

# COVINGTON

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June 29, 2015

## By Electronic Mail

Jacqueline C. Charlesworth  
General Counsel and Associate Register of Copyrights  
U.S. Copyright Office  
Library of Congress  
101 Independence Ave SE  
Washington, DC 20559-6000

**Re: Docket No. 2014-7, Proposed Class 23: Abandoned  
Software–Video Games Requiring Server  
Communication**

Dear Ms. Charlesworth:

On behalf of the Entertainment Software Association (“ESA”), this letter responds to your June 3, 2015 letter regarding Proposed Class 23.

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

A video game publisher may invest millions of dollars developing a single video game. In order to obtain a return on this significant investment, publishers are continuously looking for ways to refresh these highly-valuable copyrighted works during their copyright terms, adapt them for different platforms, and reissue games after server support has ended. The following examples illustrate just a few of the ways in which publishers have reissued or repackaged their copyrighted video games:<sup>1</sup>

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<sup>1</sup> See also “E3 2015: Old Games Find New Life,” *The Times of India* (June 17, 2015), <http://timesofindia.indiatimes.com/tech/gaming/E3-2015-Old-games-find-new-life/articleshow/47704590.cms>.

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- *Worms* was first released in 1995 as an artillery strategy game for personal computers with single-player and online multi-player functionality. Using a small platoon of worms, players battle computer-generated teams or teams controlled by other players online. In addition to being iterated upon through multiple releases of different versions of the game,<sup>2</sup> the original video game recently was reissued for Microsoft Xbox LIVE Arcade with single-player and online multi-player modes.<sup>3</sup> In the full version, players can choose among three random landscape themes, change various game settings, collect achievements, and join the *Worms* hall of fame. In addition, the game's sequel, *Worms 2: Armageddon*, is now available on Xbox LIVE Arcade with online and offline multi-player and single-player modes.<sup>4</sup> This version is the most fully-featured digital version of the *Worms* series, with voice support, new weapons and landscape themes, play modes, hats, skins, and speech banks.
- Ubisoft *recently* announced that it has completely reworked the racing game *Trackmania Turbo* and will be re-releasing the game in November 2015 for the Sony PlayStation 4, Microsoft Xbox One, and personal computers.<sup>5</sup> The game was initially released on the Nintendo DS handheld in 2011. The original version allowed players to compete against each other through online or local multi-player mode. The repackaged version likewise will enable single-player and multi-player modes.
- In 2010, Microsoft discontinued multi-player matchmaking for *Halo 2*. More than four years later, in late 2014, Microsoft re-released the *Halo 2* video game in nearly the same form as part of the bundled title for Xbox One, *Halo: The Master Chief Collection*.<sup>6</sup>
- Video game publisher Take-Two Interactive has re-issued a number of its console-based games for mobile platforms, such as smartphones and tablets.

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<sup>2</sup> See *Worms (series)*, *Wikipedia*, [https://en.wikipedia.org/wiki/Worms\\_\(series\)](https://en.wikipedia.org/wiki/Worms_(series)).

<sup>3</sup> See <http://marketplace.xbox.com/en-us/Product/Worms/66acd000-77fe-1000-9115-d802584107de>.

<sup>4</sup> See <http://marketplace.xbox.com/en-us/Product/Worms-2-Armageddon/66acd000-77fe-1000-9115-d80258410912>.

<sup>5</sup> Luke Plunkett, *Kotaku* (June 15, 2015), <http://kotaku.com/https-youtu-be-3piye62byf4-trackmania-turbo-a-game-t-1711525854#>; see also <https://www.ubisoft.com/en-GB/game/trackmania-turbo/>.

<sup>6</sup> See, e.g., Marc Graser, "E3: Microsoft To Relaunch 'Halo' Franchise To Build Audience for Web Series, TV Shows," *Variety* (June 9, 2014), <http://variety.com/2014/digital/news/e3-microsoft-to-relaunch-halo-franchiseto-build-audience-for-web-series-tv-shows-1201216591/>.

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- *Nintendo* announced earlier this month that it is remastering and releasing an English-language port of the popular video game *Mother* for the Wii U Virtual Console. The original version of the game was released for the Nintendo Famicom in 1989.<sup>7</sup> As explained in ESA’s testimony, Nintendo now sells a number of classic video game titles from the 1980s—including *Mario Bros.*, *Donkey Kong*, *Duck Hunt*, *Punch Out*, *Zelda*, and *Metroid*—for online download through the Nintendo WiiU and Nintendo 3DS Virtual Consoles. Similarly, Sony recently announced that video game publisher Square Enix’s landmark game *Final Fantasy VII*, which is a classic Japanese role-playing adventure game, is going to be reissued for the Sony PlayStation 4. While these games were originally developed without online functionality, they are important examples of how video game publishers continue to create markets for their highly-expressive copyrighted works for the period of their copyright terms.
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.*

The specific language varies depending on the publisher, platform, and context, but publishers are committed to ensuring that when a consumer is making a purchasing decision about a game, that consumer has clear and prominent notice that server support for a game may someday be discontinued. And because in many cases video games continue to be sold at retail even after server support has ended because the game often can continue to be played in single- or multi-player mode (without online server support), notice also is provided to consumers in this context. For example:

- Electronic Arts currently provides the following prominent notice on the website product pages and on the packaging for all of its games: “EA MAY RETIRE ONLINE FEATURES AFTER 30 DAYS NOTICE POSTED ON [www.ea.com/1/service-updates](http://www.ea.com/1/service-updates).”<sup>8</sup> In addition, EA maintains a webpage providing online service updates that explains:

“The decisions to retire older EA games are never easy. The development teams and operational staff pour their hearts into these games almost as much as the customers playing them and it is hard to see one retired. But as games

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<sup>7</sup> Dave Their, “‘Mother’ Finally Coming To Virtual Console As ‘Earthbound: Beginnings,’ Nintendo Announces,” *Forbes* (June 14, 2015), <http://www.forbes.com/sites/davidthier/2015/06/14/mother-finally-coming-to-virtual-console-as-earthbound-beginnings-nintendo-announces/>.

<sup>8</sup> See, e.g., <https://www.origin.com/en-us/store/buy/battlefield-hardline/pc-download/base-game/standard-edition#details>.

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get replaced with newer titles, the number of players still enjoying the older games dwindles to a level -- typically fewer than 1% of all peak online players across all EA titles -- where it's no longer feasible to continue the behind-the-scenes work involved with keeping these games up and running. We're constantly working to keep our games and services available for as long as possible."<sup>9</sup>

- Similarly, the packaging for all games published by Activision state: "Activision makes no guarantees regarding the availability of online play and may modify or discontinue online service in its discretion without notice, including for example, ceasing online service for economic reasons due to a limited number of players continuing to make use of the service over time." Players can continue to play any of the Activision games that they have lawfully purchased in single-player mode, and (where applicable) local multi-player mode.
- Take-Two Interactive games include the following language at point of sale:

"Non-transferable access to special features such as exclusive, unlockable, downloadable, online content, services, and functions, such as multiplayer services or bonus content, may require single-use serial code, additional fee, and/or online account registration (13+). Access to special features may require internet connection, may not be available to all users or at all times, and may, upon 30 days' notice, be terminated, modified, or offered under different terms."
- Microsoft video games published for the Xbox 360 console include the following disclaimer: "In available games, paid subscription required for online multiplayer. . . . Features and system requirements may change without notice. Subject to Terms of Use (at [www.xbox.com/live/termsfuse](http://www.xbox.com/live/termsfuse))."<sup>10</sup>
- As explained in ESA's comments, when online services were terminated as a result of the GameSpy server shutdown, Nintendo continued to sell the affected video game titles at retail without any online server support because the video games were still playable in single or multi-player mode (without online server support). Nintendo provided consumers clear notice prior to purchase that they could only play the games offline.<sup>11</sup> In addition, Nintendo's Network Services

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<sup>9</sup> <http://www.ea.com/1/service-updates>.

<sup>10</sup> See also, Xbox LIVE Terms of Use, Section 1.7, <http://www.xbox.com/en-US/Legal/livetou>.

<sup>11</sup> See ESA Comments, at 11, Exhibit C.

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Agreement—which users must accept at the time they decide to connect their console or handheld to the Internet—states: “We may modify, cancel, or suspend the availability of the Network Services in whole or in part at any time without notice to you.”<sup>12</sup>

Based on the experience of ESA’s members, these notices appear to be working. For example, Nintendo released thirty-seven video game titles that incorporated online multi-player matchmaking services using the third-party GameSpy servers. From the date these game titles were released until the date GameSpy ended its online match-making services in June 2014, 44 million copies of these games were sold that included the online matchmaking functionality.<sup>13</sup> To date, however, Nintendo has been contacted by only approximately 500 consumers (or .0000113% of consumers who purchased at least one of these video game titles) with questions related to the shutdown of the GameSpy services.

\* \* \*

We hope this information is useful. Please let us know if you have any further questions.

Respectfully submitted,



Simon J. Frankel  
*Counsel for the  
Entertainment Software  
Association*

cc: Stan Pierre-Louis, ESA  
Cory Fox, ESA  
Ehren Reynolds, ESA

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<sup>12</sup> Nintendo Network Services Agreement, Section 13(B),  
[http://www.nintendo.com/consumer/info/en\\_na/docs.jsp](http://www.nintendo.com/consumer/info/en_na/docs.jsp).

<sup>13</sup> Ample alternatives remain available to users after server support ends. For example, when the GameSpy online matchmaking services ended, each of the thirty-seven video game titles that were published by Nintendo and available with online match-making services via GameSpy allowed users to play in single-player mode and multi-player mode over a local area network.