighs heavily against adopting the proposed exemptions. In particular, any expansion of the video games preservation exemption to allow additional organizations to circumvent access controls on video game consoles would greatly exacerbate this harm. Those access controls are critical to preserving the secure ecosystems that authenticate legitimate copies of video games and enable streaming and downloading of other types of entertainment content, including works owned by RIAA and MPA members.

B. Austin Petition

As explained in the ESA Comments, permitting circumvention of TPMs used to protect video games would run the risk of legitimizing the infringing distribution of copyrighted games.[34] Moreover, as no party submitted comments or provided any evidence in support of the Austin Petition, the burden of proof to establish the requirements for granting that exemption has not been satisfied.[35]

DOCUMENTARY EVIDENCE

We have included hyperlinks to webpages/documents within the body of this document. We are not submitting any other documentary evidence.

Respectfully submitted:

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[32] SPN/LCA Class 6(b) Long Comment at 6-8.

[33] *Id.* at 7 ("Having to do everything on-premises is also constraining in terms of physical space and staff bandwidth.").

[34] ESA Comments at 14.

[35] 2021 Rec. at 7-8.

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