



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

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### ITEM A. COMMENTER INFORMATION

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These comments are submitted by the Entertainment Software Association (“ESA”), the U.S. trade association serving companies that publish computer and video games for game consoles, handheld devices, personal computers and the Internet. ESA represents the major game platform providers and almost all of the major video game publishers in the United States.<sup>1</sup>

ESA’s member companies are leaders in bringing creative and innovative products and services into American homes and have made major contributions to the U.S. economy.<sup>2</sup> In fact, the U.S. video game industry generated \$36 billion in revenue during 2017,<sup>3</sup> and provided jobs to more than 220,000 people across all fifty states.<sup>4</sup> This innovation and economic activity depends on strong copyright protection for the software and other creative works that are the

<sup>1</sup> A complete list of ESA’s member companies is available at <http://www.thesa.com/about-esa/members/> (last reviewed January 19, 2018).

<sup>2</sup> Aside from their significant and ongoing contributions to the traditional home video game and handheld video game markets, member companies have established fully-fledged online entertainment services (including mobile), developed popular and forward-looking immersive technologies (augmented, virtual, and mixed reality), and have taken the lead in the burgeoning esports industry. More innovation and creativity is promised in the future as the industry begins to embrace artificial intelligence and new ways to play and enjoy video games.

<sup>3</sup> Press Release, Entertainment Software Association, *US Video Game Industry Revenue Reaches \$36 Billion in 2017* (Jan. 18, 2018), <http://www.thesa.com/article/us-video-game-industry-revenue-reaches-36-billion-2017/>.

<sup>4</sup> Stephen E. Siwek, Entertainment Software Association, *Video Games in the 21<sup>st</sup> Century*, at 36 (2017), [http://www.thesa.com/wp-content/uploads/2017/02/ESA\\_EconomicImpactReport\\_Design\\_V3.pdf](http://www.thesa.com/wp-content/uploads/2017/02/ESA_EconomicImpactReport_Design_V3.pdf). In fact, about two thirds of U.S. households are home to at least one person who plays three or more hours of video games a week. Entertainment Software Association, *2017 Essential Facts about the Computer and Video Game Industry*, at 6 (Apr. 2017), [http://www.thesa.com/wp-content/uploads/2017/09/EF2017\\_Design\\_FinalDigital.pdf](http://www.thesa.com/wp-content/uploads/2017/09/EF2017_Design_FinalDigital.pdf) (“2017 ESA Essential Facts”).

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lifeblood of the video game industry. Accordingly, ESA member companies have a strong interest in maintaining effective copyright protection, including protection against circumvention of technologies that control access to copyrighted game software.

## **ITEM B. PROPOSED CLASS ADDRESSED**

Proposed Class 6: Computer Programs—Jailbreaking

## **ITEM C. OVERVIEW**

Class 6 is a proposal to expand the existing exemption for circumventing access controls on software that controls smartphones and other portable all-purpose mobile computing devices.<sup>5</sup> This class was originally proposed in a petition filed by the Electronic Frontier Foundation (“EFF”). Its petition suggested regulatory language that broadened the current mobile phone “jailbreaking”<sup>6</sup> exemption in various respects, including extending it to general-purpose computing devices designed to be used in a home, so long as those devices are not designed “for consumption of a particular type of media content.”<sup>7</sup> As the Office implied in the NPRM, that is a vague and potentially very broad expansion of the existing exemption.<sup>8</sup> Among other things, the regulatory language originally proposed by EFF would seem to encompass personal computers, and potentially video game consoles (since, despite their name, they are multimedia content delivery platforms).

EFF’s initial comments took a different tack than its petition, proposing narrower regulatory language that would only add “voice assistant devices” to the existing mobile phone jailbreaking exemption.<sup>9</sup> In advocating this more restrained proposal, EFF distinguished voice assistant devices from other kinds of devices, including desktop and laptop computers and video game consoles.<sup>10</sup> Accordingly, it seems clear that, at this time, EFF does not seek to extend the existing mobile phone jailbreaking exemption to video game consoles. Nonetheless, Consumers Union and the Free Software Foundation seem to support EFF’s original, broader proposal.<sup>11</sup>

For its part, ESA did not (and does not) oppose continuation of the existing mobile phone jailbreaking exemption. However, no proponent has met its burden to establish that a broader exemption is warranted.<sup>12</sup> ESA provides these comments to make clear that whatever the

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<sup>5</sup>Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, 82 Fed. Reg. 49,550, 49,560-49,561 (Oct. 26, 2017) (“NPRM”).

<sup>6</sup> In these comments, we use the term “jailbreaking” because the Office has done so from time to time. However, we note that it is a loaded term intended by those who popularized it to downplay the importance of protecting copyrighted works. By contrast, the Register has repeatedly found that the hugely valuable copyrighted works distributed for and through game consoles are reasonably and appropriately secured with technological protection measures.

<sup>7</sup> Electronic Frontier Foundation Comments at 2 (Dec. 18, 2017) (“EFF Comments”).

<sup>8</sup> NPRM, 82 Fed. Reg. at 49,561 (pointing out that the existing exemption was recommended “in part, because the record [of the 2015 proceeding] ‘meaningfully defined’ such devices”).

<sup>9</sup> EFF Comments at 2.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> To the extent that the Free Software Foundation asserts a jailbreaking exemption should cover all devices, its claim sweeps beyond EFF’s petition, beyond the Register’s articulation of proposed Class 6, and should be denied as untimely.

<sup>12</sup> See Joint Creators and Copyright Owners Comments at Part E.1, 3.

Register might recommend with respect to broadening of the mobile phone jailbreaking exemption,<sup>13</sup> the exemption should not be expanded to cover video game consoles.

The Office has considerable experience with the subject of game console jailbreaking. In the 2012 triennial proceeding, proposed Class 3 targeted jailbreaking of video game consoles. That proposal was decisively rejected by the Register because “the circumvention of console restrictions—even when initially undertaken for salutary purposes—is inextricably linked to and tends to foster piracy.”<sup>14</sup> The Register also found that the proponents of the exemption “fail[ed] to demonstrate that video game console access controls have or are likely to have a substantial adverse impact on [noninfringing] uses.”<sup>15</sup>

A warmed-over version of that proposal was presented as Class 19 in the 2015 proceeding, where the Register found the evidence that was presented to be “not materially different from the evidence considered in 2012.”<sup>16</sup> The Register again rejected the proposal decisively, because substantial evidence continued “to support the conclusion that jailbreaking of video game consoles leads to infringing activity[,]” while the proponents offered only “sparse evidence” that was not materially different from the case rejected in 2012.<sup>17</sup> In this proceeding, the evidence supporting a console jailbreaking exemption is not even sparse – it is nonexistent. The Register should not expand the mobile phone jailbreaking exemption to cover video game consoles.

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

Video game consoles are the center of an intellectual property ecosystem that makes copyrighted content easily and legally accessible, to the benefit of creators, distributors, and video game fans. More than 150 million Americans play video games,<sup>18</sup> and 48% of U.S. households own a dedicated gaming console.<sup>19</sup> Through these consoles, consumers can access vast numbers of valuable copyrighted works, including not only video games, but also movies, television, music, and live-sports programming that is provided by ESA’s members and a wide range of content partners.<sup>20</sup>

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<sup>13</sup> To be clear, ESA opposes any broadening of the existing exemption for reasons set forth in the comments of the Joint Creators and Copyright Owners.

<sup>14</sup> U.S. Copyright Office, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 43 (Oct. 2012), [https://www.copyright.gov/1201/2012/Section\\_1201\\_Rulemaking\\_2012\\_Recommendation.pdf](https://www.copyright.gov/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf) (“Register’s 2012 Recommendation”).

<sup>15</sup> *Id.* at 45.

<sup>16</sup> U.S. Copyright Office, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 200 (Oct. 2015), <https://www.copyright.gov/1201/2015/registers-recommendation.pdf> (“Register’s 2015 Recommendation”).

<sup>17</sup> *Id.* at 200.

<sup>18</sup> Entertainment Software Association, *2015 Essential Facts about the Computer and Video Game Industry*, at 2 (Apr. 2015), <http://www.theesa.com/article/150-million-americans-play-video-games/>.

<sup>19</sup> *2017 ESA Essential Facts* at 6.

<sup>20</sup> *See, e.g.*, Xbox Entertainment, <http://www.xbox.com/en-US/entertainment?xr=shellnav>; Nintendo Wii U eShop, <https://www.nintendo.com/wiiu/built-in-software#/nintendo-eshop>; Nintendo Switch Hulu, <https://www.nintendo.com/games/detail/hulu-switch> (last visited Feb. 7, 2018); PlayStation Network, <https://www.playstation.com/en-us/network/>.

These creators make their copyrighted works available through video game consoles because platform providers use access controls to make consoles a secure platform for content distribution. As the Register concluded in 2012:

Console access controls protect not only the integrity of the console code, but the copyrighted works that run on the consoles. In so doing, they provide important incentives to create video games and other content for consoles, and thus play a critical role in the development and dissemination of highly innovative copyrighted works.<sup>21</sup>

This is just the kind of result that Congress intended when it enacted Section 1201.<sup>22</sup>

The fundamental nature of the technological protection measures (“TPMs”) used to secure game consoles has not changed since the Register considered console jailbreaking in 2012 and 2015. Video game consoles use a range of access controls, the details of which vary from console to console, but all of which aim to prevent users from making unauthorized copies of the copyrighted video games and other content available on consoles, distributing those unauthorized copies to others, or using the console to play unauthorized copies of such works. In general, these TPMs include encryption of the firmware that controls access to the video game console, and other software as well, in addition to authentication checks that prevent the installation and execution of unauthorized software and likewise protect access to media content.<sup>23</sup> These TPMs work in concert to create a secure media platform.

A modern game console cannot be used to run modified firmware or to load other software that has not been authorized for use on the console without first circumventing one or more TPMs. In many cases, successful circumvention requires users to bypass the encryption on the console firmware and successfully avoid authentication processes used to check for unauthorized software loaded to the console. Once a console’s TPMs have been cracked, it can be used to play infringing copies of games, regardless of the user’s intent. In some instances, circumvention of a console renders it unable to run properly licensed content. In addition, jailbreaking permits copying of other kinds of copyrighted works distributed through the console. The Register has repeatedly acknowledged these facts, finding that there is a strong link between jailbroken consoles and piracy.<sup>24</sup>

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<sup>21</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260, 65,274 (Oct. 26, 2012).

<sup>22</sup> *E.g.*, H.R. Rep. No. 105–551, pt. 1, at 10 (1998) (“When copyrighted material is adequately protected in the digital environment, a plethora of works will be distributed and performed over the Internet.”).

<sup>23</sup> In the 2015 Triennial Proceeding, the Register compiled a robust record regarding the access controls that protect video game consoles. Those access controls have not meaningfully changed since the 2015 Proceeding. Information concerning the nature of TPMs on major consoles was attached to ESA’s 2015 comment on proposed Class 23. *See* Statement of Peter Waxman (Microsoft); Statement of Dylan Rhoads (Nintendo); Statement of Anthony Justman (Sony), available at <https://www.copyright.gov/1201/2015/comments-032715/>.

<sup>24</sup> Register’s 2015 Recommendation at 200 (“[J]ailbreaking of video game consoles leads to infringing activity.”); Register’s 2012 Recommendation at 43 (“[T]he circumvention of console restrictions—even when initially undertaken for salutary purposes—is inextricably linked to and tends to foster piracy.”).

## ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

Section 1201 does not adversely affect the ability of consumers to make noninfringing uses of software on video game consoles so as to warrant a console jailbreaking exemption (and will not over the next three years).

### 1. **No exemption should be granted as to video game consoles, because proponents fail to demonstrate the requisite adverse effects as to video game consoles.**

“Those who seek an exemption from the prohibition on circumvention bear the burden of establishing that the requirements for granting an exemption have been satisfied.”<sup>25</sup> With respect to adverse impact, “the proponent of an exemption must show by a preponderance of the evidence that the harmful impact on noninfringing uses of copyrighted works ‘is more likely than not.’”<sup>26</sup> This showing must be made with “reliable, probative, and substantial evidence.”<sup>27</sup> No such showing has been made with respect to TPMs controlling access to copyrighted video game console software.

Here, EFF – the original proponent of Class 6 – is no longer advocating an exemption that would extend to video game consoles. Its comments focus solely on voice assistant devices. While Consumers Union and the Free Software Foundation support EFF’s original proposal, which would potentially encompass video game consoles along with other kinds of devices, their very brief comments generically support jailbreaking without providing any evidence or analysis specific to video game consoles. As a result, no commenter has suggested any adverse effects at all from the use of technological protection measures to limit access to video game console software.

In 2012 and 2015, the proponents of a console jailbreaking exemption at least tried to show adverse impact, although the Register found that they failed to do so.<sup>28</sup> In the absence of any showing whatsoever with respect to adverse impact from video game console TPMs, an exemption for console jailbreaking cannot be granted.

### 2. **No exemption should be granted as to video game consoles, because a console jailbreaking exemption would promote infringement.**

It is also the proponents’ burden to show “that uses affected by the prohibition on circumvention are or are likely to be noninfringing.”<sup>29</sup> Because the proponents have not addressed video game consoles at all, they have made no such showing.

In fact, the Register’s conclusions in 2012 and 2015 concerning the linkage between console jailbreaking and infringement remain true today. The firmware for video game consoles is a computer program protected by copyright, and that firmware protects highly valuable and

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<sup>25</sup> Register’s 2015 Recommendation at 13.

<sup>26</sup> *Id.* at 14 (citation omitted).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 200; Register’s 2012 Recommendation at 45.

<sup>29</sup> Register’s 2015 Recommendation at 14-15; *see also* NPRM, 82 Fed. Reg. at 49,551-52.

expressive video games and other copyrighted content available for play on consoles.<sup>30</sup> Copying and modifying the console firmware implicates the copyright owner’s rights to control the reproduction and distribution of the firmware and the creation of derivative works, and enables other infringement of games and media content. As the Register has concluded,<sup>31</sup> those activities are not a fair use:

- The purpose and character of the use is commercial and not transformative because the primary reason many users seek to hack video game consoles is not to create new and different works, but to avoid paying the customary cost of acquiring existing works. That is a commercial use.<sup>32</sup> It is not a transformative use, because “the circumvented console code is serving the same fundamental purpose as is served by the unbroken code.”<sup>33</sup>
- The nature of the copyrighted work does not support fair use, because the console firmware contains literal and non-literal elements protectable under copyright and, even if elements of the console firmware are considered functional, the games, motion pictures and other works that are protected by the firmware are highly expressive.
- The amount and substantiality of the portion used is not reasonable, because virtually all of the hacks for video game consoles use nearly all of the code contained within the copyrighted computer programs.
- Jailbreaking harms the market for and value of copyrighted works, because “the compromised code can no longer serve as a secure platform for the development and distribution of legitimate content.”<sup>34</sup>

**3. No exemption should be granted as to video game consoles, because the statutory factors weigh against such an exemption.**

The Register has previously found that the statutory factors weigh against a video game console jailbreaking exemption, and nothing has changed in the last three years that would warrant a contrary conclusion in this proceeding.

As to the availability for use of copyrighted works, the Register has concluded that “console access controls encourage the development and dissemination of highly creative copyrighted works by facilitating secure platforms for the development and distribution of video games and other applications.”<sup>35</sup> In previous proceedings, the proponents of a console jailbreaking exemption worked – unsuccessfully<sup>36</sup> – to make a case that “homebrew” activities

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<sup>30</sup> Register’s 2012 Recommendation at 41, 43.

<sup>31</sup> Register’s 2015 Recommendation at 204; Register’s 2012 Recommendation at 44.

<sup>32</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

<sup>33</sup> Register’s 2012 Recommendation at 41.

<sup>34</sup> *Id.* at 44.

<sup>35</sup> *Id.* at 48.

<sup>36</sup> *Id.* at 47; accord Register’s 2015 Recommendation at 200.

on hacked consoles also yield new works. However, here the proponents have not even tried to make such a showing, and in any event, there continue to exist alternatives to jailbreaking consoles for creating new games.<sup>37</sup> Accordingly, as the Register has previously found, “console access controls, because they encourage the creation and distribution of valuable expressive works and do not foreclose independent channels of creative development, have the effect of increasing, rather than decreasing, the availability of copyrighted works.”<sup>38</sup>

As to availability of works for nonprofit archival, preservation, and educational purposes, the proponents here offer no evidence that users who jailbreak consoles do so for these purposes. Moreover, the existing game preservation exemption adequately addresses any need for jailbreaking for these purposes.<sup>39</sup>

As to any impact on criticism, comment, news reporting, teaching, scholarship, or research, the proponents of a console jailbreaking exemption tried to marshal evidence of such an impact in 2012. The Register found that evidence unpersuasive,<sup>40</sup> and the proponents here have offered no evidence at all. In any event, the existing game preservation exemption adequately addresses scholarly purposes.<sup>41</sup>

As to the effect of circumvention on the market for or value of copyrighted works, a generalized console jailbreaking exemption would allow the widespread play of pirated games on consoles. As the Register explained in 2012:

[D]ue to the particular characteristics of the video game marketplace, the circumvention of access controls protecting a console computer program so that it can be copied and modified for the purpose of enabling unauthorized applications has the effect of decreasing the market for, and value of, that program, as it can no longer serve to facilitate a secure gaming platform. Further, by enabling the ability to obtain and play pirated games and other unauthorized content, the dismantling of console access controls undermines the value of legitimate copyrighted works in the marketplace, many of which require a substantial investment of creative and financial resources to create.<sup>42</sup>

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<sup>37</sup> See Register’s 2012 Recommendation at 47; *accord* Register’s 2015 Recommendation at 200. Indeed, broadly accessible and highly sophisticated applications now enable any individual to create high quality games. See, e.g., Unreal Engine, *Frequently Asked Questions* (last visited Feb. 9, 2018), <https://www.unrealengine.com/en-US/faq>; Unity, *About Unity* (last visited Feb. 9, 2018), <https://unity3d.com/public-relations>. These independently created games can be sold across several (legitimate) platforms. This renders it entirely unnecessary to jailbreak consoles for the purpose of playing homebrew games. In fact, because individuals – be they skilled programmers or hobbyists – can use widely available tools to create independent games, jailbreaking consoles and cracking other access controls will not enhance the market for games.

<sup>38</sup> Register’s 2012 Recommendation at 48.

<sup>39</sup> See 37 C.F.R. § 201.40(b)(8)(ii).

<sup>40</sup> Register’s 2012 Recommendation at 49.

<sup>41</sup> See 37 C.F.R. § 201.40(b)(8)(i)(B).

<sup>42</sup> Register’s 2012 Recommendation at 49; *see also* Register’s 2015 Recommendation at 200.

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The proponents of Class 6 have failed to meet their burden of establishing that the mobile phone jailbreaking exemption should be extended to game consoles. For all of the reasons discussed above, the Register should not recommend such an extension.

**DOCUMENTARY EVIDENCE**

ESA is not submitting any exhibits regarding this proposed class.