



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

Entertainment Software Association

Gina M. Vetere
Senior Vice President & General Counsel
Bijou I. Mgbojikwe
Senior Counsel, Policy
601 Massachusetts Avenue, NW
Washington, DC 20001
Telephone: (202) 223-2400
Email: bijou@theesa.com

Represented by

Steven R. Englund
Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
Telephone: (202) 639-6000
Email: senglund@jenner.com

These comments are submitted by the Entertainment Software Association (“ESA”), the U.S. trade association representing the video game industry. ESA’s member companies are the innovators, creators, publishers and business leaders that are reimagining entertainment and transforming how we interact, learn, connect and play.¹

Video games are America’s favorite pastime, with more than 212 million Americans playing video games regularly.² The video game industry is also one of America’s fastest-growing industries, and makes major contributions to the U.S. economy. The U.S. video game industry generated \$56.6 billion in revenue during 2022³ and directly or indirectly supported more than 428,000 jobs.⁴

¹ A list of ESA’s member companies is available at <https://www.theesa.com/about-esa/> (last accessed Feb. 19, 2024).

² See Entertainment Software Association, Video Games Remain America’s Favorite Pastime With More Than 212 Million Americans Playing Regularly (July 10, 2023), <https://www.theesa.com/news/video-games-remain-americas-favorite-pastime-with-more-than-212-million-americans-playing-regularly/>; Entertainment Software Association, 2023 Essential Facts About the U.S. Video Game Industry 2 (July 2023), https://www.theesa.com/wp-content/uploads/2023/07/ESA_2023_Essential_Facts_FINAL_07092023.pdf (“2023 ESA Essential Facts”).

³ *Id.* at 9.

⁴ Entertainment Software Association, Impact of the Video Game Industry, <https://www.theesa.com/video-game-impact-map/> (last accessed Feb. 19, 2024).

Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office website and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

Major new game titles are released nearly every week.⁵ And video games, like other types of commercially- and culturally-significant creative works, are also regularly reintroduced or reimagined. In addition, the industry has shown that it will continue to innovate and be a leader on the frontiers of new technologies through its ongoing research and development bringing gamers developments such as voice recognition, portability, customizable characters, augmented and virtual reality, and use of artificial intelligence algorithms to create more immersive and engaging games.

ESA and its member companies are committed to, and actively support, serious professional efforts to preserve video games and recognize the industry’s creative contributions under circumstances that do not jeopardize game companies’ rights under copyright law. For example, ESA members regularly donate game copies and gaming hardware to preservation organizations and support museum exhibitions featuring games.⁶ However, the industry’s innovation and economic activity depends on strong copyright protection for the software and other creative works that are its lifeblood. Thus, ESA member companies have a strong interest in maintaining effective copyright protection, including protection against circumvention of technologies that control access to copyrighted video game software, where such circumvention is undertaken in circumstances that would lead to the unauthorized public exploitation of games.

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 6(b) Video Games — Preservation. These comments do not address non-game software (proposed Class 6(a)).⁷

ITEM C. OVERVIEW

As the Office’s Notice of Proposed Rulemaking (“NPRM”)⁸ in this proceeding recognizes, Class 6(b) addresses focused issues that, in the main, the Office “has previously considered and rejected.”⁹ Specifically, the Software Preservation Network (“SPN”) and Library Copyright Alliance (“LCA”)¹⁰ seek to broaden the video game preservation exemption in 37 C.F.R. § 201.40(b)(17)(ii) (which the Office has already said it intends to recommend renewing¹¹) by removing the current requirement that preserved games not be “distributed or

⁵ See Gabe Gurwin, Every Game Released In 2023, GameSpot (Jan. 3, 2024), <https://www.gamespot.com/articles/2023-upcoming-games-release-schedule/1100-6508202/>.

⁶ As just one example, Electronic Arts recently supported use of *Battlefield 1* in a World War I exhibition at the Notre Dame de Lorette in Souchez, France (June 2023-January 2024) and War and Peace Museum in Novion-Porcien, France (April-December 2024) and use of *SimCity 2000* in the “Game Society” exhibition at the National Museum of Modern and Contemporary Art in Seoul, Korea (May-September 2023).

⁷ ESA addresses Class 6(a) in the joint comment it is filing with the Motion Picture Association and the Recording Industry Association of America. ESA notes that video games and productivity software embody very different types of authorship, are commercialized in separate markets, are used in very different ways, and raise significantly different preservation and access issues. The Office’s analysis should recognize the distinct issues each raises.

⁸ 88 Fed. Reg. 72013, 72025-26 (Oct. 19, 2023).

⁹ *Id.* at 72026.

¹⁰ Thomas Sullivan filed a petition in this proceeding concerning the topic addressed by SPN/LCA, but did not provide a supporting initial comment. Because SPN/LCA provided detailed comments, while Mr. Sullivan’s petition adds nothing to the record, these comments treat the proposal as SPN/LCA’s.

¹¹ 88 Fed. Reg. at 72023.

made available outside of the physical premises of the eligible library, archives, or museum.”¹² SPN/LCA sought to eliminate that requirement in the last Section 1201 rulemaking proceeding, and the Register recommended against it, because there was insufficient assurance “that uses would be limited to bona fide teaching, research, or scholarship uses and would [not] affect the market for the original works.”¹³

The Office likewise rejected a different proposal for remote access to preserved games in the 2018 triennial proceeding. Then, the Museum of Art and Digital Entertainment (“MADE”) proposed allowing an ill-defined group of “affiliate archivists” to circumvent technological protection measures under the auspices of libraries, archives or museums. While that proposal was more limited than what SPN and LCA propose here, since the affiliate archivists were at least ostensibly to be involved in preservation efforts rather than merely being users of preserved games, the Register found that she “cannot agree that the use of affiliate archivists, as contemplated by MADE, is likely to constitute a fair use.”¹⁴ There have been no developments in the last six years that would justify eliminating the on-premises limitation at this time.

To be sure, SPN/LCA has now proposed additional regulatory language authorizing “electronic distribution, display, or performance” of preserved games outside the physical premises of the organization involved:

only for a limited time and after the eligible institution acts to ensure that users seeking off-premises access to works are doing so primarily for the purposes of private study, scholarship, teaching, or research by: 1) specifically determining that the user’s interest is private study, scholarship, teaching, or research, 2) instituting access restrictions appropriate to the nature of the use and the material, and 3) notifying users that they are receiving access to copyrighted material subject to adherence with applicable laws.¹⁵

However, these limitations are illusory, and the breadth of use they would enable is not remotely justified by the initial comments filed in this proceeding. For example:

- SPN/LCA promise that “[e]mulated games would not be plastered on the homepage of cultural institutions’ websites,”¹⁶ but the proposed regulation does not say that. As described further below, one self-described archive makes its emulated games readily accessible.¹⁷

¹² 37 C.F.R. § 201.40(b)(17)(ii); Comments of the Software Preservation Network and Library Copyright Alliance at 2 (proposing revised language for Section 201.40(b)(17)(ii)). It does not appear that SPN/LCA propose to delete the on-premises limitation in 37 C.F.R. § 201.40(b)(17)(i)(B). Because the proponents have not made a case for deleting the on-premises limitation in 37 C.F.R. § 201.40(b)(17)(i)(B), it would be improper to make such a change.

¹³ U.S. Copyright Office, Section 1201 Rulemaking: Eighth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention at 279 (Oct. 2021) (“2021 Register’s Recommendation”).

¹⁴ U.S. Copyright Office, Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention at 271-74 (Oct. 2018) (“2018 Register’s Recommendation”).

¹⁵ SPN/LCA Comments at 2.

¹⁶ SPN/LCA Comments at 18.

¹⁷ See, e.g., Classic PC Games, Internet Archive, <https://archive.org/details/classicpcgames> (last accessed Feb. 19, 2024).

- While the SPN/LCA comments say that “[w]e’re not giving you a copy of it to add to your collection”¹⁸ and are focused on emulation as a technique for remote access,¹⁹ the proposal would allow “distribution” of copies to remote users.
- Unlike the software preservation exemption in 37 C.F.R. § 201.40(b)(18)(i) on which SPN/LCA’s proposal is based, access could be provided to more than “one user at a time.”²⁰
- While access is to be given “only for a limited time,” and SPN/LCA gives the example of “thirty minutes,”²¹ a time that is limited nonetheless can be long,²² and the SPN/LCA comments address time limitations in permissive terms.²³
- There is no requirement of user verification, or even a requirement for a human interaction before granting access.²⁴ It would seem that an online user’s clicking a box affirming an interest in “private study, scholarship, teaching, or research” would suffice under the proposed regulation. SPN/LCA specifically contemplates that the notice specified by the proposed regulation could be given by an online transaction, such as through “pop-ups” or a “clickwrap” agreement.²⁵
- To the extent that SPN/LCA envisions a human interaction at all, the idea seems to be that remote users would be much less supervised by librarians than on-premises users are, since vastly increased access, including by large numbers of students for “a class discussion or assignment,”²⁶ seems to be the goal of the proposal, while SPN/LCA bemoan the limited resources and thinly-stretched staff of their constituents.²⁷

¹⁸ SPN/LCA Comments at 18 (quoting The Strong Museum’s Andrew Borman).

¹⁹ *See id.* at 5, 7-11, 13-14, 18-20.

²⁰ 37 C.F.R. § 201.40(b)(18)(i).

²¹ SPN/LCA Comments at 3, 14.

²² *Eldred v. Ashcroft*, 537 U.S. 186, 196-208 (2003) (copyright term a “limited time” within the meaning of the copyright clause of the constitution).

²³ SPN/LCA Comments at 4 (restrictions “potentially” include “time-bounded access”), 17 (“Example access restrictions *could* include time-bounded access” (emphasis added)).

²⁴ See 2021 Register’s Recommendation at 272 (“The use of the preserved video games for entertainment purposes seems particularly likely given proponents’ unwillingness to impose user verification requirements or other measures that would make the video games more likely to be used solely for education or research purposes.”).

²⁵ SPN/LCA Comments at 17.

²⁶ *Id.*; *see also id.* at 3 (describing possible use of *Duck Hunt* in undergraduate class projects), 6 (referring to “syllabi that feature vintage games”), 7 (referring to “courses being too large to fit into the room”), 7-8 (expressing desire for “professors of video game courses” to provide students access to desired games), 9 (suggesting that games could be used for teaching “in fields like English, History, and Computer Science”), 14 (referring to access “for a class project”), 16-17 (assignment of games by professors), 17 (access by “students in game studies courses”).

²⁷ *See id.* at 7 (staff capacity insufficient to cover a large number of in-person visits; remote access would “remove a meaningful burden from librarians and preservationists”), 13 (“bandwidth at cultural institutions” a “natural constraint[] on the prevalence of remote access”).

- Beneficiaries of the exemption would have effectively unlimited discretion to determine what access restrictions might be “appropriate.”²⁸
- In addition to use for “scholarship, teaching, or research,” the proposed regulation permits use for “private study.” That term is not explained or justified in SPN/LCA’s comments, but to the extent private study is different from “scholarship, teaching, or research,” it might be understood as permitting any personal use of the games involved.
- The proposed regulation does not even set out to ensure that preserved games would “be used solely for education or research purposes” as the Register contemplated in 2021,²⁹ but instead includes a primary purpose test, expressly approving 49% usage for recreational purposes.

In short, the proposed regulation is a fig leaf obscuring the desire of SPN/LCA to have as much flexibility in granting remote access as librarians would have had under SPN/LCA’s 2021 proposal that the Register found wanting.³⁰ The proposed regulation would ensure that “a significant use of the works would be for the entertainment purposes for which the works were originally created.”³¹ It does not contain the kind of “appropriate safeguards to prevent users from further distributing or making entertainment uses of video games” that the Register expressed openness to considering in 2021.³²

The constituents of SPN/LCA may be well-intentioned professionals who only seek to advance legitimate research and educational purposes, but what matters is what the regulation says, because that regulation will be available to every qualifying organization, and not just the constituents of SPN/LCA. Thus, as in the 2021 proceeding, analysis of the SPN/LCA proposal must take into account the full scope of usage permitted by the proposed regulation, including the possibility that the proposal would transform the exemption from one directed at “preserving games in playable condition to enable research and study”³³ to an exemption that would permit unauthorized persons to provide an online arcade available to the public. Taking such usage into account leads to the same conclusion as in the 2021 proceeding – that the use that would be enabled by the broader exemption is not a fair use.³⁴

Enabling widespread remote access to preserved games with minimal supervision would present a serious risk to an important market. Probably more so even than at the time of the last

²⁸ *Id.* at 4 (restrictions “*potentially* also include[] technological controls, such as download protection, and time-bounded access or scheduled appointments” (emphasis added)), 17 (“Example access restrictions *could* include time-bounded access and technological controls” (emphasis added)).

²⁹ See 2021 Register’s Recommendation at 272.

³⁰ *Id.* at 275-76.

³¹ *Id.* at 272.

³² See 2021 Register’s Recommendation at 275.

³³ U.S. Copyright Office, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention at 342 (Oct. 2015) (“2015 Register’s Recommendation”).

³⁴ See 2021 Register’s Recommendation at 272-76.

proceeding, there is a vibrant and growing market for authorized versions of classic games that could be jeopardized by the broad exemption proposed here. Here are just a few examples:

- The Xbox Game Pass provides access to a variety of classic games.³⁵ Microsoft also has made thousands of older titles available by offering backwards-compatibility through its Xbox consoles.³⁶
- Nintendo Switch Online members can access a large library of classic games originally released for NES, Game Boy, Nintendo 64 and SEGA Genesis consoles.³⁷ Nintendo also offers packages of classic games, like SEGA Genesis Classics.³⁸
- Sony’s PlayStation Plus offers subscribers access to hundreds of games in its Classics Catalog.³⁹ These include regular introductions of PS5 ports of games originally released for earlier PlayStation consoles.⁴⁰
- In honor of its 50th anniversary, Atari released *Atari 50: The Anniversary Celebration*, an interactive journey through 50 years of video game history, including more than 90 classic games.⁴¹ Atari Flashback Classics bring numerous classic games to modern consoles.⁴²
- Antstream Arcade offers access to over 1300 licensed classic games.⁴³
- Individual titles are regularly re-released on new consoles by a variety of video game publishers. Commentators observed that “2023 stood out as a particularly strong and

³⁵ See Xbox Game Pass games, <https://www.xbox.com/en-US/xbox-game-pass/games> (last accessed Feb. 19, 2024); Dale Bashir, 10 Awesome Retro Games to Check Out on Microsoft’s Game Pass Service, IGN (Aug. 21, 2023), <https://sea.ign.com/xbox-game-pass/204495/news/10-awesome-retro-games-to-check-out-on-microsofts-game-pass-service>.

³⁶ Bring Your Favorites with You: Xbox Backward Compatible Games Library, <https://www.xbox.com/en-US/games/backward-compatibility> (last accessed Feb. 19, 2024).

³⁷ Classic Games, <https://www.nintendo.com/us/switch/online/nintendo-switch-online/classic-games/> (last accessed Feb. 19, 2024).

³⁸ See, e.g., SEGA Genesis Classics, <https://www.nintendo.com/us/store/products/sega-genesis-classics-switch/> (last accessed Feb. 19, 2024).

³⁹ PlayStation Plus Games, <https://www.playstation.com/en-us/ps-plus/games/> (last accessed Feb. 19, 2024).

⁴⁰ See, e.g., PlayStation Plus Game Catalog Additions for November 2023 Revealed (Nov. 15, 2023), <https://www.ign.com/articles/playstation-plus-game-catalog-additions-for-november-2023-revealed>.

⁴¹ Atari 50: the Anniversary Celebration, <https://atari.com/products/atari-50th-the-anniversary-celebration> (last accessed Feb. 19, 2024).

⁴² See, e.g., Atari Classics, <https://atari.com/collections/games-atari-classics> (last accessed Feb. 19, 2024).

⁴³ See Antstream Arcade, <https://www.antstream.com/> (last accessed Feb. 19, 2024); Microsoft, Antstream Arcade, <https://www.xbox.com/en-US/games/store/antstream-arcade/9N0BXMRL9X66> (last accessed Feb. 19, 2024); Matt Gardner, Retro Games Now Free to Play, Thanks to Antstream Arcade, Forbes (Feb. 4, 2021), <https://www.forbes.com/sites/mattgardner1/2021/02/04/retro-games-now-free-to-play-thanks-to-antstream-arcade>.

noteworthy year for video game remakes.”⁴⁴ Release announcements promise that 2024 will be another strong year.⁴⁵

The copyrights in classic games are valuable intellectual property, in many cases representing the creative efforts of hundreds of people and millions of dollars in investment. As the examples above clearly show, those copyrights can remain valuable for 50 years or more, because there is a substantial market for classic games going back to the early years of the medium. Game companies regularly choose when to release, withdraw, port to new consoles, or otherwise reissue their copyrighted works. For example, video game companies may desire to give a title a rest until nostalgia would help support renewed demand. Or a copyright owner may choose to suspend commercialization of an older game in a series to help drive demand for a successor to that game. Such release cycles have long been common in the markets for motion pictures, television programming and sound recordings, which likewise remain valuable and commercialized for decades after their original release. Even if a particular video game format is no longer supported, it does not mean that games originally issued in that format are obsolete, because games are commonly rereleased in updated formats. Determining whether, when and how to commercialize their valuable copyrights is the prerogative of the copyright owner.⁴⁶

SPN’s study of video game availability does not meaningfully contradict the facts stated above, because the study simply purports to measure the number of sampled classic game titles that researchers were able to find in current release during a short period in early 2023.⁴⁷ That many classic titles are not in current release at a particular moment in time does not mean that those titles are “lost,”⁴⁸ “gone”⁴⁹ or “critically endangered”⁵⁰ as commenters said. Nor does it mean that they “have reached the end of their commercial life” as SPN/LCA suggest.⁵¹ It simply means that the copyright owner made a business decision not to put those titles on the market at that time. That 13% of all the video game titles released from 1960 through 2009 were found to

⁴⁴ Alex Perry, The best video game remakes of 2023, Mashable (Dec. 13, 2023), <https://mashable.com/article/best-video-game-remakes-2023>; see also, e.g., Mark Serrels, In 2023 All the Best Games Are Old, CNET (May 7, 2023), <https://www.cnet.com/tech/gaming/in-2023-all-the-best-games-are-old/>; Ty Richardson, The 10 BEST Video Game Remakes And Remasters Of 2023, WatchMojo (“Every year gamers get to re-experience more and more of their favorite classic games with a modern touch!”), <https://www.watchmojo.com/articles/best-remakes-and-remasters-of-2023>; George Foster, Remasters And Remakes Make Up 90 Percent Of 2023’s Highest-Rated Games, TheGamer (Mar. 19, 2023), <https://www.thegamer.com/remasters-remakes-90-percent-highest-rated-games-2023-metroid-dead-space-resident-evil-4/>.

⁴⁵ See, e.g., Marcus Stewart, The Big List of Upcoming Video Game Remakes, GameInformer (Nov. 29, 2023), <https://www.gameinformer.com/2023/11/29/the-big-list-of-upcoming-video-game-remakes>.

⁴⁶ See, e.g., *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1314 (11th Cir. 2008) (out-of-print status did not favor fair use because copyright owner reserved decision on whether or not to reissue); *Robinson v. Random House, Inc.*, 877 F. Supp. 830, 843 (S.D.N.Y. 1995) (“[T]he fact that the Daley Book currently is out of print is not dispositive—the statute focuses on the potential market for the original work.”); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1533 (S.D.N.Y. 1991) (“[D]amage to out-of-print works may in fact be greater since permissions fees may be the only income for authors and copyright owners.”).

⁴⁷ See Phil Salvador, Survey of the Video Game Reissue Market in the United States 25-26 (2023) (“[r]esearchers determined whether each game is or is not currently in release”), available at <https://zenodo.org/records/8161056>.

⁴⁸ Tripp Ceysens Comments at 1.

⁴⁹ Anonymous Comments at 1.

⁵⁰ Anonymous 2 Comments at 1.

⁵¹ SPN/LCA Comments at 14.

be commercially available in early 2023 is a testament to the vibrancy of the market for classic games.

In addition to the thriving market for authorized distribution of classic games, infringing uses of classic games are a serious issue, and copyright owners have active content protection programs to enforce their copyrights in the very games the proponents would allow libraries to make available remotely.⁵²

In view of the important market for classic games, and the problem of video game piracy, complaints that the on-premises limitation is too burdensome for librarians or too difficult for scholars need to be balanced against the risk that persons other than the proponents of the broadened exemption would take advantage of a broadened exemption to exploit off-premises access in ways that could injure the market for classic games. The Register should find that the latter outweighs the former and deny SPN/LCA's request for a broader exemption.

* * *

In addition to the SPN/LCA proposal, Ken Austin filed a petition for a new exemption that would permit circumvention by "individual owners of video games which have DRM (digital rights management) that no longer functions due to incompatibility . . . with modern operating systems."⁵³ However, despite the NPRM's specific invitation to address the issue,⁵⁴ neither Mr. Austin, SPN/LCA nor anyone else addressed the proposal in initial comments. To the extent that there may be any proponents of this proposal, they have not given ESA anything meaningful to respond to, and so have not met their "burden of establishing that the requirements for granting an exemption have been satisfied."⁵⁵

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

Both video game copies and video game platforms are typically protected by access controls that work together to limit infringement by making only legitimate game copies playable.⁵⁶ Like the current exemption, the proposed exemption would apply broadly to circumvention of access controls on video games distributed as complete products in physical or downloaded formats, as well as access controls on consoles used by eligible organizations in authorized preservation activities.

The proposed expansion of the preservation exemption does not change the works subject to the exemption, nor does it change the types of technological protection measures subject to circumvention. Instead, the proponents seek to eliminate a critical limitation on the *use* of

⁵² By way of example, in 2020, Nintendo alone organized customs seizures of over 100,000 consoles preloaded with infringing copies of legacy games globally, and seizures of over 15,000 such consoles at the U.S. border. In 2022 and 2024, ESA sent takedown notices to the Internet Archive informing it about hundreds of infringing video games available on its website. In addition, sellers on online marketplaces often make available counterfeit plug-n-play devices that are pre-loaded with classic games. Over 4,500 of these types of listings were removed from online marketplaces in 2023, and ESA identified 8,200 such listings in 2022.

⁵³ Petition of Ken Austin at 2.

⁵⁴ 88 Fed. Reg. at 72026.

⁵⁵ 2015 Register's Recommendation at 13; see also 2021 Register's Recommendation at 7-8.

⁵⁶ See ESA 2018 Comment at 11-12 (describing critical access controls subject to the now-current exemption).

circumvented, already-preserved video games, and hence expand the permitted goals of authorized circumvention.

Eliminating the physical premises requirement currently contained in 37 C.F.R. § 201.40(b)(17)(ii) would greatly expand the scope of who would be eligible to perform circumvention. Without the need for a physical premises to provide a point of access, any organization professing to have a preservation purpose, making its “collections” available to unaffiliated persons, and not acting for “commercial advantage” would arguably be eligible. *See* 37 C.F.R. § 201.40(b)(17)(ii), (iv)(E). The commenters also propose only illusory limitations on the public access goals of the circumvention. Thus, the effect of the proposal is to transform an exemption focused on certain types of organizations with a physical premises truly dedicated to preservation and scholarly research, into an exemption potentially available to almost any nonprofit organization interested in providing online gameplay. This has the potential to cause substantial harm to the legitimate market for games.

Further, by expanding eligibility to organizations without a physical premises, the proposal would greatly expand eligibility to circumvent the technological protection measures (“TPMs”) on consoles pursuant to Section 201.40(b)(17)(iii). Video game consoles could then be used to play unauthorized infringing games and render other media in an unprotected environment without the supervision one should expect from a professional scholarly organization with a physical facility. As the Register has repeatedly concluded, “jailbroken consoles are strongly linked to piracy of video games.”⁵⁷ The infringement effects of circumventing TPMs on consoles are also not limited to video games. The access controls in consoles protect various forms of media that are accessible on video game consoles, including movies, television, music, and live-sports programming that is provided by ESA’s members and a wide range of content partners.⁵⁸ All of that media would likely be rendered susceptible to infringing uses if the proposed exemption significantly broadened the universe of organizations eligible to circumvent the access controls on consoles.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

The Register should reject the proposed changes constituting Class 6(b). The Register should reject the only proposal for which initial comments were submitted – the proposal of SPN/LCA to broaden the video game preservation exemption in 37 C.F.R. § 201.40(b)(17)(ii) by removing the current on-premises use limitation – for essentially the same reasons the Register rejected a similar proposal from the same proponents in the 2021 proceeding. There have been no developments in the last six years that would justify eliminating the on-premises limitation at this time. Mr. Austin’s unsupported proposal for a new exemption directed to TPMs incompatible with modern operating systems should be rejected because no proponents of the proposal have made any effort to meet their burden of proof.

⁵⁷ 2015 Register’s Recommendation at 339-40; *see also* 2018 Register’s Recommendation at 273; 2012 Register’s Recommendation at 50.

⁵⁸ *See, e.g.*, Microsoft, All your entertainment all in one place, <https://www.xbox.com/en-US/entertainment> (last accessed Feb. 19, 2024); Nintendo, Hulu, <https://www.nintendo.com/us/store/products/hulu-switch/> (last accessed Feb. 19, 2024); Sony Interactive Entertainment, PS5 entertainment, <https://www.playstation.com/en-us/ps5/ps5-entertainment/> (last accessed Feb. 19, 2024).

As the Register has consistently reiterated, proponents “bear the burden of establishing that the requirements for granting the exemption have been satisfied.”⁵⁹ This burden means that the proponents must prove that (1) the class includes copyrighted works; (2) the proposed uses “are likely to be noninfringing”; (3) “the statutory prohibition on circumventing access controls is the cause of the adverse effects”; and (4) “users are either adversely affected, or are likely to be adversely affected, in their ability to make noninfringing uses during the next three years,” as analyzed under Section 1201(a)(1)(C)’s statutory factors.⁶⁰ Here, the proposed class includes copyrighted works (satisfying item (1)), but none of the other three requirements are met. As set forth below, there is no need or basis for revising the current game preservation exemption, which the Office has already said it intends to recommend renewing.⁶¹

1. The proposed class includes copyrighted works.

It is undisputed that the proposed class includes copyrighted works.⁶² As the Register has stated, “video games are highly expressive and thus at the core of copyright’s protective purposes.”⁶³

2. The additional uses will include infringement.

A. SPN/LCA proposal.

The Register has found that preservation, research and teaching are often fair uses.⁶⁴ However, that isn’t the relevant question for analysis of SPN/LCA’s proposal in this proceeding. Instead, the analysis must take into account the full range of activity in which users are likely to engage if the proposal was adopted, and that includes the significant risk of use of preserved video games for recreational purposes.⁶⁵

SPN/LCA’s comments naturally focus on the activities of their constituents, who ESA understands to be professional staff of research libraries and archives. It may be that SPN/LCA’s constituents at institutions like Harvard,⁶⁶ Yale,⁶⁷ and Stanford,⁶⁸ would employ practices to ensure that remote access to preserved games is effectively limited to persons with genuine scholarly purposes. However, with its primary purpose test, the proposed regulation would allow even those institutions to provide access to preserved games to students with a 49% interest in recreational play.

⁵⁹ See, e.g., 2021 Register’s Recommendation at 7 (quoting 2015 Register’s Recommendation at 13).

⁶⁰ *Id.* at 10-11.

⁶¹ 88 Fed. Reg. at 72023.

⁶² See, e.g., SPN/LCA Comments at 2 (proposing regulation requiring notice that users “are receiving access to copyrighted material”); 2021 Register’s Recommendation at 264.

⁶³ 2015 Register’s Recommendation at 338.

⁶⁴ See, e.g., 2021 Register’s Recommendation at 270-71 & n.1508.

⁶⁵ See *id.* at 272; NPRM, 88 Fed. Reg. at 72,026 (“In cases where a class proposes to expand an existing exemption, participants should focus their comments on the legal and evidentiary bases for modifying the exemption, rather than the underlying exemption.”).

⁶⁶ SPN/LCA Comments at 5-6, 17-18.

⁶⁷ *Id.* at 6, 18, 19.

⁶⁸ *Id.* at 7, 14, 18-19.

Moreover, the proposed regulation is not an exemption only for the libraries at Harvard, Yale, and Stanford. The proposed exemption would be available to every public library or school library in America. The American Library Association supports such organizations' providing access to games.⁶⁹ And SPN/LCA have proposed eliminating one of the most significant limitations on organization eligibility – the requirement to have a physical premises at which access is provided – meaning that a wide range of organizations, including providers of purely online services, could circumvent TPMs to allow remote gameplay with little or no supervision. SPN/LCA have made no effort to show that those organizations are all inclined to apply, or capable of applying, the same level of restriction that SPN/LCA constituents like Harvard, Yale, and Stanford have said they would apply if the permissive regulatory language proposed by SPN/LCA was adopted.

ESA is deeply concerned that some eligible organizations might actively seek to provide a collection of playable games accessible to anyone with an internet connection who is prepared to profess an interest in “private study, scholarship, teaching, or research.” This is not a hypothetical concern. The Internet Archive is an established organization that provides online access to a vast collection of materials of various types.⁷⁰ It presumably would take the position that it is an eligible preservation organization as described in 37 C.F.R. § 201.40(b)(17)(iv)(E). However, it has been adjudicated as an infringer on a massive scale for its unauthorized distribution of 3.6 million literary works protected by valid copyrights.⁷¹ It is also currently being sued for a similar effort to provide access to over 400,000 sound recordings originally distributed on 78 rpm phonograph records.⁷² Its interests extend to video games as well, with offerings that include unauthorized emulated arcade games,⁷³ classic PC games,⁷⁴ MS-DOS games⁷⁵ and flash games.⁷⁶ Adopting the SPN/LCA proposal would seem to authorize the Internet Archive and others⁷⁷ to circumvent TPMs for purposes of providing such offerings, so long as they take minimal measures that gesture at compliance with the proposed regulation,

⁶⁹ See Why have games in libraries?, American Library Association, <https://games.ala.org/why-have-games-in-libraries/> (last accessed Feb. 19, 2024); Games & Gaming Roundtable, American Library Association, <https://games.ala.org/> (last accessed Feb. 19, 2024).

⁷⁰ See Internet Archive, About the Internet Archive, <https://archive.org/about/> (last accessed Feb. 19, 2024).

⁷¹ *Hachette Book Group, Inc. v. Internet Archive*, 664 F. Supp. 3d 370 (S.D.N.Y. 2023) (on appeal).

⁷² See *UMG Recordings, Inc. v. Internet Archive*, No. 23 Civ. 7133 (LGS), 2023 WL 8520587 (S.D.N.Y. Dec. 8, 2023) (granting transfer to N.D. Cal.); Internet Archive, The Great 78 Project, <https://great78.archive.org/> (last accessed Feb. 19, 2024); n.52 *supra* (describing ESA takedown notices sent to Internet Archive).

⁷³ See Internet Arcade, Internet Archive, <https://archive.org/details/internetarcade> (last accessed Feb. 19, 2024).

⁷⁴ See Classic PC Games, Internet Archive, <https://archive.org/details/classicpcgames> (last accessed Feb. 19, 2024).

⁷⁵ See Software Library: MS-DOS Games, Internet Archive, https://archive.org/details/softwarelibrary_msdos_games (last accessed Feb. 19, 2024).

⁷⁶ See Software Library: Flash Games, Internet Archive, https://archive.org/details/softwarelibrary_flash_games (last accessed Feb. 19, 2024).

⁷⁷ Google searches for “play classic games online” and “play retro games online” readily reveal vast numbers of unauthorized game sites whose operators could choose to style themselves as preservationists to clothe themselves with a patina of legitimacy if the proposed exemption were adopted. As a further example, Locast was a free over-the-top television streaming service offered by a nonprofit organization until it shut down after a district court found that it was ineligible for the exemption in Section 111(a)(5) of the Copyright Act. See *Am. Broadcasting Cos. V. Goodfriend*, 557 F. Supp. 3d 409 (S.D.N.Y. 2021).

such as providing a “clickwrap” copyright warning and agreement to use the service “primarily for the purposes of private study.”⁷⁸

The comments filed by individual commenters in this proceeding make clear that there is a desire for recreational play through such offerings. For example:

- Tripp Ceysens expresses his “support for the exemption . . . for the purposes of historical preservation and *public enjoyment*.”⁷⁹ He adds that, in his understanding, the broadened exemption would “allow the general population to experience the history of games without massive inconveniences.”⁸⁰
- Anonymous 2 agrees that “it should be legal to use video game roms/isos to make classic video games always accessible *to the public*.”⁸¹ That commenter further opines that “[a]ll Video games should be able to be enjoyed by anyone regardless of where a person is located in the world.”⁸²

As the Register concluded in 2021, providing unauthorized remote access to preserved games for purposes of recreational gameplay is not fair use:

- *Purpose and character of the use.* While access to preserved games for purposes of research and teaching may be a favored use even if not a transformative one,⁸³ “the playing of video games” is “the same use of the copyrighted work as before” and so “not transformative.”⁸⁴ Contrary to the unsupported suggestions of SPN/LCA that an emulated experience is “sub-par for a recreational user,”⁸⁵ there is substantial demand by recreational users for emulated gameplay, as illustrated by the positive reaction of recreational users to the Internet Arcade’s various emulated offerings.⁸⁶ And while the Register concluded in 2021 that “proponents’ proposed expanded uses are non-commercial in nature,”⁸⁷ a federal district court recently reached the contrary conclusion when considering the Internet Archive’s unauthorized dissemination of

⁷⁸ The term “private study” in the SPN/LCA proposal originally comes from Section 108(d)(1) and (e)(1), where it is not clear that it means anything more than private use. SPN/LCA do not explain or justify use of the term in their comments, which are focused on scholarship and teaching.

⁷⁹ Tripp Ceysens Comments at 1 (emphasis added).

⁸⁰ *Id.*

⁸¹ Anonymous 2 Comments at 1 (emphasis added).

⁸² *Id.*

⁸³ 2021 Register’s Recommendation at 271.

⁸⁴ 2015 Register’s Recommendation at 337; *see also* 2021 Register’s Recommendation at 272 (“If a significant use of the works would be for the entertainment purposes for which the works were originally created, that would not be transformative or otherwise favor fair use under the first factor.”).

⁸⁵ SPN/LCA Comments at 10-11.

⁸⁶ *See, e.g.,* Dante D’Orazio, The Internet Arcade puts 900 classic games right in your web browser, The Verge (Nov 2, 2014) (“[t]he result is something to behold”), <https://www.theverge.com/2014/11/2/7147505/the-internet-arcade-puts-900-classic-games-right-in-your-web-browser>; Internet Archive is an amazing website if you want to play games that have been delisted for a long time, for example, a game from 20 years ago, PatientGamers, Reddit, https://www.reddit.com/r/patientgamers/comments/r2plhw/internet_archive_is_an_amazing_website_if_you/ (“Internet Archive is a patient gamer’s gold mine”); Archive.org games, Roms, Reddit, https://www.reddit.com/r/Roms/comments/rtfvnk/archiveorg_games/ (“definetly [sic] one of my favorite sites”).

⁸⁷ 2021 Register’s Recommendation at 270.

ebooks, despite its arguments that it “is a non-profit organization that does not charge patrons to borrow books and . . . private reading is noncommercial in nature.”⁸⁸ Because the SPN/LCA proposal would allow video games to be used significantly for recreational play, “the first factor does not weigh in favor of a finding of fair use.”⁸⁹

- *Nature of the work.* The Register has stated that “video games are highly expressive and thus at the core of copyright’s protective purposes.”⁹⁰ SPN/LCA don’t dispute this, although they argue that the assertedly-transformative purpose of scholarship should nonetheless tilt this factor in favor of the broadened exemption.⁹¹ SPN/LCA can’t assume away the significant recreational gameplay that their proposal would enable for purposes of the second factor any more than they can for purposes of the first factor. This factor weighs against fair use just as it did in the Register’s 2021 analysis.⁹²
- *Amount and substantiality of the portion used.* The proposal would allow online access to the full expressive content of games, and SPN/LCA do not argue otherwise. Instead, they seek to minimize the factor by pointing to allegedly transformative purposes that supposedly justify use of the whole works.⁹³ In 2021, the Register found that “this factor does not necessarily weigh against fair use, as it may be necessary to copy an entire work to provide researchers with access to the work for educational or research purposes.”⁹⁴ However, the Register did not speak to use of entire games for recreational purposes. As to such uses, the factor clearly weighs against fair use.
- *Effect of the use on the market.* In 2021, the Register 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

⁸⁸ *Hachette* 664 F. Supp. 3d at 383-84.

⁸⁹ 2021 Register’s Recommendation at 273.

⁹⁰ 2015 Register’s Recommendation at 338.

⁹¹ SPN/LCA Comments at 11-12. This argument rests on a single, conditional sentence in the Google Books decision that goes beyond the court’s holding that the second factor was not “dispositive” to suggest that a transformative secondary use may inform understanding of the nature of the original work. *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015). That is contrary to the text of Section 107(2), which commands a focus on the characteristics of the work used (not the way it is used), as well as binding Supreme Court precedent. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (“factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied”). It is also contrary to earlier and later Second Circuit precedent. *See, e.g., Andy Warhol Foundation v. Goldsmith*, 11 F.4th 26, 45 (2d Cir. 2021) (“though we have previously held that this factor ‘may be of limited usefulness where the creative work is being used for a transformative purpose,’ . . . this relates only to the weight assigned to it, not whom it favors” (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006)), *aff’d on other grounds*, 143 S. Ct. 1258 (2023); *Cariou v. Prince*, 714 F.3d 694, 709 (2d Cir. 2013); *Blanch v. Koons*, 467 F.3d 244, 256-57 (2d Cir. 2006). To the extent that sentence may have been intended to mean what SPN/LCA say it means, it is not good law.

⁹² 2021 Register’s Recommendation at 273 (“While this factor favors fair use in the context of software other than video games, it does not do so with respect to games, which are often highly expressive in nature.”).

⁹³ SPN/LCA Comments at 12.

⁹⁴ 2021 Register’s Recommendation at 274.

games.”⁹⁵ SPN/LCA argue that their current proposal has corrected these defects, pointing to various library practices that could mitigate the risk of recreational play of preserved games.⁹⁶ However, as described above, the proposed regulation does not actually require such practices, and in fact provides only illusory protection. It does not contain “appropriate safeguards to prevent users from further distributing or making entertainment uses of video games.”⁹⁷ As in 2021, there remains a substantial market for classic games, and it is still true that SPN/LCA’s proposal does not mitigate the risk of harm to that market.

The bottom line is that SPN/LCA have not proposed meaningful limitations to ensure that removal of the on-premises limitation would not result in a significant increase in infringing activity. Thus, the record and analysis are pretty much the same as they were in 2021 when the Register found that SPN/LCA had not met their “burden of showing that the proposed off-premises uses are likely to be fair with respect to . . . video games,”⁹⁸ in 2018 when the Register could not “agree that the use of affiliate archivists, as contemplated by MADE, is likely to constitute a fair use,”⁹⁹ and in 2015, when the Register recommended that “any digital copies or adaptations of the video games or console software created by the institution as a result of preservation efforts must not be distributed or otherwise made accessible beyond the physical premises of the institution.”¹⁰⁰ The Register should deny SPN/LCA’s request for a broader exemption in this proceeding.

B. Ken Austin proposal.

There is little ESA can say about Ken Austin’s proposal, because there is no concrete regulatory language to analyze or record to respond to. However, ESA can say that infringing distribution of video games remains a massive problem that the industry devotes substantial resources to addressing. Infringing distribution has negative effects on the markets for the games involved, and in the case of classic games, reissues and remakes of the games involved. Permitting circumvention of the TPMs used to protect video games¹⁰¹ would run the risk of legitimizing the infringing distribution of copyrighted games. Infringing downloads of the game cited by Mr. Austin – Black & White – are offered online now,¹⁰² and surely would be more so if the Librarian authorized cracking the TPMs used to secure the game.

⁹⁵ *Id.* at 275.

⁹⁶ SPN/LCA Comments at 13-14.

⁹⁷ 2021 Register’s Recommendation at 275.

⁹⁸ *Id.* at 276.

⁹⁹ 2018 Register’s Recommendation at 274.

¹⁰⁰ 2015 Register’s Recommendation at 352.

¹⁰¹ Mr. Austin’s petition mentions only a compatibility issue involving computers running the Windows 10 operating system, so he has not made a case that would justify an exemption for the TPMs used to protect video game consoles.

¹⁰² *See, e.g.*, Black & White, My Abandonware, <https://www.myabandonware.com/game/black-white-a33> (last accessed Feb. 19, 2024); Black & White, OldGames Download, <https://oldgamesdownload.com/black-and-white/> (last accessed Feb. 19, 2024).

3. The alleged adverse effects are not primarily caused by TPMs.

A. SPN/LCA proposal.

The foregoing analysis should mark the end of the SPN/LCA proposal, just as it did in the 2021 proceeding.¹⁰³ However, considering other factors confirms that the Register should deny SPN/LCA's request for a broader exemption in this proceeding.

SPN/LCA argue that remote access to preserved games is necessary to promote video game scholarship. These concerns are anecdotal and exaggerated, since video game scholarship is flourishing even with the on-premises limitation. Literature searches using Google Scholar readily find vast numbers of papers reporting on video game scholarship. By contrast, the SPN/LCA comments include a lengthy discussion of hypothetical scholarship involving the game *Duck Hunt* that is supposedly being impeded by that title's withdrawal from the market.¹⁰⁴ This is apparently a circumvention issue because some librarian might like to make the game available on an emulator rather than a Wii U (although to be clear, the game is playable on a Wii U). SPN/LCA do not identify any scholar or teacher interested in the kinds of uses of *Duck Hunt* that SPN/LCA hypothesize or who wishes that they had the emulator access SPN/LCA hope to enable. In the 2021 proceeding, the Register was prepared to treat the on-premises limitation as a limitation on scholarship caused by the prohibition on circumvention,¹⁰⁵ but it should be recognized that the linkage between the on-premises limitation and effects on real-world scholarship appears weak, if not entirely hypothetical.¹⁰⁶

Moreover, it appears that SPN/LCA is concerned about the resource constraints of librarians as much as scholars' limited time and money for travel. SPN/LCA explain that remote access would "remove a meaningful burden from librarians and preservationists."¹⁰⁷ However, constraints imposed by library budgets are not caused by TPMs or the statutory prohibition on circumvention, and the hope that an expanded exemption would reduce the workload of librarians is fundamentally at odds with the assurances of SPN/LCA that librarians would individually vet requests for remote access using procedures "of the type already deployed in special collections settings."¹⁰⁸ SPN/LCA can't have it both ways. Either this proposal is about allowing emulated access to video games with minimal supervision to relieve library resource constraints at the expense of enabling infringing use of games, or it is the library resource constraints, not the statutory prohibition on circumvention, that is impeding access.

B. Ken Austin proposal.

Again, there is little ESA can say about Ken Austin's proposal, because there is no record. While his petition identified one TPM (SafeDisc) that may be incompatible with one

¹⁰³ 2021 Register's Recommendation at 276 (proceeding beyond the fair use analysis only with respect to non-video game software).

¹⁰⁴ SPN/LCA Comments 2-3.

¹⁰⁵ 2021 Register's recommendation at 276.

¹⁰⁶ *Id.* at 12 ("for a finding of adverse effects, the evidence in the record cannot be hypothetical, theoretical, or speculative, but must be real, tangible, and concrete." (quotation marks omitted)); NPRM, 88 Fed. Reg. at 72,026 ("the Office favors specific, 'real-world' examples supported by evidence over hypothetical observations").

¹⁰⁷ SPN/LCA Comments at 7.

¹⁰⁸ *Id.* at 13.

operating system version (Windows 10), there is no evidence of a broader issue that might be caused by the statutory prohibition on circumvention.

4. Proponents fail to demonstrate requisite adverse effects that outweigh the harm that would be caused by a broadened exemption.

A. SPN/LCA proposal.

SPN/LCA have not met their burden to demonstrate that the statutory prohibition against circumvention, as modified by the existing exemption, is causing (or will in the coming three-year period cause) an adverse effect on noninfringing uses. The Register has explained that the requisite adverse effects should be analyzed in reference to the nonexclusive statutory factors in Section 1201(a)(1)(C). In assessing those factors, the Register “balances the harm identified by a proponent of an exemption with the harm that would result from an exemption.”¹⁰⁹ “To prove the existence of adverse effects, it is necessary to demonstrate ‘distinct, verifiable and measurable impacts’ occurring in the marketplace.”¹¹⁰ “[E]xemptions ‘should not be based upon de minimis impacts.’”¹¹¹

In 2021, the Register’s analysis did not reach the point of balancing the adverse effects cited by SPN/LCA with the harm to video game copyright owners that would result from adoption of its proposal, because the Register found that “the proposed use is not likely to be noninfringing in the context of video games.”¹¹² The Register should do the same in this proceeding. However, as discussed above, the effects on research, scholarship and teaching asserted by SPN/LCA are mostly hypothetical, or at least not supported by concrete evidence of projects that would have been conducted but for the on-premises limitation.¹¹³ By contrast, it is clear that removing the on-premises limitation would allow a wide range of organizations well beyond SPN/LCA’s constituents to crack video game TPMs to provide online access to them without meaningful limitations. If the Register gets to the point of balancing those harms, the Register should find that the latter outweighs the former and deny SPN/LCA’s request for a broader exemption.

* * *

Because SPN/LCA have failed to meet their burden of proving all the requirements for an exemption (except that video games are copyrighted works), the Register should reject the proposed class. The Register imposed the physical premises limitation to tailor the game preservation exemption to the requirements of copyright law, and in particular to enable uses perceived as noninfringing to the exclusion of uses perceived to be infringing.¹¹⁴ The Register should retain the physical premises limitation because it is required by copyright law, and there

¹⁰⁹ 2021 Register’s recommendation at 12 (quotation marks and alterations omitted).

¹¹⁰ *Id.* (quoting Staff of H. Comm. on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281 as Passed by The United States House of Representatives on August 4, 1998, at 7 (Comm. Print 1998)).

¹¹¹ *Id.*

¹¹² 2021 Register’s Recommendation at 276 (proceeding beyond the fair use analysis only with respect to non-video game software).

¹¹³ *See, e.g.*, SPN/LCA Comments at 6 (in effort to show that concerns “are not merely hypothetical,” giving example of research that actually occurred because the researcher was “able to come to campus”).

¹¹⁴ *See* 2018 Register’s Recommendation at 274, 279; 2015 Register’s Recommendation at 352.

is no concrete evidence that its elimination would significantly address a problem created by Section 1201 given the current exemption.

B. Ken Austin proposal.

Nobody stepped forward to provide evidence relating to Ken Austin’s proposal. As a result, there is no basis for the Register to conclude that there will be “distinct, verifiable and measurable impacts” that are more than *de minimis* and outweigh the infringement risk presented by granting the exemption.