

Before the
U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS

**In the Matter of Exemption to Prohibition on Circumvention
of Copyright Protection Systems for Access Control Technologies Under 17 U.S.C. 1201**

Docket No. 2014-07

**Response of Electronic Frontier Foundation to June 3, 2015 Copyright Office Questions
on Proposed Class 23**

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- 1. Please explain whether, and under what circumstances, video game publishers reissue or repackaged 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?**

All official authentication and matchmaking servers for video games are eventually shut down. For the vast majority of games, official server support is never restored, even in instances where the game itself is reissued or repackaged. Thus, as to games written for older devices such as the Nintendo 64, Nintendo GameCube, the PlayStation 2, and the original Xbox, as well as PC games, reissue with Internet multiplayer capability is the exception, and permanent loss of that capability is the norm, except where fans of a game have created their own servers, with potential risk of liability under Section 1201.

Older games can be reissued, sold, or maintained without Internet multiplayer support. For example, the original Halo: Combat Evolved (released in 2001) was repackaged in 2014 without support for the original multiplayer combat aspect of the game.¹ Worms 2 was also sold without support for Internet multiplayer play after a reissue.² Many multiplayer games for the PlayStation 2 and Nintendo DS that were once playable through official servers remain playable

¹ The repackaged version of Halo: Combat Evolved did not include the original multiplayer aspect of the game, but instead offered multiplayer play based on Halo: Reach, a later game in the series. See “Halo: Combat Evolved Anniversary,” Wikipedia, https://en.wikipedia.org/wiki/Halo:_Combat_Evolved_Anniversary (accessed June 29, 2015).

² “Worms 2,” Wikipedia, https://en.wikipedia.org/wiki/Worms_2 (accessed June 29, 2015) (“Online play is disabled in the GOG.com digital release of the game.”).

over a local area network (LAN), but this is not an adequate substitute for Internet multiplayer play because it requires players to gather in the same physical location. SOCOM 2, SOCOM 3, and Mario Kart DS fall into this category.³

In the rare instances where games have been reissued or repackaged by the rightsholders with official Internet multiplayer support, one or both of these conditions is generally present: 1) the reissued game uses a different set of access controls for multiplayer play, such that users of older copies of the game cannot play against users of the reissued game; and 2) the reissued game has significant differences from the original, especially with respect to multiplayer play over the Internet.

The popular Battlefield series of games for Windows PCs are an illustrative example. Battlefield 1942 was a multiplayer game with Internet functionality first published in 2002.⁴ In 2012, Electronic Arts re-released the game as a free download.⁵ However, the re-released version used different server access controls; thus, owners of the original game could not play against owners of the re-released version.⁶ Commenters noted that this incompatibility increased the difficulty of assembling a group of players, essentially making the game unplayable for many.⁷ The reissued Battlefield 1942, along with its sequels Battlefield 2 and Battlefield Vietnam, lost official multiplayer capability *again* in June 2014 when the GameSpy service which provided matchmaking servers for the games shut down.⁸

As with Battlefield 1942, multiplayer games that were first released on older consoles and later reissued for newer systems use different technological measures to control access to multiplayer play. Many PC games that used publisher-specific servers and technological measures now use the servers and access controls provided by Steamworks.⁹ Likewise, Halo 2, which was repackaged as part of the “Master Chief Collection” for the Xbox 360 in 2014, now uses the newer Windows Live servers and access controls. Proponents could find no examples of games for which official server support was discontinued for a period of months and subsequently restored *using the same access controls*. This means that when official server

³ Comment, PS2 Online Gaming, “SOCOM servers to be terminated 8/31/12” (May 30, 2012), <http://www.ps2onlinegaming.com/forum/viewtopic.php?f=10&t=1040>; Kyle Orland, “The day the *Mario Kart* died: Nintendo’s kill switch and the future of online consoles,” *Ars Technica* (Feb. 27, 2014), <http://arstechnica.com/gaming/2014/02/the-day-the-mario-kart-died-nintendos-killswitch-and-the-future-of-online-consoles/>.

⁴ “Battlefield 1942,” Wikipedia, https://en.wikipedia.org/wiki/Battlefield_1942 (accessed June 29, 2015).

⁵ *Id.*

⁶ “10th Anniversary: Download and play Battlefield 1942 for free!,” Battlefield Official Blog (Nov. 5, 2012), <http://blogs.battlefield.com/2012/11/download-bf1942-for-free/> (“Q: Can I play online against players who have the original disc-based version? A: Unfortunately, no. This Origin digital download version can only be played against other players who are using the same version.”).

⁷ VicX Comment, Battlefield Official Blog (Nov. 5, 2012, 22:03), <http://blogs.battlefield.com/2012/11/download-bf1942-for-free/> (“This Origin digital download version can only be played against other players who are using the same version.’ . . . [N]o wonder people are saying it’s dead! If we could play with the existing disc-based players then maybe there’d be enough people combined to play with, but if we can only play with other people who have JUST downloaded this version alone then of course it’s going to be dead.”).

⁸ “Online Service Updates,” <http://www.ea.com/1/service-updates> (accessed June 29, 2015).

⁹ See Daniel Perez, “DiRT 3 leaves Games for Windows Live in the dust for Steamworks,” ShackNews (Apr. 1, 2015), <http://www.shacknews.com/article/88892/dirt-3-leaves-games-for-windows-live-in-the-dust-for-steamworks>; Erik Johnson, “Nordic Games removes GFWL requirement from Red Faction: Guerrilla,” MCV (Nov. 4, 2014), <http://www.mcvuk.com/news/read/nordic-games-removes-gfwl-requirement-from-red-faction-guerrilla/0140892>.

support for a game is discontinued, and enthusiasts preserve the functionality of their copies by modifying them to use a new server, those modifications will not be effective for copies of a reissued or repackaged version of the game. If the proposed exemption were in effect, the exemption would protect the earlier preservation efforts by players of the original game, but would not cover circumvention of the new access controls on the reissued game.

Games which are marketed as reissued or repackaged often differ significantly from the original, effectively comprising a different game. For example, 1997's *Goldeneye 007*, an early success in Internet multiplayer gaming for the Nintendo 64,¹⁰ was rereleased in 2010 having replaced the likeness of actor Pierce Brosnan as James Bond with that of Daniel Craig.¹¹ Servers for the re-release were shut down in 2014.¹² For these games, a reissue that includes access to official servers does *not* restore the original game.

Finally, many reissues are considered inferior by players because of differences like lower frame rates or changes to the rendering engine.¹³ In addition, reissues are sometimes plagued with server malfunctions and other playability problems. The fall 2014 release of *Halo: The Master Chief Collection*, which was a repackaging of several games in the *Halo* series, suffered from repeated, pervasive server malfunctions that made multiplayer play nearly impossible.¹⁴ These problems were never entirely resolved, and game sales were low. Had alternate servers for the original *Halo* games been created by players before the 2014 repackaging, the new release would not have provided an adequate substitute either for players of the original game or for archivists.

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.

Disclaimers regarding online server support may appear, if at all, on game packaging or on related websites.

Disclaimers on videogame packaging that would be visible before purchase, or before the first use of the game, vary considerably. Among PlayStation 2 games with server-based features, most of which have been shut down as of this filing, the original *SOCOM* game—possibly the first game to allow voice communication between players over the Internet—has no disclaimer language of any kind concerning server shutdowns on the game box.¹⁵ The printed manual for the game, which is accessible after the game has been purchased and unwrapped, says only that

¹⁰ Richard Mitchell, "GoldenEye 007's multiplayer was added last minute, unknown to Rare and Nintendo management," *Engadget* (Aug. 14, 2012), <http://www.engadget.com/2012/08/14/goldeneye-007s-multiplayer-was-added-last-minute-unknown-to-ra/>.

¹¹ "GoldenEye 007 (2010 video game)," Wikipedia, https://en.wikipedia.org/wiki/GoldenEye_007_%282010_video_game%29 (accessed June 29, 2015).

¹² DarknessKey92 Comment, "Which Online Game Servers are/will 'Shut Down'?", *PSN Profiles* (Mar. 13, 2014, 03:53AM), <http://psnprofiles.com/forums/topic/13857-which-online-game-servers-arewill-shut-down/>.

¹³ *See generally* "Examples where the original release is better than any re-release/remaster," NeoGAF, <http://www.neogaf.com/forum/showthread.php?t=987017> (accessed June 29, 2015).

¹⁴ Bo Moore, *Microsoft Can't Fix its Halo: Master Chief Collection Fail*, *Wired* (Dec. 24, 2014), <http://www.wired.com/2014/12/halo-master-chief-collection/>.

¹⁵ All of the disclaimer texts from physical game media cited herein were observed on media maintained at the Museum of Art and Digital Entertainment in Oakland, California.

“[u]se of the online portion of this game is subject to the terms and conditions under the User Agreement located within the game. A full copy of the User Agreement is available at www.scea.com/user_agreement. That Internet address is nonexistent as of this filing, simply redirecting to the PlayStation homepage.

In contrast, SOCOM II, the next game in the series, has a disclaimer on the back of the box stating that the publisher “may discontinue hosting of the game server at any time.” It also lists an Internet address, www.us.playstation.com/useragreements, which is also nonexistent as of this filing. Similarly, the packaging for Metal Gear Solid 4, which contains an online multiplayer game known as Metal Gear Online 2, states only that “Features and offerings for the PlayStation Network may change without notice.”

Another game in the SOCOM series, Combined Assault, has a disclaimer on the box stating that “SCEA reserves the right to retire the online portion of the game with 90 days’ notice.” However, the printed manual inside the box conflicts with this disclaimer, stating instead that “SCEA may, at its sole discretion, discontinue hosting of the game server at any time. SCEA has no liability for such discontinuance.” The manual also notes that terms “may be modified at any time.” The packaging for Killzone, another PlayStation 2 game, contains the same conflicting disclaimers.

The legal terms presented on the websites of game publishers also vary, particularly as to whether they promise to give notice of future server shutdowns and whether they offer compensation. The Games for Windows Live service terms from 2010 state that “We may change the Service or delete or discontinue features, games, or other content at any time and for any reason (or no reason). . . . If we cancel the Service in its entirety without cause, then we will refund to you on a pro-rata basis the amount of payment that you have made corresponding to the portion of your Service remaining at the time of cancellation.”¹⁶ Electronic Arts informs users that “EA may terminate access to any online or mobile products and/or EA Services (and/or any portion thereof) at any time by giving you notice of such termination within the time period specified when you joined the particular EA Service, or if no time period for notice of termination was specified, then within thirty (30) days of the date such notice is either (at EA’s discretion) provided to you via email or is posted on the applicable product or EA Service or on <http://www.ea.com/2/service-updates>.”¹⁷ The EA terms of service also note that some games may use servers controlled by third parties, who may impose their own terms.¹⁸

Other game services do not promise any advance notice of a shutdown, such as Nintendo’s Wi-Fi Connection, which states that “[w]e reserve the right, at our sole discretion, to change, modify, add, or delete portions of this Agreement and to discontinue or modify the Service at any time without further notice.”¹⁹

¹⁶ Xbox LIVE and Games for Windows LIVE Terms of Use (October 2010), *available at* <http://web.archive.org/web/20101031014022/http://www.xbox.com/en-US/Legal/LiveTOU>.

¹⁷ Electronic Arts Terms of Service (Sep. 4, 2012), <http://www.ea.com/terms-of-service>.

¹⁸ *Id.*

¹⁹ Nintendo Wi-Fi Connection Instruction Booklet: Terms of Service, https://www.nintendo.com/consumer/gameslist/manuals/DS_Nintendo_WFC.pdf (accessed June 29, 2015).