



UNITED STATES COPYRIGHT OFFICE

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

Although we will not be providing multimedia evidence in connection with this comment, we provide in-text hyperlinks throughout the comment (represented as blue, underlined words) that link to documentary evidence and/or some cited documents.

ITEM A. COMMENTER INFORMATION

These comments are submitted on behalf of the Motion Picture Association of America, Inc. (“MPAA”), the Entertainment Software Association (“ESA”), the Recording Industry Association of America (“RIAA”), and the Association of American Publishers (“AAP”). They are collectively referred to herein as the “Joint Creators and Copyright Owners.” They may be contacted through their counsel at Mitchell Silberberg & Knupp LLP, J. Matthew Williams, 202-355-7904, mxw@msk.com, 1818 N. Street, NW, 8th Floor, Washington, D.C. 20036.

The Motion Picture Association of America, Inc. (“MPAA”) is a trade association representing some of the world’s largest producers and distributors of motion pictures and other audiovisual entertainment material for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the internet. The MPAA’s members are: Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

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

The Recording Industry Association of America (“RIAA”) is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all recorded music produced in the United States.

The Association of American Publishers (“AAP”) represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. As essential participants in local markets and the global economy, our members invest in and inspire the exchange of ideas, transforming the world we live in one word at a time.

The Joint Creators and Copyright Owners all rely on technological protection measures to offer innovative products and licensed access to consumers. Access controls make it possible (i) for consumers to enjoy recorded music through subscription services like SiriusXM, Spotify, Amazon Music Unlimited, YouTube Red, Apple Music and Pandora, including on mobile devices, through in-home voice assistants, and in their vehicles; (ii) for consumers to view motion pictures at home or on the go via discs, downloadable copies, digital rental options, cloud storage platforms, TV Everywhere, video game consoles, and subscription streaming services; (iii) for consumers to play their favorite video games on consoles, computers, and mobile devices; and (iv) for consumers to enjoy and learn from books, journals, poems and stories (including through subscription, lending, and rental options) on dedicated e-book readers, such as the Kindle and the Nook, on tablets and smartphones, and via personal computers. As the Register concluded in the recent Section 1201 Study, “[t]he dramatic growth of streaming

services like Netflix, Spotify, Hulu, and many others suggests that for both copyright owners and consumers, the offering of access—whether through subscriptions, *à la carte* purchases, or ad-supported services—has become a preferred method of delivering copyrighted content. . . .

[T]he law should continue to foster the development of such models.” U.S. Copyright Office, [Section 1201 of Title 17: A Report of the Register of Copyrights](#) 45-46 (2017) (“1201 Study”).

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 8: Computer Programs – Video Game Preservation

ITEM C. OVERVIEW

The Joint Creators and Copyright Owners fully support the separate comments concurrently submitted by ESA in opposition to the broad expansions requested by petitioner Museum of Art and Digital Entertainment (“MADE”) and others.¹ Some MPAA members, such as Walt Disney Studios Motion Pictures and Warner Bros. Entertainment Inc., are also ESA members. In addition, video games are sometimes derived from literary works. For example, Warner Bros. has announced a video game label called [Portkey Games](#), based on the Harry Potter series of books and movies. Moreover, sound recordings owned by RIAA members appear in video games, such as *Guitar Hero*, *Rock Band* and *Just Dance*. Motion pictures and sound recordings are also available for purchase, rental and streaming through video game consoles. Exemptions that potentially lead to infringement of video games and unauthorized access to works via video game consoles thus impact all of the creative industries represented by the Joint Creators and Copyright Owners.

¹ Although other commenters submitted in support of the proposed, expanded exemption, these comments were, for the most part, focused on misguided, general, philosophical objections to copyright law and to § 1201. *See, e.g.*, Consumers Union, [Class 8 Long Comment](#) (Dec. 18, 2017); Free Software Foundation, [Class 8 Long Comment](#) (Dec. 18, 2017). Accordingly, our comments will focus on MADE’s comments.

While preservation of video games is an important issue, ESA and its members (and other publishers) are already invested in preserving video games, both internally at the corporate level and through cooperative initiatives with non-profit institutions, such as the Library of Congress. These efforts are discussed in detail in ESA's own comments. The petition and comments from proponents in the current record do not establish that these efforts are insufficient with respect to preserving video games. In fact, the petitioner's proposed class appears to enable recreational video game play, including by numerous museum "affiliates," rather than preservation strictly for academic purposes.

Whether a video game is currently being supported for multiplayer, online play or not, the copyright owner retains the exclusive right to offer such video game play at a time of its choosing. Video games are not "abandoned" just because authentication is discontinued. As described in ESA's comments, there is a thriving market for classic video games. This market provides video game publishers with a strong economic incentive to preserve their copyrighted works. Consumers, who almost always acquire access to multiplayer, online play via licenses/subscriptions, are no more entitled to permanently access those features of video games than they are entitled to leave the movie theatre with a copy of a motion picture or to possess a permanent download of a work accessed via a subscription streaming or reading service.

In sum, the proposed class, if adopted, would cover infringing conduct that would harm potential markets for copyrighted works and lead to hacking that would enable play of pirated video games and undermine protections for other copyrighted works. The record does not reflect any justification for expanding the exemption.

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

The access controls at issue are discussed in detail in the separate comments submitted by ESA. As the Register has repeatedly concluded, access controls utilized in connection with video games and video game consoles protect important copyright interests. *E.g.*, U.S.

Copyright Office, [*Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention: Recommendation of the Register of Copyrights*](#) 50 (2012) (“2012 Rec.”) (“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.”).

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

As discussed in detail in the separate comments submitted by ESA, the market for video games – including multiplayer, online video games – is a vibrant ecosystem within which access controls are critically important. ESA members offer consumers access to extremely creative works that require substantial investments to produce and market. In addition, new releases of classic video games are frequently being re-issued and adapted by their copyright owners or their licensees, when demand exists. Moreover, ESA members and other publishers preserve their own video games and cooperate with legitimate preservationists.

MADE’s assertion that “despite their ever-growing cultural importance, online video games continue to turn into digital dust when their copyright owners cease to provide access to an external server necessary for the game to function,” is unsupported. MADE, [*Class 8 Long Comment*](#) at 1 (Dec. 18, 2017) (“MADE 2017 Comment”). MADE does not present evidence

that most video games are not preserved – it instead complains that they are not always being made publically accessible for multiplayer video game play. That is a critical distinction.

Expanding the exemption to cover multiplayer, online play and copying of unpublished video game elements stored on remote servers, including by “affiliates,” would also likely result in infringing public performances, the creation of infringing derivative works, and harm to console manufacturers, video game publishers, their licensors (including the motion picture, book publishing, and music industries), and, potentially, consumers. In addition, the proposed expansion would involve console “jailbreaking,” which the Register has repeatedly concluded, potentially fosters piracy. 2012 Rec. at 50; U.S. Copyright Office, [*Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention: Recommendation of the Register of Copyrights*](#) 344 (2015) (“2015 Rec.”).

1. The Existing Exemption’s Limitations Are Sound And Necessary.

The existing regulations exempt the following classes of works:

- (i) Video games in the form of computer programs embodied in physical or downloaded formats that have been lawfully acquired as complete games, when the copyright owner or its authorized representative has ceased to provide access to an external computer server necessary to facilitate an authentication process to enable local gameplay, solely for the purpose of:
 - (A) Permitting access to the video game to allow copying and modification of the computer program to restore access to the game for personal gameplay on a personal computer or video game console; or
 - (B) Permitting access to the video game to allow copying and modification of the computer program to restore access to the game on a personal computer or video game console when necessary to allow preservation of the game in a playable form by an eligible library, archives or museum, where such activities are carried out without any purpose of direct or indirect commercial advantage and the video game is not distributed or made available outside of the physical premises of the eligible library, archives or museum.
- (ii) Computer programs used to operate video game consoles solely to the extent necessary for an eligible library, archives or museum to engage in the preservation activities described in paragraph (i)(B).
- (iii) For purposes of the exemptions in paragraphs (i) and (ii), the following definitions shall apply:

(A) “Complete games” means video games that can be played by users without accessing or reproducing copyrightable content stored or previously stored on an external computer server.

(B) “Ceased to provide access” means that the copyright owner or its authorized representative has either issued an affirmative statement indicating that external server support for the video game has ended and such support is in fact no longer available or, alternatively, server support has been discontinued for a period of at least six months; provided, however, that server support has not since been restored.

(C) “Local gameplay” means gameplay conducted on a personal computer or video game console, or locally connected personal computers or consoles, and not through an online service or facility.

(D) A library, archives or museum is considered “eligible” when the collections of the library, archives or museum are open to the public and/or are routinely made available to researchers who are not affiliated with the library, archives or museum.

37 C.F.R. § 201.40(8).

One reason that the Register limited this exemption to accessing “video games in the form of computer programs embodied in physical or downloaded formats that have been lawfully acquired as complete games” for the facilitation of “local gameplay” was because the petitioner at the time, the Electronic Frontier Foundation (“EFF”), expressly conceded in its submissions that authorizing circumvention to access and make use of remotely stored programs and content would be problematic. EFF, [Class 23 Comment](#) at 2 (Feb. 6, 2015) (citations omitted). At the public hearing regarding the proposed class, EFF’s representative reiterated this position, in response to questions concerning how to properly tailor the class. Transcript of Hearing, [Sixth Triennial 1201 Rulemaking Hearings, Proposed Classes: 19, 20, 23, 6](#) at 227-28 (2015) (“MR. Stoltz: So our class as proposed excluded what are called massively multiplayer online games. And the reason for that was essentially to streamline the Office’s inquiry and to create a well-defined and administrable class.”); *id.* at 269 (“MR. Stoltz: [I]f the restoration would require the copying of copyrightable material that was hosted on the server, we would exclude that from the class.”).

The Register relied, in part, on this concession and its impact on the relevant legal analyses when deciding to recommend the existing exemption. *See* 2015 Rec. at 323 (limitation to “games that can be played by users without accessing or reproducing copyrightable content stored or previously stored on an external computer server” is “significant”); *id.* at 337 (“In reviewing the statutory factors, the Register notes that ... the proposed exemption contemplates circumvention of self-contained copies of lawfully acquired games in physical or downloaded formats rather than games that involve shared content hosted by third parties (such as persistent world games) or are accessed via subscription, and that *these are critical assumptions in the fair use analysis.*”) (emphasis added); *id.* at 350 (“Following EFF/Albert’s suggestion, the Register recommends that the exemption exclude uses that require access to or copying of copyrightable content stored or previously stored on developer game servers, finding this to be an important limitation.”).

The Copyright Office, in the 2017 Notice of Proposed Rulemaking, again noted that this is “an important limitation.” [*Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking*](#), 82 Fed. Reg. 49,550, 49,561 (Oct. 26, 2017). However, as has become typical in these triennial proceedings, now that the Librarian has granted an exemption related to this category of conduct based on the proponents’ representations that the activities in which they wished to engage were reasonable and narrow, the petitioner seeks to discard what were once uncontroversial limitations and represents that they are devastating to legitimate activities without providing adequate evidence that the circumstances that previously justified the limitations have changed. The petitioner also seeks to discard other common-sense aspects of the exemption designed to prevent infringement and to

limit the covered conduct to legitimate preservation activities. As discussed further below, and in ESA's separate comments, the Register should not recommend these proposed expansions.

2. MADE's Requested Expansions Are Dangerous And Misguided.

MADE seeks to expand the preservation related aspects of the existing exemption such that the proposed regulatory text would read as follows:

(i) Video games in the form of computer programs embodied in physical or downloaded formats that have been lawfully acquired as complete games, when the copyright owner or its authorized representative has ceased to provide access to an external computer server necessary to **either** facilitate an authentication process to enable local gameplay **or to conduct online gameplay**, solely for the purpose of: (A) Permitting access to the video game to allow copying and modification of the computer program to restore access to the game for personal, **local** gameplay on a personal computer or video game console; or (B) Permitting access to the video game to allow copying and modification of the computer program to restore access to the game on a personal computer or video game console when necessary to allow preservation of the game in a playable form by an eligible library, archives or museum, **or an eligible library, archives or museum's eligible affiliate**, where such activities are carried out without any purpose of direct or indirect commercial advantage and the video game is not distributed or made available **to the public** outside of the physical premises of the eligible library, archives or museum.

(ii) Computer programs used to operate video game consoles solely to the extent necessary for an eligible library, archives or museum, **or an eligible library, archives or museum's eligible affiliate**, to engage in the preservation activities described in paragraph (i)(B).

(iii) For purposes of the exemptions in paragraphs (i) and (ii), the following definitions shall apply:

(A) "Complete games" means video games that can be played by users without accessing or reproducing copyrightable content stored or previously stored on an external computer server, **or video games that can be played by users through lawful access of game content stored or previously stored on an external computer server.**

(B) "Ceased to provide access" means that the copyright owner or its authorized representative has either issued an affirmative statement indicating that external server support for the video game has ended and such support is in fact no longer available or, alternatively, server support has been discontinued for a period of at least six months; provided, however, that server support has not since been restored.

(C) "Local gameplay" means gameplay conducted on a personal computer or video game console, or locally connected personal computers or consoles, and not through an online service or facility.

(D) “Online gameplay” means gameplay conducted on a personal computer or video game console using an external computer server.

(E) A library, archives or museum is considered “eligible” when the collections of the library, archives or museum are open to the public and/or are routinely made available to researchers who are not affiliated with the library, archives or museum.

(F) An affiliate of a library, archives, or museum is considered “eligible” when engaged in the lawful preservation of video games under the supervision of an eligible library, archives, or museum.

MADE 2017 Comment at 6-8 (bold in original to highlight proposed changes).

MADE describes the requested expansions as “modest,” – they are not. MADE 2017 Comment at 2. The proposed exemption could result in an army of off-site “affiliates” drawn from the public. Those affiliates, and eligible preservationists, could claim license to hack video game servers for the purpose of creating unauthorized copies and derivate works. And those affiliates, along with eligible preservationists, could make infringing use of video games preserved in “playable form,” by engaging in public performances and enabling recreational video game play (rather than true, scholarly preservation).

(a) The Requested Expansions Would Likely Enable Infringement And Other Unlawful Conduct.

MADE concedes that “preservation of abandoned online video games requires copying and modifying both functional and expressive elements contained in a game’s architecture.” MADE 2017 Comment at 15. It also appears that copying the computer programs and expressive video game elements MADE’s proposal targets would require unauthorized hacking into computer servers. *See* MADE 2017 Comment at 12 (“Since entry into most server-based games and virtual worlds requires an authentication procedure such as a log in, after a server shuts down, the authentication procedure built into the software will be an obstacle for preservation or research activities.”). Such conduct would likely not only violate the Copyright Act – it would also likely violate the Computer Fraud and Abuse Act. *See* 18 U.S.C. § 1030

(prohibiting intentionally accessing a computer without authorization to extract information). This runs counter to the Register’s (and Congress’) repeated preference that exemptions not apply to unlawful conduct. *E.g.*, 37 C.F.R. § 201.40(b)(7); 17 U.S.C. § 1201(j)(2). Moreover, “to restore online games to full functionality, preservationists must create replacement servers and protocols that interoperate with a game’s client.” MADE 2017 Comment at 11. Doing so would likely infringe the derivative work right under 17 U.S.C. § 106(2).

The proposal could enable other infringements, as well. Although MADE claims that its proposal “does not authorize the public performance or display of preserved online games,” MADE 2017 Comment at 14, such activities appear to be at the heart of MADE’s mission. Indeed, the proposal appears to allow attendees of MADE’s venue to play video games in public (*i.e.*, public performances) for a price. *See* ESA, Class 8 Long Comment (Feb. 12, 2018) (“ESA 2018 Comment”). As the Register concluded in 2015, “[t]he performance and display of a video game for visitors in a public space is a markedly different activity than efforts to preserve or study the game in a dedicated archival or research setting.” 2015 Rec. at 342.

While section 109(c) would seemingly cover the display of a video game in a museum or other public setting, it does not address the right of public performance, which would also be implicated, as video games render visual images and accompanying sounds. There is no express exception in the Copyright Act that would appear to address the performance aspects of the exhibition uses at issue here. The Register expresses no opinion on whether the exhibition activities proposed by proponents, insofar as they constitute public performances, would or could constitute fair or otherwise noninfringing uses of video games or associated console software. The Register merely concludes that the lack of any legal or evidentiary record on this issue precludes such a finding.

Id. at 343; *see also* 17 U.S.C. § 109(e) (exception only for certain public performances using “coin-operated equipment”).

Enabling public video game play is distinct from preservation for purposes of research and study, and is not transformative. Copying and/or adapting a work to enable people to use it

for the exact purpose for which it was originally created is the definition of non-transformative. *See Soc’y of Holy Transfiguration v. Gregory*, 689 F.3d 29, 60 (1st Cir. 2012). Moreover, the fact that server authentication has been discontinued does not mean that there is no potential market harm under the fourth fair use factor. Content owners have a right to revive their video games, as the Register noted in 2015. *See* 2015 Rec at 338-39 (“Certainly opponents are correct in asserting their rights to reintroduce games in the future[.]”). Indeed, classic video games are often revived. ESA 2018 Comment.

MADE argues that preservation will reignite interest in classic video games. MADE 2017 Comment at 22-23. However, if classic video games are made accessible via unauthorized means by “preservationists,” these offerings would be market substitutes that would potentially discourage new, legitimate offerings. This impacts not only the fair use analysis, but also the analysis under § 1201(a)(1)(C)(iv) related to how the exempted activity will impact the value of copyrighted works. A work’s value would plummet if it was available to be played for free on a widespread basis. As ESA’s Comments highlight, there are over one-hundred thousand libraries in the United States. Also, as discussed further below, MADE wants to allow numerous “affiliates” to access works. Thus, the exemption could allow an alarming amount of public play of online video games and effectively usurp the market now supported by ESA members and other publishers. Congress did not intend this rulemaking to result in exemptions that present such threats.²

² Although the Register concluded that the relatively narrow exemption issued in 2015 would not ultimately harm markets for classic video games, 2015 Rec. at 339, the Joint Creators and Copyright Owners submit that the broad expansions requested by MADE could harm those markets.

(b) *Covering “Affiliate Archivists” Is Inconsistent With Section 108’s Principles And Would Invite Misuse.*

MADE claims that the Section 108 Study Group Report provides support for expanding the exemption to cover “Affiliate Archivists.” MADE 2017 Comment at 5. However, recommending that § 108 be amended to allow libraries and archives to hire, when appropriate, outside contractors, U.S. Copyright Office, [*Section 108 of Title 17: A Discussion Document of the Register of Copyrights*](#) 49 (Sept. 2017), is a far cry from MADE’s request to authorize crowdsourced “preservation” by thousands of individuals. MADE 2017 Comment at 27. MADE claims that widespread access would not be allowed because its proposed exemption would only apply where “the video game is not distributed or made available to the public outside of the physical premises of the eligible library, archives or museum.” MADE 2017 Comment at 7. However, MADE’s regulatory language appears to exclude “affiliates” from “the public.” The definition of “affiliates” is not only vague, but also allows for off-site access and, MADE admits, could cover huge numbers of people.³ In 2015, the Register properly concluded that such off-site access is not appropriate for an exemption targeting preservation. *See* 2015 Rec. at 346-47 (“[S]ection 108 suggests that preservation activities are properly limited to on-site uses, and multiplayer play over the internet would violate that principle.”).

If “affiliates” are allowed to hack consoles, as archives are under the current exemption, the exemption would enable play of pirated video games. *See* 2015 Rec. at 49 (“Even if piracy is not the initial or intended purpose for circumvention and modification of console software, the

³ The proposed definition is as follows: ““Affiliate Archivists’ means persons who engage in lawful game preservation activities under the supervision of an eligible library, archives, or museum.” MADE 2017 Comment at 8. As discussed in the separate comments submitted by ESA, this definition is inadequate for numerous reasons, including that it does not impose legally enforceable restrictions on affiliate behavior or require any formal protections against infringement.

record substantiates opponents’ assessment that in the case of video games, console jailbreaking leads to a higher level of infringing activity.”). The “preservation” efforts could also involve myriad people engaging in online video game play and thereby receiving unauthorized public performances, and potentially distributions, of works. As the Register concluded previously, this could also involve the provision of unlawful circumvention services. *See* 2015 Rec. at 346. Finally, this conduct would put at risk other content accessible via the consoles, such as motion pictures and recorded music. ESA 2018 Comment; 2015 Rec. at 49 (console jailbreaking involves “enabling the ability to obtain and play pirated games *and other unauthorized content*”) (emphasis added). MADE’s proposed expansions are ill conceived and perilous.

DOCUMENTARY EVIDENCE

The Joint Creators and Copyright Owners are not submitting any exhibits for this proposed class of works. Throughout the comment, links are provided for documentary evidence.

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