



## 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, ESA member companies have established full-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* 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) (“*Video Games in the 21<sup>st</sup> Century*”). 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* 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 video game software.

There is no doubt that video games are an important and significant form of creative expression.<sup>5</sup> In fact, video games of all types are now being recognized by major art museums across America.<sup>6</sup> And the creative nature of the medium is evident from the treatment of video games in the mainstream press, which reviews and critiques video games alongside other copyrighted works, such as literature, movies, television, and theater.<sup>7</sup> Accordingly, and as described further below, 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.

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

Proposed Class 9: Computer Programs—Software Preservation

## **ITEM C. OVERVIEW**

Proposed Class 9 is an incredibly broad proposal to permit libraries, archives and museums to circumvent Technological Protection Measures (“TPMs”) on lawfully acquired software, as well as a set of “dependent materials” that seems to consist of any material that is

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<sup>5</sup> In *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786 (2011), the U.S. Supreme Court recognized that video games, as expressive works, are fully protected by the First Amendment. That is because “[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages.” *Id.* at 790.

<sup>6</sup> Many institutions have recognized video games' central place among the most established forms of art. For example, in 2012, the Museum of Modern Art (“MoMA”) in New York City began displaying video games in its galleries, and exhibitions devoted to video games opened at the Smithsonian American Art Museum and the Museum of the Moving Image, prompting the *New York Times* to declare that “[v]ideo games are now high culture.” See Allan Kozinn, *MoMA Adds Video Games to Its Collection*, N.Y. Times: Artsbeat (Nov. 29, 2012, 1:45 PM), <https://artsbeat.blogs.nytimes.com/2012/11/29/moma-adds-video-games-to-its-collection/>. The MoMA selects video games to acquire using the same criteria the museum uses for other collections, including “historical and cultural relevance, aesthetic expression, functional and structural soundness, innovative approaches to technology and behavior, and a successful synthesis of materials and techniques.” *Id.* Moreover, the Strong National Museum of Play in Rochester, which houses the World Video Game Hall of Fame, recognizes individual video games that have exerted influence on the industry or on popular culture and society in general. See World Video Game Hall of Fame, Strong Nat’l Museum of Play, <http://www.museumofplay.org/about/world-video-game-hall-fame> (last visited Feb. 7, 2018); see also Nathan Reese, *An Exhibition That Proves Video Games Can Be Art*, N.Y. Times (Feb. 10, 2016), <https://www.nytimes.com/2016/02/10/t-magazine/art/jason-rohrer-video-games-exhibit-davis-museum.html> (reviewing *The Game Worlds of Jason Rohrer*, a video game art exhibit which was on view at the Davis Museum in Wellesley, Massachusetts in 2016).

<sup>7</sup> E.g., Seth Scheisel, *Way Down Deep in the Wild, Wild West*, N.Y. Times (May 16, 2010), <http://www.nytimes.com/2010/05/17/arts/television/17dead.html> (review of Take-Two Interactive Software's 2010 hit *Red Dead Redemption*, commenting on the way in which video games often confront moral issues).

machine-readable,<sup>8</sup> for purposes of preservation. The concept of “dependent materials” appears to be an effort to back-door every type of copyrighted work into an exemption that is ostensibly about software.<sup>9</sup>

The exceptionally broad scope of this proposed exemption is new.<sup>10</sup> While the proponents try to link proposed Class 9 to exemptions granted by the Register in 2003 and 2006,<sup>11</sup> those exemptions focused solely on software (including video games) in cases in which the original media was a condition of access, and the media format had become obsolete.<sup>12</sup> The proposal here is not nearly so limited.

Four triennial proceedings later, as to video games, proposed Class 9 is significantly duplicative of an existing exemption for preservation, codified at 37 C.F.R. § 201.40(b)(8)(i)(B). Under the existing exemption, eligible preservationists may circumvent TPMs protecting lawfully acquired copies of certain complete video games to preserve local gameplay, when an external server authentication process is otherwise required, and server support for the game has been discontinued for at least six months. The exemption contains important restrictions on this activity. Most notably, preservation must be directed to *local* gameplay, cannot be carried out for “direct or indirect commercial advantage” and cannot involve distributing or making the game available “outside of the physical premises of the eligible library, archive[s,] or museum.”<sup>13</sup> In crafting the exemption, the Register made nuanced judgments about the scope of preservation, which she ultimately understood as an attempt to archive video games “and make them available for research and study.”<sup>14</sup> ESA did not oppose continuing the current exemption for video game preservation, which the Register has said she intends to recommend continuing.<sup>15</sup>

The Notice of Proposed Rulemaking (“NPRM”) in this proceeding also seeks comments on proposed Class 8, a proposal to expand significantly the scope of the current video game

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<sup>8</sup> The proponents define these as “digital file formats where accessibility depends on a software program.” SPN-LCA Comments at 4.

<sup>9</sup> See, e.g., SPN-LCA Comments at 7-8 (giving examples of visual art, architectural designs, literature and music).

<sup>10</sup> Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, 82 Fed. Reg. 49,550, 49,562 (Oct. 26, 2017) (“NPRM”).

<sup>11</sup> SPN-LCA Comments at 3.

<sup>12</sup> Recommendation of the Register of Copyrights in RM 2005-11, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 24-33 (Nov. 17, 2006), [https://www.copyright.gov/1201/docs/1201\\_recommendation.pdf](https://www.copyright.gov/1201/docs/1201_recommendation.pdf); Recommendation of the Register of Copyrights in RM 2002-4, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 41-63 (Oct. 27, 2003), <https://www.copyright.gov/1201/docs/register-recommendation.pdf>.

<sup>13</sup> 37 C.F.R. § 201.40(b)(8)(i).

<sup>14</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 322 (Oct. 2015), <https://www.copyright.gov/1201/2015/register-recommendation.pdf> (“Register’s 2015 Recommendation”) (drawing on proponents’ definition of preservation); see also *id.* at 322 n.2182 (quoting proponents of exemption for preservationists as “asserting that ‘the goal of preservation is to preserve every aspect of the original experience of playing a game, to provide really the maximum amount of data and experiential data for the future, *whether that is a museum exhibit for academics* or whatever use coming down the road.” (emphasis added)); *id.* at 327 (summarizing proponents’ position that loss of online multiplayer gameplay adversely affects preservationists by “thwart[ing] . . . their efforts to preserve video games and make them available for study.”).

<sup>15</sup> NPRM, 82 Fed. Reg. at 49,555-56.

preservation exemption, particular with respect to online video games.<sup>16</sup> ESA is separately submitting comments opposing proposed Class 8, because Class 8 contemplates uses far beyond the serious preservation and scholarly activities imagined by the Register when she granted the existing game preservation and would substantially increase infringement.

In contrast to proposed Class 8, the proponents of proposed Class 9 barely mention video games in their comments.<sup>17</sup> Nonetheless, video games are software, and so would potentially be subject to the proposed Class 9 exemption as well as the proposed Class 8 exemption and the existing game preservation exemption.

The initial and primary proponents of the software preservation exemption – the Software Preservation Network and Library Copyright Alliance (together “SPN-LCA”) – are not entirely clear about the full scope of the video games and other software they hope to reach with proposed Class 9. They describe preservation of “historical” software, which they suggest consists of titles that are a decade or more old, have over that time achieved a level of historical significance, and are not currently commercially significant.<sup>18</sup> However, the proponents do not propose specific limitations consistent with those descriptions. As a result, proposed Class 9 potentially encompasses all video games and other software, including current titles, along with every other type of work available in machine-readable form, so long as circumvention is performed by an eligible organization for preservation purposes and a lawfully-acquired copy is used. Understood so broadly, proposed Class 9 would subsume entirely the existing video game preservation exemption and to a significant extent overlap the game preservation exemption proposed as Class 8.

Video games should not be subject to multiple overlapping preservation exemptions, and decisions about exemptions applicable to video games should not be based on a record that fails to address their unique characteristics. Video games are a large and discrete subset of software with characteristics very different from operating system software, productivity applications, or other types of specialized software. Consistent with the principle that a “particular class of copyrighted works” subject to a Section 1201 exemption should “be a narrow and focused subset of the broad categories” of copyrighted works,<sup>19</sup> any preservation exemption for video games should be considered with respect to the unique characteristics of video games, as opposed to other types of software with different characteristics. To the extent that the general software preservation exemption proposed as Class 9 overlaps with the current video game preservation exemption, proposed Class 9 should be rejected.

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<sup>16</sup> *Id.* at 49,561-62.

<sup>17</sup> SPN-LCA Comments at 4 (mentioning “video games” in a list of types of software); *id.* at 29 (mentioning video games in statement largely addressing software preservation in general).

<sup>18</sup> SPN-LCA Comments at 7 (noting that “[h]istorical software study is made much more difficult on TPM-protected software without circumvention”); *id.* at 21 (“The software that archives and libraries are looking to preserve is often comprised of titles that are no longer commercially relevant.”; “It is highly unlikely that circumvention techniques appropriate for software from the 1990s or the early 2000s would have any effect on the more advanced technological protection measures of modern software programs.”); *id.* at 26 (“[W]e attempt to preserve and exhibit historical significant artifacts from the history of computing.”); *id.* at 29 (“historically important software titles”).

<sup>19</sup> H.R. Rep. No. 105-551, pt. 2, at 38 (1998) (internal quotation marks omitted).

The general software preservation exemption in proposed Class 9 should also be rejected with respect to video games and any “dependent materials” to the extent it contemplates broadening the existing video game preservation exemption, for essentially the reasons set forth in ESA’s comments concerning proposed Class 8. The existing video game exemption was predicated on a substantial record specific to video games that was compiled in the 2015 triennial proceeding and strikes a careful balance between the interests of preservationists and copyright owners. The balance was struck, at least in part, by adopting restrictions designed to ensure that content distribution systems remain secure. This is critical: enabling content owners to disseminate valuable expressive works through a secure distribution system preserves the incentive to invest in creation. The Register’s decision to maintain important restrictions on circumvention for purposes of video game preservation has helped ensure the continued outpouring of new video games. Broadening the existing exemption as proposed in Class 9 would disrupt incentives and threaten the vibrant marketplace for video games.

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

As detailed at greater length in ESA’s comments concerning proposed Class 8,<sup>20</sup> this is a golden age for video games. In addition to the release of major titles and introduction of new gaming experiences, video game publishers have met demand in the fast-growing market for mobile video games, and have re-released a substantial number of classic titles for all platforms (PC, console, and mobile). Additionally, in response to consumer demand, video game publishers have significantly expanded opportunities for online multiplayer gameplay, offering services that provide consumers access to online play as well as several additional features. This variety of video games incorporates a variety of TPMs, and it appears that the proponents target all of them.

Most notably, it appears that the proponents desire proposed Class 9 to enable uses similar to those covered by the existing game preservation exemption, but in broader circumstances. Among the kinds of TPMs they say they would like to circumvent are “Online Authentication” and “Time Restrictions.”<sup>21</sup> In the case of video games, those seem to correspond roughly to instances where a server-based authentication is required for gameplay, and access to the server is discontinued. It appears the proponents would keep the lawful copy requirement in the existing exemption, but omit the requirements that server support has been discontinued for at least six months, and that preservation not be carried out for “direct or indirect commercial advantage” or involve distributing or making the game available “outside of the physical premises of the eligible library, archives, or museum.”<sup>22</sup> It is not clear what they propose in the case of online video games that depend on a server not only for authentication, but also for functionality and game elements integral to gameplay. With respect to such online video games, proposed Class 9 is at least arguably directed to many of the same uses targeted by proposed Class 8, although with a somewhat different set of (relaxed) limitations.<sup>23</sup>

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<sup>20</sup> See ESA Class 8 Comments at Part D.1.

<sup>21</sup> SPN-LCA Comments at 5.

<sup>22</sup> 37 C.F.R. § 201.40(b)(8)(i).

<sup>23</sup> See ESA Class 8 Comments at Part D.2.

## ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

The proponents “bear the burden of establishing that the requirements for granting an exemption have been satisfied.”<sup>24</sup> This means that the proponents must prove both that (1) “uses affected by the prohibition on circumvention are or are likely to be noninfringing,”<sup>25</sup> and (2) “as a result of a technological measure controlling access to a copyrighted work, the prohibition is causing, or in the next three years is likely to cause, an adverse impact on those uses.”<sup>26</sup> The proponents of proposed Class 9 have failed to show that Section 1201, as modified by the existing exemption for preservation of video games, adversely affects the ability of libraries, archives and museums to preserve video games, or to make them available for research or study. As a result, the proposed exemption should be rejected as to circumvention of access controls that protect both video games and video game consoles, for essentially the reasons provided in ESA’s comments concerning proposed Class 8.

### **1. Circumvention for purposes of video game preservation should not be governed by two separate exemptions with two different sets of rules, one of them based on a record that is largely silent as to video games.**

ESA has not opposed renewal of the existing exemption for video game preservation. ESA is contesting the unwarranted expansion of that exemption that has been designated as proposed Class 8 in this proceeding. ESA likewise contests the broad proposed Class 9 exemption for software preservation, which also seeks to expand the circumstances under which circumvention is permitted for purposes of preserving video games. In the NPRM, the Office did not de-conflict proposed Classes 8 and 9, although as described above, they seem to overlap to a significant degree. Video game preservation should not be governed by two separate exemptions targeting the same uses with two different sets of rules. That result would be needlessly confusing.

The proponents of proposed Class 9 have failed to make any meaningful evidentiary showing specific to video games. Video games are barely mentioned in the proponents’ comments on software preservation. By contrast, the Register and Librarian have already considered video game preservation and adopted a carefully-tailored exemption that is sufficient to ensure that video games can be archived for research and study. In addition to striking a delicate balance between the needs of creators and preservationists, the current exemption is consistent with prior preservation exemptions, and with the Office’s focus on obsolete access controls.<sup>27</sup> And perhaps most significantly, the existing exemption was based on a substantial record specific to video games that was developed during the 2015 triennial proceeding.

This proceeding has a class directed specifically to video game preservation – Class 8. Proponents of Class 8 have addressed (although inadequately) the unique attributes of video

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<sup>24</sup> Register’s 2015 Recommendation at 13.

<sup>25</sup> *Id.* at 14-15.

<sup>26</sup> *Id.*

<sup>27</sup> United States Copyright Office, Section 1201 of Title 17, at 100-101 (June 2017), <https://www.copyright.gov/policy/1201/>.

games. Without building any record specific to video games, the proponents of Class 9 ask for an exemption that, with respect to video games, is broadly similar to, but even less clearly delineated than, Class 8. This proceeding requires more.

For these reasons, the Register should exclude video game preservation from any exemption granted under proposed Class 9. Whatever the Register might recommend as to other software, video games should be addressed in a manner permitting circumvention to no greater extent than the existing video game preservation exemption that the Register has already decided to continue.<sup>28</sup>

**2. The proponents did not satisfy their burden to establish that Section 1201 imposes or will in the next three years impose adverse effects on preservation of video games for research and study.**

Video games are hardly mentioned in the Class 9 proponents' comments on software preservation in general. Those comments do not acknowledge the existing video game preservation exemption, let alone explain why it is inadequate for their purposes. Because the proponents of proposed Class 9 have failed to address video games specifically, and for the reasons set forth in ESA's Class 8 Comments,<sup>29</sup> which are briefly summarized below, the Register should reject proposed Class 9 as to video games.

The prohibition on circumventing access controls protecting video games and video game consoles, as modified by the existing exemption, does not adversely affect efforts to preserve video games for research and study. This is true for several reasons. First, video game publishers have strong economic incentives to preserve their own games, which are often issued and re-issued in patterns common to other forms of creative content, such as film and music. Second, there are currently extensive video game preservation programs, and large collections of historical games, at public institutions, as well as cooperative efforts between the ESA and its members and public institutions like the Library of Congress. Third, the existing exemption is sufficient to facilitate preservation by eligible institutions, and to facilitate subsequent research and study.<sup>30</sup> Because the proponents' comments barely mention video games, they never explain what additional preservation activities they think should be occurring, or how Section 1201 is materially preventing them.

Next, activities beyond those permitted under the existing exemption that some people have called "preservation" are infringing or would promote infringement.<sup>31</sup> For example, public gameplay has been a major motivation for some proponents that have held themselves out as

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<sup>28</sup> To the extent the Register considers recommending the exemption proposed in Class 9, ESA endorses the position of the Joint Creators and Copyright Owners, namely, that any exemption be limited to accessing computer programs, and exclude other categories of expressive works. *See generally* Joint Creators and Copyright Owners Class 9 Comments.

<sup>29</sup> *See generally* ESA Class 8 Comments at Part E.

<sup>30</sup> *See id.* at Part E.1. The Register determined that limiting the exemption to preservation for purposes of local gameplay was an important restriction and, to the extent that proponents of the software preservation seek to restore *online* multiplayer gameplay, obstacles to doing so are not caused by TPMs. *See id.* at Part E.1.i.

<sup>31</sup> *See id.* at Part E.2.i, iii.

preservationists, but unauthorized public performance and display of video games is infringing. The proponents of Class 9 have not stated whether public gameplay is their goal as well, or, if not, why genuine scholarly needs are not adequately addressed by existing preservation efforts. Likewise, the proponents have not been clear about what they would like to do about preservation of online video games, but they have proposed eliminating the requirement that server support be discontinued before circumvention is permitted. Replicating online game services is infringing, and the harm of doing so would be even worse while the authorized game services are still being provided.

The existing exemption for video game preservation was crafted based on a fact-specific infringement analysis.<sup>32</sup> Those facts were developed in a record that pertained only to video games. It would be inappropriate to subject video games to an overlapping exemption with eligible requirements based on a less particularized record, and the proponents have provided an insufficient basis for the Register to recommend one.<sup>33</sup>

Finally, a broader exemption for video game preservation is not justified under the statutory factors.

- With respect to the first factor: an extremely broad exemption for video game preservation presents several potential risks to effective copyright protection, which could reduce the incentives to invest in creation of new video games and make video game consoles a less attractive platform for content delivery. Proponents make no countervailing showing that a broader exemption would enable more preservation or development of more research and study than is generated under the existing exemption.<sup>34</sup>
- With respect to the second and third factors: the existing exemption for preservation of video games is more than adequate, and expanding the circumstances under which eligible preservationists can bypass TPMs in video games and video game consoles will not increase the availability of works for the relevant purposes, or increase the amount of criticism, comment, news reporting, teaching, scholarship, or research.<sup>35</sup>
- With respect to the fourth factor: an exemption broader than the current exemption for preservation of video games would harm the market for and value of reissues. It would also encourage or enable widespread infringement of video games, which damages the market for and value of all video games, and facilitate infringement of other entertainment content made available on (jailbroken) video game consoles.<sup>36</sup>

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<sup>32</sup> See *id.* at Part E.2.i.a,b.

<sup>33</sup> The proponents' comments note that "a slim subsection" of their contemplated uses *may* be noninfringing under Section 108(c), which permits some reproduction for purposes of preserving otherwise obsolete formats. See SPN-LCA Comments at 14. The current exemption allows preservation activity consistent with that provision. However, proponents make no showing that preservation activities beyond the scope of the existing exemption are permissible under Section 108(c).

<sup>34</sup> See ESA Class 8 Comments at Part E.3.i.

<sup>35</sup> See *id.* at Part E.3.ii-iii.

<sup>36</sup> See *id.* at Part E.3.iv.

- With respect to additional factors that warrant consideration: broadening the current exemption for video game preservation is premature. The Library of Congress and other governmental and nongovernmental entities around the world are exploring collaborative approaches to preservation efforts.<sup>37</sup> Cooperation between public and private stakeholders is likely to generate far more substantial progress on preservation than would broader circumvention.

Because the existing exemption for video game preservation is sufficient, because additional activity is in significant respects infringing, and because the Register should avoid subjecting video games to overlapping exemptions (and overlapping rules) with respect to preservation, the proposed exemption for software preservation should be rejected.

#### **DOCUMENTARY EVIDENCE**

ESA is not submitting any exhibits regarding this proposed class.

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<sup>37</sup> See *id.* at Part E.1.iii; see also Joint Creators and Copyright Owners Class 9 Comment at 5 n.3.