

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

**In the Matter of Exemption to Prohibition on Circumvention  
of Copyright Protection Systems for Access Control Technologies**

**Docket No. 2014-07**

**Reply Comments of the Electronic Frontier Foundation**

**1. Commenter Information**

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The Electronic Frontier Foundation (EFF) is a member-supported, nonprofit public interest organization devoted to maintaining the traditional balance that copyright law strikes between the interests of copyright owners and the interests of the public. Founded in 1990, EFF represents over 25,000 dues-paying members, including consumers, hobbyists, artists, writers, computer programmers, entrepreneurs, students, teachers, and researchers, who are united in their reliance on a balanced copyright system that ensures adequate incentives for creative work while facilitating innovation and broad access to information in the digital age. In filing these reply comments, EFF represents the interests of gaming communities, archivists, and researchers who seek to preserve the functionality of video games abandoned by their manufacturers.

**2. Proposed Class Addressed**

**Proposed Class 23: Abandoned Software—video games requiring server communication**

*Literary works in the form of computer programs, where circumvention is undertaken for the purpose of restoring access to single-player or multiplayer video gaming on consoles, personal computers or personal handheld gaming devices when the developer and its agents have ceased to support such gaming.*

We propose an exemption to 17 U.S.C. § 1201(a)(1) for users who wish to modify lawfully acquired copies of computer programs for the purpose of continuing to play videogames that are no longer supported by the developer, and that require communication with a server. Such modifications may include, as necessary, eliminating checks to authentication servers for games where the developer or its agent has stopped operating such servers, or modifying access controls in the software that control access to multiplayer matchmaking servers so that users can switch to third-party servers when the servers authorized by the developer are no longer operating.

### **3. Overview: An Exemption To Preserve Consumer Value And Protect Archival and Research Work Is Needed and Justified.**

#### **A. It Is No Longer Valid To Treat a Limited Exemption for Lawful Purposes as a Referendum on the Use of Access Controls.**

The Librarian should grant an exemption to § 1201(a)(1) to preserve consumers' investments in video games and to allow for preservation and scholarship. EFF, with support from researchers, academics, archivists, and software engineers, has demonstrated how access controls in the form of client-server communication cripple the functionality of hundreds of games each year as manufacturers cease to support them. In our Opening Comments, EFF explained that dedicated player communities have at times reverse-engineered the server communication protocol for a game in order to replicate a deactivated authentication or matchmaking server, that these efforts dovetail with those of museums and archives to preserve the history of video games, and that Section 1201 creates a substantial roadblock to these efforts. Over 1,000 individuals filed comments in support of this exemption.

Opponents have not rebutted these submissions. The Electronic Software Association (ESA) filed two comments in opposition, joined in one of them by the Motion Picture Association of America (MPAA) and the Recording Industry Association of America (RIAA). ESA's principal argument is that *any* exemption to the ban on circumvention with respect to video games, no matter how limited, will “undermine . . . fundamental copyright principles,”<sup>1</sup> “greatly diminish the value of copyrighted works,”<sup>2</sup> and cause game producers to cease distribution entirely.<sup>3</sup>

Extraordinary claims require extraordinary evidence; ESA does not supply it. Indeed, ESA offers little evidence at all, choosing instead to rely on sheer speculation and a variety of factual assertions that should have no bearing here. First, ESA elides the substantial limitation in this proposal: it applies only to games that are no longer supported by their publisher, indicating that the copyright holder's actual interest in continued sale of the game has ended. Second, ESA provides no evidence that an exemption for this limited purpose would materially contribute to the proliferation of infringing copies. Third, ESA all but ignores a principal purpose of this proposed exemption—to allow for the preservation of games in fully functional form for future scholarship and research. Negative impact on archival and research activities is one of the main reasons why Congress instituted this rulemaking process.<sup>4</sup> Fourth, ESA invokes business considerations that have no relationship to copyright or the purposes of Section 1201, such as brand management, “safety,” avoiding competition between old games and new, and a desire to discourage lawful “hacking.” These objections do not overcome the substantial evidence that an exemption is needed.

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<sup>1</sup> In the Matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Dkt. No. 2014-07, Comment of the Entertainment Software Association on Proposed Class 17 (“ESA Comments”) at 12.

<sup>2</sup> *Id.* at 22.

<sup>3</sup> *Id.* at 20-21.

<sup>4</sup> See 17 U.S.C. § 1201(a)(1)(iii).

ESA describes the access controls on video games as being “similar” to the Content Scramble System used on DVDs.<sup>5</sup> ESA’s position on this proposed class mirrors that of the motion picture industry of a decade ago with respect to the circumvention of DVD encryption. In 2000, 2003, and 2006, MPAA argued that an exemption for DVDs, no matter how limited, would lead to widespread infringement and decimate the motion picture industry.<sup>6</sup> The Register adopted this reasoning in the first two triennial rulemakings, denying limited exemptions for circumvention of DVD encryption in part because “[a]n exemption for motion pictures on DVDs would lead to a decreased incentive to distribute these works on this very popular new medium.”<sup>7</sup>

But in subsequent cycles, the Register rejected these predictions of doom, recommending exemptions for DVDs and newer video formats for numerous specific non-infringing purposes. The Register concluded that these exemptions did *not* harm the market for motion pictures and audiovisual works. For example, the Register concluded in 2006 that “by crafting a class that appropriately addresses the narrow adverse consequences of the prohibition demonstrated by film and media professors, the effect of the market or value of the copyrighted works is likely to be virtually nonexistent.”<sup>8</sup> Later exemptions broadened both the categories of persons who would be permitted to circumvent video encryption and the permitted purposes for doing so.<sup>9</sup> This broadening of the exemptions has not harmed the market for motion pictures.<sup>10</sup>

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<sup>5</sup> ESA Comments at 20.

<sup>6</sup> Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works, Docket No. RM 99-7, Joint Reply Comments of American Film Marketing Assoc., et al., at 25-26 (Movies on DVD “would not be available but for access and copy control technology. . . . [A]n exception . . . which allowed circumvention of CSS could have a seriously negative impact on overall availability of these products.”); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. RM 2002-4, Joint Reply Comments of AFMA et al., at 34 (access controls on video are “essential to minimize [sic] the smooth rollout of online distribution of feature films”); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. RM 2005-11, Joint Reply Comments of AAP et al., at 30 (“The threat to the success of this medium that digital piracy presents far outweighs the inconveniences to educators.”).

<sup>7</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Final Rule, RM-99-7D, 65 Fed. Reg. 64556, 64569 (Oct. 27, 2000) (“2000 Final Rule”); *see also* 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 117 (Oct. 27, 2003) (“2003 Rec.”) (denying exemption for circumvention of DVD encryption for ancillary material to be used in comment and criticism in part because “[t]here is little doubt that the prohibition on circumvention has contributed to rightsholders’ confidence in the security of the DVD format”).

<sup>8</sup> Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on Exemptions from Prohibition of Circumvention of Copyright Protection Systems for Access Control Technologies 24 (Nov. 17, 2006) (“2006 Rec.”).

<sup>9</sup> Recommendation of the Register of Copyrights in RM 2008-8, Rulemaking on Exemptions from Prohibition of Circumvention of Copyright Protection Systems for Access Control Technologies 21-77 (June 11, 2010) (“2010 Rec.”); Recommendation of the Register of Copyrights in Docket No. 2011-7, Fifth Triennial Rulemaking to Determine Exemptions to the Prohibition on Circumvention 101-142 (Oct. 12, 2012) (“2012 Rec.”).

<sup>10</sup> Michael Masnick & Michael Ho, *The Sky is Rising* (Jan. 2012), available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/562830/the-sky-is-rising.pdf> (collecting data on the steady rise of motion picture industry revenues and film production in the period 2006-2010); Statista, *Filmed entertainment revenue in the United States from 2014 to 2018*, <http://www.statista.com/statistics/259984/filmed-entertainment-revenue-in-the-us/> (last visited Apr. 30, 2015) (Reporting PwC data projecting a continued rise in US filmed entertainment revenue through 2018, to nearly \$40 billion).

Nine years of experience with targeted exemptions for DVDs and other video formats demonstrates that such exemptions do not undermine “fundamental copyright principles” or creative industries. A similar shift from complete prohibition to specific exemptions is warranted for video games. Thus, as she has done with proposals regarding video, the Register should decline ESA’s invitation to treat this proposal as a binary referendum on video game access controls generally.<sup>11</sup> And in the light of experience, the Register should not credit ESA’s assertions—made without evidentiary support—that an exemption for specific lawful purposes will “encourage” infringement to which the exemption would *not* apply.<sup>12</sup>

ESA’s objections also focus on the consoles and games its members are selling today, rather than the thousands of titles that are no longer sold anywhere. Games that are still supported by their publishers are not included in the proposed class. Older games, particularly those written for outdated consoles and PC operating systems, use different, generally simpler server access controls than those described in ESA’s comments. It is those games that are most in need of preservation in a playable state.

B. The Scope of the Proposed Exemption Is Appropriately Limited to Lawful Possessors of Games That Are No Longer Being Supported by Developers.

Although ESA makes much of EFF’s proposal that the class extend to game software on PCs and mobile devices as well as consoles, the proposed class of works is limited by *use*, and that limitation confines the exemption to lawful actors with a demonstrated need for circumvention. As with prior exemptions for motion pictures,<sup>13</sup> the proposed limits on the permitted purposes for circumvention make the class appropriately narrow. As the Register concluded in 2006, “[w]hile starting with a section 102 category of works, or a subcategory thereof, the description of a ‘particular class’ of works ordinarily should be further refined by reference to other factors.”<sup>14</sup> Thus, a class of works “may additionally be refined . . . by reference to the particular type of use and/or user to which the exemption shall be applicable.”<sup>15</sup> Proposed Class 23 is appropriately limited.

For example, the exemption specifically excludes “persistent worlds” (also known as massively multiplayer online games, or MMOs), thereby sharply limiting the likelihood that the proposed class could be interpreted to protect potentially infringing activity. ESA misapprehends the critical distinction.<sup>16</sup> When a game server merely enables single-player play, matches players to one another for competition, or records scores, players can modify their copy of the game to use a new server without the need to copy audiovisual content that once resided on the original server. In other words, a game that does not have a persistent world can be restored after server shutdown *without* making new, permanent copies of any original audiovisual content. MMOs like World of Warcraft, in contrast, cannot be revived after a server shutdown without the cooperation of the publisher.

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<sup>11</sup> See ESA Comment at 2 (“Absent the access controls . . .”).

<sup>12</sup> ESA Comment at 21.

<sup>13</sup> 2006 Rec. at 12-24; 2010 Rec. at 21-77; 2012 Rec. at 101-143.

<sup>14</sup> 2006 Rec. at 9-10.

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

<sup>16</sup> ESA Comments at 7.

ESA's objection to EFF's (and the Register's) use of the word "abandoned" is misplaced, as neither this proposed class nor any other contemplates a "surrender" of any underlying copyright.<sup>17</sup> Whether a developer has ended support for a game that requires a server connection is a factual issue, not a legal one. This proposed class, as with every exemption ever granted by the Librarian, concerns lawful public uses of works that remain under copyright. To the extent that ESA believes a valid exemption to §1201(a)(1) is itself "contrary to principles of copyright law" or the Constitution,<sup>18</sup> it must address that belief to Congress.

Also, contrary to ESA's assertion, actual re-releases of abandoned games (as opposed to sequels) are difficult and rare.<sup>19</sup> On the rare occasions where a game is re-released, the game would no longer be abandoned and the proposed exemption would cease to apply. In the far more common scenario where a publisher "improve[s] upon"<sup>20</sup> a game by releasing a new game, lawful possessors of the older game should be able to continue playing the game they already have.

#### 4. The Technological Protection Measure: Communication with Servers

ESA's description of access controls is specific to console gaming, and to the current consoles sold by ESA's members. In many PC games and older consoles, server communications for authentication and matchmaking operate separately from integrity checks. This means that the modifications necessary to restore the game to functionality do not permit the playing of unauthorized copies of games. For example, games that used the now-shutdown Gamespy servers for multiplayer play can be modified to use new servers without removing other access controls.<sup>21</sup> Similarly, Metal Gear Online, which was shut down by its developers in early 2012,<sup>22</sup> was restored to functionality by enthusiasts by reverse-engineering the network protocol, "pushing various pieces of fake data to their consoles, and then using the responses to craft adequate private servers," but without bypassing or removing the encryption on the game files.<sup>23</sup> The modification of Sony's Dynamic Network Authentication protocol necessary for playing Metal Gear Online is different from the type needed to enable playing the game without a

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<sup>17</sup> ESA Comments at 6-7.

<sup>18</sup> *Id.*

<sup>19</sup> See Dave Tach, *Digital Archeology: How Double Fine, Disney, LucasArts and Sony Resurrected Grim Fandango*, Polygon (Jan. 27, 2015), <http://www.polygon.com/2015/1/27/7921837/grim-fandango-remastered-interview-double-fine-disney-lucasfilm-sony> (describing the difficult and almost foreclosed process of re-mastering Grim Fandango, a widely acclaimed game originally released in 1998); See also Kirk Hamilton, *The Sad Story Behind a Dead PC Game That Can't Come Back*, Kotaku (Feb. 27, 2015), <http://kotaku.com/the-sad-story-behind-a-dead-pc-game-that-cant-come-back-1688358811> (describing how the re-release of No One Lives Forever failed, despite support from the founder of the original game studio).

<sup>20</sup> ESA Comments at 7.

<sup>21</sup> See PÕQ~Technut, Comment on *IMPORTANT: GameSpy is shutting down on May 31, 2014*, Halo Fixes (May 9, 2014, 12:41am), <http://halo-fixes.findforum.net/t1-important-gamespy-is-shutting-down-on-may-31-2014>.

<sup>22</sup> Brian Ashcraft, *Metal Gear Online Is Dead* (Feb. 14, 2014), <http://kotaku.com/5884916/metal-gear-online-is-dead>.

<sup>23</sup> Tom Fox-Brewster, *Metal Gear Online brought life by professional hackers* (Sept. 24, 2014), <http://www.theguardian.com/technology/2014/sep/24/metal-gear-online-professional-hackers>. See also Mr.Game20, *Toorcon: San Diego (2014) – Cyber Necromancy: Reverse Engineering Dead Protocols* (Oct. 30, 2014) <https://www.youtube.com/watch?v=K4dyyLpMkQk>.

lawfully purchased disk.<sup>24</sup> Contrary to ESA’s claims, the PS2 console does not need to be modified in order to play on the user-run server.<sup>25</sup> Metal Gear Online 2, a game for the PlayStation 3, used a system for matchmaking that was separate from the PlayStation Network used for authentication.<sup>26</sup> ESA’s comments assume that the specifics of modern consoles apply to all circumstances in which a user might want to modify a game, which is not the case. The proposed exemption would accommodate the needs of players and archivists, without including modifications made for purposes of infringement.

## **5. The Uses To Which The Proposed Class Is Limited Are Important and Non-Infringing.**

### **A. Multiplayer Gameplay Over The Internet Is A Primary, Integral Feature.**

ESA’s assertion that the ability to play a game with others over the Internet is not a core feature of many games is incorrect, and frankly bizarre. Many hundreds of popular games are played primarily in multiplayer mode over the Internet, and Internet play is a heavily marketed feature. Game reviewer Steve Lubitz notes that “it’s becoming such the norm to have, not even a multiplayer component, but to have multiplayer be an integral part of the game.”<sup>27</sup> Professional game critic Maddy Myers believes that

[m]ultiplayer is an integral part of electronic games, and preserving it—even if only on a few servers—is key to the archival of videogames in the long term. The historical and academic study of these cultural artifacts would be ruined if multiplayer could not continue to be made available, especially for smaller and more artistic games developed by independent artists.<sup>28</sup>

Numerous game enthusiasts submitted comments to the Digital Right to Repair Coalition’s website regarding this exemption proposal, expressing their view that multiplayer play is “critical to the games that I play,” and that most games are “crippled without online play.”<sup>29</sup> In particular, commenters identified the current games Star Wars:Battlefront, Titanfall, Destiny, Overwatch, Battlefield 2142, and Battlefield 3, and older games including Starcraft, Richard Burns Rally, Tribes 2, Grand Theft Auto V, and versions of Street Fighter as examples of games where multiplayer play is central.<sup>30</sup>

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<sup>24</sup> “We couldn’t just use the piracy bypass where you just patch the parts of the disk to return positive information and you’re good to go. The bypass for games no longer online is something new.” CCCen, Cyber Necromancy - Reverse Engineering Dead Protocols [31c3], <https://www.youtube.com/watch?v=fIAKzzlJ67w>.

<sup>25</sup> CCCen, Cyber Necromancy – Reverse Engineering Dead Protocols [31c3], <https://www.youtube.com/watch?v=fIAKzzlJ67w>.

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

<sup>27</sup> Georgia Dow, Brianna Wu, Steve Lubitz, & Maddy Myers, Isometric Podcast, episode 50 at 24:20, *available at* <http://www.relay.fm/isometric/50> (“Isometric Podcast”) See also <http://venturebeat.com/community/2014/06/16/is-single-player-dying-the-move-to-multiplayer-and-the-sacrifice-of-solitude/> and <http://www.giantbomb.com/articles/the-growing-illusion-of-single-player/1100-5017/>

<sup>28</sup> See App’x B, Selected Comments Submitted by Visitors to the Digital Right to Repair Coalition Website, at 2.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

In 2012, an executive of game publisher and ESA member Electronic Arts suggested that his company had not “green-lit” a single game that was solely a single-player experience.<sup>31</sup> Many video game writers have actually begun to argue that online multiplayer is playing too large a role in the modern video game industry.<sup>32</sup>

Professional reviewers consider single-player and multiplayer modes to be completely different experiences, and consider reviews of the single-player mode alone to be “inaccurate, not indicative of the actual experience.”<sup>33</sup> Evaluation of “online connectivity” and “server stability” is an indispensable part of evaluating a game.<sup>34</sup> An accurate review comes only from “play[ing] the game with a variety of players, on live servers.”<sup>35</sup> Many professional reviews of games focus almost entirely on multiplayer play, or on the stark differences between single-player and multiplayer modes.<sup>36</sup>

Single-player mode involves playing against an artificial intelligence, which is generally a less sophisticated opponent and lacks a social element that many players seek.<sup>37</sup> One commenter on this rulemaking writes that “I’m a female in my 20s, I have zero interest in sitting by myself in an isolated world. But I have made many friends through online gaming, and that’s what keeps me coming back.”<sup>38</sup> Another called multiplayer play “one of the most important social spaces in my life.”<sup>39</sup> And a third writes, “I game with a group of friends that is scattered across the world. This is how we keep in touch.”<sup>40</sup>

Multiplayer play over the Internet is a major component of the value that players expect to receive for their purchase money. Players’ preference for multiplayer mode is illustrated by the number of players who sign up for it. On the PlayStation 4 for example, 56 million players used

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<sup>31</sup> Paul Tassi, *Single Player Matters: Why Not All Games Need to Be ‘Social’*, Forbes (Sep. 6, 2012) <http://www.forbes.com/sites/insertcoin/2012/09/06/single-player-matters-why-not-all-games-need-to-be-social/>.

<sup>32</sup> Joel Castro-Reyes, *Is single-player dying? The move to multiplayer and the sacrifice of solitude*, GamesBeat (June 16, 2014) <http://venturebeat.com/community/2014/06/16/is-single-player-dying-the-move-to-multiplayer-and-the-sacrifice-of-solitude/>.

<sup>33</sup> Ben Kuchera, *Playing against the gods: how the press reviews multiplayer games*, Ars Technica (Apr. 7, 2011), <http://arstechnica.com/gaming/2011/04/07/playing-against-the-gods-how-the-press-reviews-multiplayer-games/>.

<sup>34</sup> Kyle Orland, *The spotty death and eternal life of gaming review scores*, Ars Technica (Feb. 15, 2015), <http://arstechnica.com/gaming/2015/02/15/the-spotty-death-and-eternal-life-of-gaming-review-scores/>.

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

<sup>36</sup> See, e.g., Michael McWhertor, *Call of Duty: Black Ops 3’s Campaign is Now a Team Effort*, Polygon (Apr. 26, 2015),

<http://www.polygon.com/2015/4/26/8499735/call-of-duty-black-ops-3-campaign-details>; Michael McWhertor, *Black Ops 3: The Future of Call of Duty Multiplayer*, Polygon (Apr. 26, 2015), <http://www.polygon.com/2015/4/26/8499325/call-of-duty-black-ops-3-multiplayer-details>;

Sam Machkovech, *Mortal Kombat X review: Fatality attraction*, Ars Technica (Apr. 19, 2015), <http://arstechnica.com/gaming/2015/04/19/mortal-kombat-x-review-fatality-attraction/2/>; Steven Strom, *Battlefield Hardline review: an odd, cops-and-robbers façade*, Ars Technica (May 22, 2015), <http://arstechnica.com/gaming/2015/03/22/battlefield-hardline-single-player-impressions-forget-about-procedure> (“New twists on old formula help in multiplayer, baffle in single player.”).

<sup>37</sup> See, e.g., Sternesammler, *Have they improved the AI with brave new world?* Sid Meier’s Civilization V forums, Steam, <http://steamcommunity.com/app/8930/discussions/0/864975249452552445/>.

<sup>38</sup> See App’x B, Selected Comments Submitted by Visitors to the Digital Right to Repair Coalition Website, at 2.

<sup>39</sup> *Id.* at 3.

<sup>40</sup> *Id.* at 6.

multiplayer mode on 13.5 million consoles as of November 2014.<sup>41</sup> An examination of a number of modern “first-person shooter” games with substantial multiplayer components on the PlayStation 3 and 4 revealed that for most games, less than 40% of players ever played a single-player campaign through to completion.<sup>42</sup>

For the vast majority of games, multiplayer play is included in the purchase price and does not require separate payment. Nearly every PC-based game, as well as every game made for Nintendo consoles and every version of the PlayStation and Xbox consoles except the most recent are capable of multiplayer play at no additional cost.<sup>43</sup> ESA does not dispute this,<sup>44</sup> but rather seeks to obscure the issue by noting that some server access involves agreeing to additional terms of service.<sup>45</sup> An additional set of click-through terms does not make multiplayer play a separate product nor diminish its significance to the overall value of a purchased game.

The ability to play a game with others over the Internet vastly increases one’s ability to find a suitable opponent. Drawing on a global community, a player need not know her opponents. Play over a local area network is not a substitute for Internet play because it requires bringing players together at the same physical location. For console games, this may require multiple, compatible consoles in the same household. As with many networked activities, the value of a game to each individual increases dramatically as the number of other participants increases.<sup>46</sup> For players of older games where Internet play is still possible, it is common to schedule playing times in order to achieve a higher player density.<sup>47</sup> The difficulty of assembling a sufficient number of players at a given time increases dramatically if those players must gather in the same physical space.

ESA’s observation that game publishers bundle multiplayer play in newer games with other features like “downloadable content, leaderboards, badges, chat, and other social features”<sup>48</sup> does not change the centrality of multiplayer play to hundreds of games. Multiplayer functionality is a core part of many games, by any practical measure, and disabling it strips the games of value for

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<sup>41</sup> Eddie Makuch, *On Eve Of PS4's First Birthday, Sony Releases New Stats*, GameSpot (Nov. 14, 2014), <http://www.gamespot.com/articles/on-eve-of-ps4-s-first-birthday-sony-releases-new-s/1100-6423601/>.

<sup>42</sup> Tashaun Brown, *Fund With Numbers: FPS Single Player vs Multiplayer*, Ourcade Games (Feb. 20, 2014), <http://ourcadedgames.com/2014/02/20/fun-with-numbers-fps-single-player-vs-multiplayer/>.

<sup>43</sup> Kyle Orland, *PS4 owners will need PlayStation Plus subscription for online multiplayer*, Ars Technica (June 14, 2013), <http://arstechnica.com/gaming/2013/06/11/ps4-owners-will-need-playstation-plus-subscription-for-online-multiplayer/>; Nintendo, Nintendo Network ID General Info, [https://www.nintendo.com/consumer/systems/3ds/en\\_la/nintendo\\_network\\_id.jsp?menu=general\\_info](https://www.nintendo.com/consumer/systems/3ds/en_la/nintendo_network_id.jsp?menu=general_info) (last visited Apr. 30, 2015), (“the Nintendo Network itself is a free service”); PlayStation, Gaming, <http://us.playstation.com/ps3/gaming/> (last visited Apr. 30, 2015), (“Register for free on PlayStation®Network and enjoy exclusive games and free online multiplayer.”); Mark Hachman, *I’m paying for what? How Xbox Live Gold must change for a new age of free*, PC World (May 1, 2014), <http://www.pcworld.com/article/2149164/its-time-to-respawn-microsofts-xbox-live-gold-and-heres-how.html> (“Over time, however, Microsoft expanded Xbox Live Gold, charging for ‘features’ that virtually every other platform offers for free”).

<sup>44</sup> See ESA Comments at 8 (“the user typically must register—and *sometimes* pay”) (emphasis added).

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

<sup>46</sup> Paul Klemperer, “Network Goods,” *The New Palgrave Dictionary of Economics* (2d ed. 2008) (“Network effects arise where current users of a good gain when additional users adopt it (classic examples are telephones and faxes).”).

<sup>47</sup> See Game Scheduling, Dreamcast Talk, <http://dreamcast-talk.com/forum/viewforum.php?f=4> (last visited Apr. 30, 2015) (scheduling play times for games on the Sega Dreamcast, a console discontinued in 2001).

<sup>48</sup> ESA Comments at 8.

which the customer has paid. The legal barrier to maintaining one's own copy of a game in a fully functional state is, to use ESA's phrase, "exceptionally unfair."<sup>49</sup>

B. A Significant Number Of Games Require A Server Connection For Single-Player Play.

There have been many games that require a server connection for *all* play. The Appendix to EFF's initial comments identifies four such games whose servers were shut down in 2014 alone.<sup>50</sup> Other well-known games that require an operating server for all play include Assassin's Creed 2 and other games by Ubisoft, SimCity, Gears of War, Drive Club, Destiny, and Diablo III.<sup>51</sup> Gaming journalist Steve Lubitz believes that "there are so many games from the PS3 era we're going to completely lose."<sup>52</sup> Microsoft's Peter Waxman writes that "Microsoft *generally* does not require any server-based authentication checks for single-player mode" in the Xbox 360 and Xbox One, but he goes on to say that game publishers can require such authentication.<sup>53</sup> In addition, even games that are not designed to require a server connection in single-player mode suffer unexpected playability problems when multiplayer servers are shut down. For example, players of the basketball game NBA 2K14 lost the ability to save their progress in the game entirely—even in single-player mode—when publisher 2K Sports unexpectedly decided to shut down the game servers.<sup>54</sup> The popular games Mass Effect 3 and Far Cry 4 have a single-player mode, but significant parts of the games are readily accessible only in multiplayer mode, which requires a server connection.<sup>55</sup> Access controls that render a lawfully purchased game unplayable at the whim of the publisher unquestionably have a substantial adverse effect on the lawful use of copyrighted works.

C. Modifying A Game To Keep It Running Is A Fair Use, As Is Modifying A Game For Archival Preservation.

Modifying one's own copy of a game in order to preserve its functionality is a fair use because it is noncommercial, does not involve any proliferation of copies, and does not involve the modification or permanent copying of any creative audiovisual work. Beginning with the first triennial rulemaking, in 2000, the Librarian has granted several exemptions for circumvention relating to preserving the functionality of computer hardware and software, finding those uses noninfringing.<sup>56</sup> Preservation of a functional copy for future scholarship and research is also a favored purpose for modification.

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<sup>49</sup> In the Matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Dkt. No. 2014-07, Comments of ESA, MPAA, and RIAA on Proposed Class 17 ("ESA et al. Comments") at 6.

<sup>50</sup> EFF Comments, Appendix A.

<sup>51</sup> See EFF Comments on Proposed Class 23, at 10; Isometric Podcast at 17:00 ("There are so many games right now that have either a server component or rely on the server completely, like Drive Club or Destiny or Diablo . . . If those servers get shut down, those games are going to become completely unplayable.").

<sup>52</sup> *Id.* at 18:00.

<sup>53</sup> ESA Comment, Statement of Peter Waxman at 1.

<sup>54</sup> Owen S. Good, *NBA 2K14 server shutdown ends players' career modes* (Apr. 6, 2015), <http://www.polygon.com/2015/4/6/8354137/nba-2k14-servers-shut-down-save-files-filesaves-mycareer-mymgm>.

<sup>55</sup> Isometric Podcast at 25:25 ("If you don't do the multiplayer, you cannot get some of the endings. . . . They want you to play the multiplayer [mode].").

<sup>56</sup> 2000 Final Rule at 64564 (granting exemption for access controls on software that fail to function because of

The noninfringement analysis focuses on whether the “*proposed use* is likely to qualify as noninfringing.”<sup>57</sup> The relevant work in this case is certain access controls in game firmware, and the proposed use is modifying those access controls, potentially creating a derivative work. For the reasons stated in EFF’s initial comments, this modification is a fair use.<sup>58</sup> ESA’s comments do not address this use but rather other hypothetical uses of other materials, such as “the unauthorized reproduction and distribution of very creative video game content.”<sup>59</sup> ESA argues tautologically that hypothetical infringing uses are infringing. The register should dismiss this sleight-of-hand as irrelevant.

Under the first fair use factor, the purpose and character of the actual use involved here is personal and noncommercial, as the lawful possessor of a game has already paid the customary price. A personal use does not become commercial merely because a rightsholder invents a means of charging money for it.<sup>60</sup> Here, modifying a lawful copy of a game for one’s own use is not transformed into a commercial transaction merely because the publisher would rather the customer buy a new game.

ESA’s focus on the “transformative” label with respect to the first factor is misplaced.<sup>61</sup> In *Sony Corp. of America v. Universal City Studios*, the Supreme Court considered a practice, time-shifting, which “merely enables a viewer to see such a work which he had been invited to witness in its entirety.”<sup>62</sup> In ESA’s words, this was “the very purpose [the works] were created—entertainment.”<sup>63</sup> Nonetheless, the Court found it to be a fair use. Likewise, the Register has concluded that a personal, noncommercial use need not be transformative in order to favor fair use under the first factor.<sup>64</sup>

ESA’s observation that “a number of individuals offer to hack users’ video game consoles for a fee”<sup>65</sup> appears to involve trafficking in circumvention services, which is prohibited by §1201(b) and is thus outside the scope of this proposal.

Regarding the second factor, the software that is modified in the process of circumvention is access controls in game firmware. This is software that does not render video or audio content, nor define the physics, rules, or storyline of a game. It is entirely functional rather than expressive. ESA’s contention that purely functional code that controls access to software is

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“malfunction, damage, or obsolescence”); 2003 Rec. at 34-63 (similar); 2010 Rec. at 206-214 (similar).

<sup>57</sup> 2012 Rec. at 7 (emphasis added).

<sup>58</sup> EFF Comments at 6-8.

<sup>59</sup> ESA Comments at 14.

<sup>60</sup> See *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929-30 (2d Cir. 1994) (only “only traditional, reasonable, or likely to be developed markets” are relevant to the fair use analysis).

<sup>61</sup> ESA Comments at 14.

<sup>62</sup> 464 U.S. 417, 449-50 (1984).

<sup>63</sup> ESA Comments at 13.

<sup>64</sup> 2010 Rec. at 93 (“The fact that the person engaging in jailbreaking is doing so . . . to use [their device] in precisely the purpose for which it was designed . . . favors a finding that the purpose and character of the use is innocuous at worst and beneficial at best.”); 2012 Rec. at 72; see also *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448-50 (noncommercial copying of TV programs for time-shifting is a fair use).

<sup>65</sup> ESA Comments at 14.

somehow entitled to *greater* protection because it “protect[s] the interests of copyright law”<sup>66</sup> gets the law entirely backwards. In fact, functional software designed as a “lockout code” designed to render other software unusable is entitled to *less* protection under the second factor.<sup>67</sup>

ESA, joined by MPAA and RIAA, grossly mischaracterizes the holding of *Oracle Am., Inc. v. Google, Inc.* by implying that the Federal Circuit somehow overruled or contradicted the cases most applicable to this proposed class with respect to fair use—*Sega Enterprises v. Accolade, Inc.* and *Sony Computer Entm’t, Inc. v. Connectix Corp.*<sup>68</sup> The opposite is true. In *Oracle*, the Federal Circuit held that the “declaring code” at issue was copyrightable in the first instance, but remanded the case for a fair use determination.<sup>69</sup> ESA quotes the *Oracle* court’s discussion of copyrightability, in which the court said that “there is no ‘interoperability exception’ to copyrightability,” and distinguished *Sega* and *Sony*. But ESA skips over the Federal Circuit’s fair use analysis, which relies explicitly on *Sega*’s holding that the functional elements of a computer program (like the access controls at issue in this proposal) “should be afforded ‘a lower degree of protection than more traditional literary works’” for purposes of the second fair use factor.<sup>70</sup> As the relevant issue in this rulemaking is whether modifying game code to preserve its functionality is a fair use, not whether game code is copyrightable in the first instance, the *Oracle* decision supports a finding of fair use here.<sup>71</sup>

ESA also misstates the third factor, implying that minimal modification of a computer program disfavors fair use because it may involve complete but temporary copies made as a necessary step in the modification. ESA describes this as “wholesale copying”<sup>72</sup> but forgets that the circumvention process begins and ends with a single copy of the program. The touchstone of the third factor is that the user copies no more than necessary to achieve a favored purpose.<sup>73</sup> Modifying a game to use a new server (or to eliminate a server requirement) fulfills this criterion because the goal is to preserve the experience of the game unchanged, and not to alter it. ESA *et al.* also suggest that the third factor requires “new expression,” citing no authority for this proposition.<sup>74</sup> It does not.<sup>75</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, No. Civ.A. 02-571, 2007 WL 1485770, at \*5 (E.D. Ky. Apr. 18, 2007) (on remand from *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004)).

<sup>68</sup> ESA *et al.* Comments at 4.

<sup>69</sup> *Oracle Am., Inc. v. Google Inc.*, 750 F. 3d 1339, 1368-77 (Fed. Cir. 2014).

<sup>70</sup> *Id.* at 1375 (quoting *Sega v. Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510,1526 (9th Cir. 1992)).

<sup>71</sup> Other aspects of the *Oracle* decision are controversial. See Jeff John Roberts, *Tech world stunned as court rules Oracle can own APIs, Google loses copyright appeal* (May 9, 2014), <https://gigaom.com/2014/05/09/tech-world-stunned-as-court-rules-oracle-can-own-apis-google-loses-copyright-appeal/>.

<sup>72</sup> ESA Comments at 15.

<sup>73</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586-87; see also *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98 (2d Cir. 2014); *Sega*, 977 F.2d at 1526; *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596, 605-06 (9th Cir. 2000); *Kelly v. Arriba Soft Corp.*, 336 F. 3d 811, 820-21 (9th Cir. 2003); *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1120-21 (D. Nev. 2006).

<sup>74</sup> ESA *et al.* Comments at 4.

<sup>75</sup> See, e.g., *HathiTrust*, 755 F. 3d at 98-99 (finding third factor favored fair use where libraries made complete copies of books).

Finally, ESA asks the Register to consider impact of preserving a game on the market for “new video games within a franchise,” because preservation “may cannibalize sales of new releases.”<sup>76</sup> In other words, ESA contends that copyright law favors rendering a lawful copy of a work nonfunctional (or less functional) in order to drive sales of *other* works. This is simply incorrect. The fourth fair use factor is concerned with the market for and value of the work at issue, not other works.

More generally, ESA writes that “there is compelling evidence” that the circumvention requested would cause market harm.<sup>77</sup> Yet ESA cites no evidence, compelling or otherwise, for the proposition that circumvention of any video game access controls “regardless of the purpose” would “harm the market for the firmware at issue.”<sup>78</sup> ESA again ignores the limited nature of the proposed class, equating any and all circumvention with “circumvent[ion] to allow the widespread, online distribution of [] copyrighted games to the public at large.” In fact, as with prior exemptions granted for video, there is no reason to believe that granting an exemption permitting circumvention in limited, otherwise lawful circumstances will have any significant effect on the level of infringement generally.

In summary, modifying one’s copy of a game in order to preserve its functionality after server shutdown is not infringing.

## **6. Adverse Effects of the Prohibition on Circumvention: Preventing Preservation and Research; Destroying Players’ Investment In Games.**

The ban on circumvention with respect to server-dependent video games causes two principal adverse effects. One is that, absent circumvention to restore access, server shutdowns degrade or destroy the value of a consumer’s investment in a game. The other is that, again absent circumvention, a game is effectively lost to future scholarship and research if technical measures render it unplayable. Contrary to ESA’s assertions, there are no effective alternatives to circumvention that address either of these problems.

As discussed above, neither single-player mode nor local area network connections are effective alternatives to play over the Internet. Internet play can connect a global community of players at nearly any time of day, while LAN play requires a coincidence of players and hardware at the same location—an expensive proposition in terms of coordination and equipment.

The impact of server shutdowns on museums, archives, and research is severe. Technology journalist Georgia Dow compares the problem to that of film preservation:

We have spent so much time and effort trying to preserve books . . . [and] we’ve done the same thing with movies. There’s so many old movies that we’ve lost because we didn’t think they’d be of historical value to us as a culture because at a

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<sup>76</sup> ESA Comments at 16.

<sup>77</sup> *Id.* at 15.

<sup>78</sup> *Id.*

point in time, movies were thought of as not that important, not as important as books. It's the same thing for games . . . they're also a part of our history.<sup>79</sup>

As noted by Jason Scott, an archivist at the Internet Archive, the Archive's efforts to preserve many games made after 1996 in a functional state has been stymied by "phone home schemes" built into those games.<sup>80</sup> Because of access controls that enforce server requirements, the Archive's collection will have significant gaps beginning in 1996.<sup>81</sup>

Alex Handy, founder and director of the Museum of Art and Digital Entertainment (the MADE), identifies over 190 multiplayer games written for the PlayStation 2 as games that the MADE would like to exhibit in full, playable form, but cannot do so without the ability to modify access controls.<sup>82</sup> He notes that these are merely examples, and that hundreds more games in the MADE's collection cannot be exhibited.

Preserving a game, such as Phantasy Star Online for Sega Dreamcast from 2000, arguably the first console-based online role-playing game, is completely impossible at present. The disc for Phantasy Star Online for Dreamcast is just that: a piece of plastic on our shelves. We will never be able to preserve this culturally and historically significant game in any way other than its physical form unless an exemption to the DMCA is made. Future generations will not be able to play the first online RPG for consoles. That is a significant cultural loss.<sup>83</sup>

ESA's suggestion that "video capture" of a game can substitute for playability is an absurd misapprehension of the needs and goals of preservation.<sup>84</sup> A game can no more be fully preserved in static video than a classic film in a still photograph. Just as the essence of a film may reside in its use of motion, editing, and audio, the artistry of a game often lies in the experience of play, which cannot be captured in a video. The Register has concluded that in the context of amateur video, documentary film, and educational uses of motion pictures, video capture is no substitute for circumvention that provides access to the source material.<sup>85</sup> This reasoning applies even more so to an interactive medium like video games.

ESA's single example of a museum exhibit built with ESA's "support" began and ended in 2012.<sup>86</sup> As with books, music, and film, limiting archival and preservation efforts to those with the active support of copyright holders is effectively to end those efforts entirely. As with other media, the copyright holders for abandoned games (as well as licensees, technology suppliers and others who may have a cause of action under §1201) are often difficult or impossible to locate after mergers, bankruptcies, or transfers of ownership. Depending on permission from, let alone the active participation of, game publishers is not an alternative to circumvention.

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<sup>79</sup> Isometric Podcast, at 21:36.

<sup>80</sup> EFF Comments, App'x A (Statement of Jason Scott).

<sup>81</sup> *Id.*

<sup>82</sup> App'x A, Statement of Alex Handy on Reply.

<sup>83</sup> *Id.*

<sup>84</sup> ESA Comments at 17-18.

<sup>85</sup> 2010 Rec. at 69; 2012 Rec. at 133-34.

<sup>86</sup> Smithsonian American Art Museum, *The Art of Video Games*, <http://americanart.si.edu/exhibitions/archive/2012/games/> (visited Apr. 30, 2015).

In addition, EFF and other proponents have explained how player communities and archival or preservation efforts are synergistic. It is players, acting out of nothing more than the desire to continue playing their favorite games and maintaining communities of like-minded enthusiasts, who do much of the volunteer work of reverse-engineering games.<sup>87</sup> Museums and archives depend on the labor and expertise of these volunteers.

While the severe impacts on players' investments and on preservation activity may be considered "de minimis" by game publishers whose interest is in selling new games, the interests of society are broader than the commercial interests of ESA's members.

## 7. The Statutory Factors Support an Exemption

All of the statutory factors support an exemption.

### A. The Availability for Use of Copyrighted Works

Much of ESA's comments focus on the purported value of access controls as such. EFF respectfully disagrees, but in any event that value is not at issue here. Whether the *existence* of access controls does or does not contribute to the availability of videogames is irrelevant for purposes of this rulemaking, because neither the technical ability to impose access controls nor the legal ability to prohibit circumvention of those access controls by infringers is at issue in this proceeding. The proposed class merely authorizes circumvention of such controls for a specific and limited purpose.

ESA notes the similarities between videogame access controls and those on DVDs.<sup>88</sup> This is instructive, because the Librarian has granted several exemptions to the circumvention ban relating to DVDs, and those exemptions have not affected the availability of motion pictures on DVD.<sup>89</sup> In both contexts, merely speculating that *any* permitted circumvention "could disrupt the incentive of platform providers and copyright holders to continue making this copyrighted content available"<sup>90</sup> says nothing about the impact of the *specific* circumvention that is the subject of the proposed exemption. The exemption does not protect players who seek to bypass controls on new games, and/or develop tools for that purpose.

ESA's suggestion that game producers will stop producing games<sup>91</sup> if the Librarian creates an exemption for preservation of abandoned games lacks foundation and defies reason.

### B. The Availability of Works for Nonprofit Archival, Preservation, and Educational Purposes

EFF, with support from archivists, professors, academic researchers, and museum curators, has illustrated the adverse impact that the ban on circumvention is having on archival, preservation,

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<sup>87</sup> EFF Comments at 9-10.

<sup>88</sup> ESA Comments at 20.

<sup>89</sup> See *supra* n.10.

<sup>90</sup> ESA Comments at 20.

<sup>91</sup> *Id.* at 21 ("Copyright owners . . . [may] not agree to permit distribution of their content at all.").

and educational uses of videogames. ESA does not address the scope of these adverse impacts, except to opine that preservation of games in playable form is not important. Given that this category of adverse impacts is specifically called out in Section 1201 as a factor the Register must consider, it cannot be dismissed so easily.

C. The Impact of the Prohibition on Criticism, Comment, News Reporting, Teaching, Scholarship, and Research

Preservation is a prerequisite for future criticism, comment, teaching, scholarship, and research into games and game firmware. If the experience of play is lost because of access controls, future writers, researchers, and scholars will lose their source material and will turn to other areas of study and comment. Granting the proposed exemption will work to put videogames on the same footing as motion pictures as an object of future study.

D. The Effect of Circumvention on the Market For or Value of Copyrighted Works

Although ESA includes screen shots of comments in Internet forums discussing “jailbreaking” of game consoles and the distribution of infringing games, ESA has not shown any concrete connection between circumvention and a loss of market value. Nor has ESA shown that *this particular proposal* would lead to “fewer copyrighted works created.”<sup>92</sup> The videogame industry is highly dynamic, and games increase in sophistication and entertainment value each year. The ability to preserve older games will not have a significant impact on the sale of new games in such a dynamic industry, and in any event, a consumer’s preference for one lawfully acquired work over another is no concern of copyright law.

E. Trademark Enforcement and Business Practices That Lock Out Competition Are Not Appropriate Factors.

ESA raises several non-statutory factors that should have no bearing here. ESA’s speculation that an abandoned game modified to use a third-party server could “diminish the brands that game publishers have worked hard to create by potentially offering a lower-quality experience”<sup>93</sup> is equivalent to the argument that Apple, Inc. raised in the 2010 rulemaking concerning jailbreaking of the iPhone, an argument that the Register rejected. Apple argued that any jailbreaking could conceivably damage the “integrity and functionality” of the iPhone and “breach the integrity of the iPhone’s “ecosystem.”<sup>94</sup> The Register, citing to *Consumers Union of the United States v. General Signal Corp.*,<sup>95</sup> concluded that “harm to reputation,” a potential “indirect negative effect of copying,” was not a cognizable harm under copyright law and did not create any grounds for denying an exemption. Likewise, ESA members’ “ability to manage and control their brands”<sup>96</sup> is not a function of copyright or Section 1201. Any liability that game preservation creates with respect to publishers’ “brands” arises, if at all, under trademark law.

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<sup>92</sup> ESA Comments at 22.

<sup>93</sup> *Id.* at 23.

<sup>94</sup> 2010 Rec. at 98-99.

<sup>95</sup> 724 F.2d 1044 (2d Cir. 1983).

<sup>96</sup> ESA Comments at 22.

ESA's claim that game preservation would impact "safety and privacy" also mirrors the arguments Apple raised in 2010.<sup>97</sup> When the owner of a copy of a game chooses to modify it to bypass a server check or use a third-party server, she assumes responsibility for her own "safety and privacy" but does not impose that decision on anyone else. The suggestion that one who modifies her own game or console has thereby made it "less attractive" is nonsensical, as the decision to do so does not affect others.<sup>98</sup> The "safety" of games, as with any product, is addressed by the law of warranties, which is not affected by an exemption. As the Register has noted previously, "state contract law is also at issue in the relationship between purchasers . . . and manufacturers and/or service providers. Nothing in this rulemaking will alter the contractual obligations between parties."<sup>99</sup>

ESA makes several suggestions that modifying a game or console in order to preserve gameplay after a server shutdown will diminish sales of *other* products, including "new video games within a franchise"<sup>100</sup> and "serial copyrighted content."<sup>101</sup> The use of access controls to prevent competition between products, or drive sales of other products, is not the purpose of Section 1201.<sup>102</sup> Such considerations are simply irrelevant to this rulemaking.

Finally, ESA suggests that if an exception is granted "users would wrongly believe they can traffic in circumvention tools."<sup>103</sup> Trafficking in circumvention devices is, of course, prohibited by §1201(b) regardless of the outcome of this rulemaking, which concerns only the act of circumvention. If ESA's reasoning is accepted, the Register should not recommend any exemptions at all because someone might "believe," contrary to the statute, that the exemption covers trafficking. This reasoning would render Section 1201(a)(1)(D) a nullity, and should be rejected outright.

Throughout its comments, ESA implies that its members' incentive to publish games is so fragile that giving legal protection to any act of circumvention, no matter how circumscribed, will destroy it. This is a position that defeats the purpose of this rulemaking and has been rejected repeatedly by the Register. Game purchasers need legal protection for their efforts to preserve the value of their investments, while museums and archives need it in order to preserve the history of this creative medium. For these reasons, we ask the Register to recommend an exemption.

## **8. Documentary Evidence**

Please see attached.

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<sup>97</sup> 2010 Rec. at 98-99.

<sup>98</sup> ESA Comments at 22.

<sup>99</sup> 2010 Rec. at 103.

<sup>100</sup> ESA Comments at 16, 22.

<sup>101</sup> *Id.* at 22.

<sup>102</sup> *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1203 (Fed. Cir. 2004); *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1315-16 (Fed. Cir. 2005); *Lexmark Intern. v. Static Control Components*, 387 F. 3d 522, 549 (6th Cir. 2004).

<sup>103</sup> ESA Comments at 22.

Appendix A



**The Museum of Art and Digital Entertainment**

**610 16th St. Ste. 230, Oakland, CA 94612**

**510-210-0291**

**[www.themade.org](http://www.themade.org)**

To Whom It May Concern;

As a Museum dedicated to preserving the history and culture of videogames, it is incumbent upon us that we are able to save everything. That does not mean saving a single DVD in a paper sleeve. It does not mean putting a complete copy of the game, in its box, with manuals and advertising inserts on the shelf. It means placing the game within its cultural context, as it was originally intended to be played.

This can mean a lot of things: from preserving fan-made art, maps or videos, to saving aspects of the game's development process, when possible. Our goal is to present the entire picture, or at least as much of the entirety as we can.

The ESA has asserted that the MADE has not been hampered in its preservation efforts by the lack of a DMCA exemption for restorative purposes. This is completely untrue.

We would like to submit that, frankly, every single unsupported online game in the MADE's collection (of which there are hundreds! The MADE has over 5000 games, and the collection grows daily) is hampered by no longer being supported online. A perfectly current example would be for any fans of the San Antonio Spurs. They won the NBA championship in 2014, but if the MADE wants to make it possible for people to experience online play using the 2014 championship Spurs in NBA 2K14, this is not possible.

Can you imagine? You're a fan of the Spurs, your friend in California is a fan of the Golden State Warriors. You've both paid good money for NBA 2K14, but you can now no longer play each other. You need to get NBA 2K15, but we all know the Warriors will be winning all of the games in NBA 2K15. (Go Warriors!) What's a Spurs fan to do?!

As is to be expected from publicly traded companies, every dollar counts. Take2 Interactive has already shut off the online play servers for NBA 2K14 as a cost cutting measure. While they see no profit in continuing support for the game, we believe the fans and players of the game have a right to be able to play the game they paid for, even if that requires them banding together and working, for free, on building an alternative server.



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This is just a sports example, and as such, the functionality that has been removed is pretty cut and dry. Can you imagine the repercussions for games that fall more on the art end of the scale? Even defining the term “Art” has been challenge for humanity since the days of the Greek philosophers.

We take the view that all games are art. As art, we must strive to preserve every aspect of it. Preserving a game, such as Phantasy Star Online for Sega Dreamcast from 2000, arguably the first console-based online role-playing game, is completely impossible at present. The disc for Phantasy Star Online for Dreamcast is just that: a piece of plastic on our shelves. We will never be able to preserve this culturally and historically significant game in any way other than its physical form unless an exemption to the DMCA is made. Future generations will not be able to play the first online RPG for consoles. That is a significant cultural loss.

The MADE is not about half measures. We are videogamers. We like to finish our games. We like to get to “100%” in all aspects of our preservation efforts, just as a player would want to unlock all the secrets and extras in their games over time. If even a single bit of the original game is unable to be preserved or shown to the public in a playable form, our society as a whole, and not only the MADE, as a non-profit, 501c3 educational institution, suffers.

I will now include list of just a handful of games the MADE hopes to preserve in such a “100%” fashion, but is prevented from doing so due to unsupported online components.

This list, for the sake of brevity, is exclusively PlayStation 2 games. There are hundreds of other games we cannot preserve at “100%” but we felt it would be more respectful of the committee’s time to include a smaller subsection that represents the whole. As we are sure you can see, there are large numbers of games left orphaned by their creators.

- *007: Everything or Nothing*
- *187 Ride or Die* (Servers closed 2009)
- *25 to Life* (Servers closed 2009)
- *Arc the Lad: End of Darkness* (Servers closed 2009)



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- *Area 51* (Servers closed December 2012, despite being fairly active with a dedicated following)
- *Arena Football*
- *Arena Football: Road to Glory*
- *ATV Offroad Fury 2*
- *ATV Offroad Fury 3*
- *ATV Offroad Fury 4*
- *Auto Modellista*
- *Battlefield 2: Modern Combat*
- *Brothers in Arms: Earned in Blood*
- *Brothers in Arms: Road to Hill 30*
- *Burnout 3: Takedown*
- *Burnout Revenge*
- *Chessmaster*
- *Code Breaker* (Late 2010)
- *Cold Winter*
- *College Hoops 2K6*
- *College Hoops 2K7*
- *Commandos: Strike Force*
- *Conflict: Global Terror*
- *Dance Dance Revolution Extreme 2* (ended September 12, 2006)
- *Dance Dance Revolution SuperNova*



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- *Dance Dance Revolution SuperNova 2*
- *Dance Dance Revolution X*
- *Destruction Derby Arenas*
- *Disney Princess: Enchanted Journey*
- *ESPN College Hoops*
- *ESPN College Hoops 2K5*
- *ESPN Major League Baseball*
- *ESPN NBA Basketball*
- *ESPN NFL 2K5*
- *ESPN NFL Football*
- *ESPN NHL 2K5*
- *ESPN NHL Hockey*
- *EverQuest Online Adventures* (ended March 29, 2012)
- *EverQuest Online Adventures: Frontiers* (ended March 29, 2012)
- *EyeToy: Chat*
- *F1 04*
- *F1 05*
- *Family Feud*
- *The Fast and the Furious*
- *FIFA 06*
- *FIFA 07*
- *FIFA 08*



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- *FIFA Football 2004*
- *FIFA Football 2005*
- *FIFA World Cup: Germany 2006*
- *Fight Club*
- *Fight Night Round 2*
- *Fight Night Round 3*
- *Frequency*
- *GoldenEye: Rogue Agent*
- *Gran Turismo 4*
- *Greg Hastings' Tournament Paintball Max'd*
- *Gretzky NHL 2005*
- *Gretzky NHL 06*
- *Hardware: Online Arena*
- *Heroes of the Pacific*
- *Hot Shots Golf Fore!*
- *Jak X: Combat Racing*
- *Juiced 2: Hot Import Nights*
- *Killzone*
- *Lemmings*
- *LMA Manager 2005*
- *LMA Manager 2006*
- *LMA Manager 2007*



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- *Madden NFL 2004*
- *Madden NFL 2005*
- *Madden NFL 06*
- *Madden NFL 07*
- *Madden NFL 08*
- *Madden NFL 09*
- *Madden NFL 10*
- *Major League Baseball 2K5*
- *Major League Baseball 2K6*
- *Major League Baseball 2K7*
- *Manchester United Manager 2005*
- *Marvel Nemesis: Rise of the Imperfects*
- *Medal of Honor: Rising Sun*
- *Metal Gear Solid 3: Snake Eater*
- *Metal Gear Solid 3: Subsistence*
- *Midnight Club 3: DUB Edition*
- *MLB 2005*
- *MLB 2006*
- *MLB 06: The Show*
- *MLB 07: The Show*
- *MLB 08: The Show*
- *MLB 09: The Show*



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- *Monster Hunter*
- *Monster Hunter 2*
- *Monster Hunter G*
- *MVP Baseball 2004*
- *MVP Baseball 2005*
- *MVP 06 NCAA Baseball*
- *MVP 07 NCAA Baseball*
- *My Street*
- *NASCAR 2005: Chase for the Cup*
- *NASCAR 06: Total Team Control*
- *NASCAR 07*
- *NASCAR 08*
- *NASCAR 09*
- *NASCAR Thunder 2004*
- *NBA 06*
- *NBA 07*
- *NBA 08*
- *NBA 2K3*
- *NBA 2K5*
- *NBA 2K6*
- *NBA 2K7*
- *NBA Live 2003*



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- *NBA Live 2004*
- *NBA Live 2005*
- *NBA Live 06*
- *NBA Live 07*
- *NBA Live 08*
- *NBA ShootOut 2004*
- *NBA Street Vol. 2*
- *NBA Street V3*
- *NCAA Basketball 2K3*
- *NCAA College Basketball 2K3*
- *NCAA Final Four 2004*
- *NCAA Football 2004*
- *NCAA Football 2005*
- *NCAA Football 06*
- *NCAA Football 07*
- *NCAA Football 08*
- *NCAA Football 09*
- *NCAA Football 10*
- *NCAA Football 11*
- *NCAA GameBreaker 2004*
- *NCAA March Madness 2004*
- *NCAA March Madness 2005*



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- *NCAA March Madness 06*
- *NCAA March Madness 07*
- *NCAA March Madness 08*
- *NFL 2K3*
- *NFL GameDay 2003*
- *NFL GameDay 2004*
- *NFL Head Coach*
- *NFL Blitz Pro*
- *NFL Street*
- *NFL Street 2*
- *NFL Street 3*
- *NHL 2004*
- *NHL 2005*
- *NHL 06*
- *NHL 07*
- *NHL 08*
- *NHL 09*
- *NHL 2K6*
- *NHL 2K7*
- *NHL Hitz Pro*
- *Need for Speed: Most Wanted*
- *Need for Speed: Underground*



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- *Need for Speed: Underground 2*
- *OutRun 2006: Coast 2 Coast*
- *Phantasy Star Universe*
- *Phantasy Star Universe: Ambition of the Illuminus*
- *Pro Evolution Soccer 5*
- *Pro Evolution Soccer 6*
- *Pro Evolution Soccer 2008*
- *Pro Evolution Soccer 2010*
- *Pro Evolution Soccer 2012*
- *Project: Snowblind*
- *Ratchet: Deadlocked* (27 June 2012)
- *Ratchet & Clank: Up Your Arsenal* (27 June 2012)
- *Resident Evil Outbreak* (Servers closed for this version February 2007\*)
- *Resident Evil Outbreak File #2* (Servers closed for this version February 2007\*)
- *S.L.A.I.: Steel Lancer Arena International*
- *Sniper Elite*
- *SnoCross 2*
- *SOCOM: U.S. Navy SEALs*
- *SOCOM II: U.S. Navy SEALs*
- *SOCOM 3: U.S. Navy SEALs*
- *SOCOM: U.S. Navy SEALs Combined Assault*
- *SSX 3*



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- *Street Racing Syndicate*
- *Syphon Filter: The Omega Strain*
- *UEFA Champions League 2004–2005*
- *UEFA Champions League 2006–2007*
- *Urban Chaos: Riot Response*
- *World Championship Cards*
- *World Poker Tour*
- *WRC 4*
- *WRC: Rally Evolved*
- *WWE SmackDown vs. Raw 2007*
- *XIII*

Alex Handy

Founder, Director

## Appendix B

### **Selected Comments Submitted by Visitors to the Digital Right to Repair Coalition Website April 2015**

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Andrew Krukowski - rockmandronian@gmail.com

Many games have been created specifically for competitive play, and it would be awful to lose the ability to play these games online with real competition as time goes on.

Thank you for your consideration.

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Andrew Faehnle - faehnle@gmail.com

Dear Copyright Office:

The notion that "multiplayer gameplay over the Internet is not a core functionality of the video game," as alleged by the ESA is laughable. Consider the following games:

Star Wars: Battlefront (release date 12/2015)

Titanfall (release date 3/2014)

Destiny (release date 9/2014)

Overwatch (release date 2016)

All of them share the fact that there is no single player campaign that can be played without a connection to the developer's servers. Also consider the case of massively multiplayer online games (MMOs); these are games such as World of Warcraft or EVE Online that, by definition, are played while accessing the developing company's servers.

The tech and games press has taken note of the growing trend to favor multiplayer over single player:

"The Growing Illusion of Single Player" Giant Bomb, 14 Sept 2014

<http://www.giantbomb.com/articles/the-growing-illusion-of-single-player/1100-5017/> (Accessed 22 April 2015)

"Is Single-Player Dying" Venture Beat, 16 June 2014

<http://venturebeat.com/community/2014/06/16/is-single-player-dying-the-move-to-multiplayer-and-the-sacrifice-of-solitude/> (Accessed 22 April 2015)

"Player One" The Guardian, 14 July 2014

<http://www.theguardian.com/technology/2014/jul/14/single-player-gamers-destiny-solo-activision-grand-theft-forza> (Accessed 22 April 2015)

Even EA Games, one of the major industry publishers, has this to say about single-player:

We're very comfortable moving the discussion towards how we make connected gameplay, be it cooperative or multiplayer or online services, as opposed to fire-and-forget, packaged goods only, single-player, 25-hours-and you're out. I

think that model is finished. Online is where the innovation, and the action, is at.

Lest you think this is just PR, that quote is attributed to EA Games label president Frank Gibeau. ("EA: Single-Player Games Are Finished" Wired, 8 December 2010, <http://www.wired.com/2010/12/ea-single-player/> [Accessed 22 April 2015])

It is clear that the major players in the video game industry are intent on moving to a server-based, subscription-based model. Whether the subscription is de jure (as in the case with many MMOs where you pay a monthly charge for access) or de facto (as when a company shuts down the servers for a game with only server-based play, forcing people to buy another version) is immaterial at this point.

Multiplayer is absolutely a core part of modern day video games, and to claim anything else is either naive or dishonest.  
Thank you for your consideration.

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Maddy Myers - maddy@pastemagazine.com  
Multiplayer is an integral part of electronic games, and preserving it -- even if only on a few servers -- is key to the archival of videogames in the long term. The historical and academic study of these cultural artifacts would be ruined if multiplayer could not continue to be made available, especially for smaller and more artistic games developed by independent artists. I have worked as a professional videogame critic for publications including the Boston Phoenix, Paste Magazine, MIT Technology Review, and others for almost a decade, and I firmly believe in the preservation of these digital artifacts for future generations to study and critique.  
Thank you for your consideration.

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Gordon Brown - arcsech@gmail.com  
Many new video games that are released today feature multiplayer as the the main (or only!) selling point - this is a trend that has been growing since the release of Quake 3. In a game which includes only a multiplayer mode and a simulation of multiplayer mode with AI opponents, I don't see how it could possibly be argued that multiplayer gameplay is not "core functionality."  
Thank you for your consideration.

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Kate Rush - k8bert1@hotmail.com  
I play video games as a social activity and consequently, I do not own any games that do not have some sort of online multiplayer mode. Even when they do have campaign mode, allegedly the "main" part of the game, I never play it. I'm a female in my 20s, I have zero interest in sitting by myself in an isolated world. But I have made many friends through online gaming, and that's what keeps me coming back.

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Paul Maschhoff - maschhoff.p@gmail.com

In many games produced nowadays, online multiplayer is the primary intended mode of play, with thousands of players online simultaneously. These games include recent rendition of the Battlefield series and many other first person shooter games.

Thank you for your consideration.

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Kelsey Higham - kelsey.higham@gmail.com

I move a lot, so I play a lot of online games. It's one of the only ways for me to maintain long-term friendships. When a multiplayer game server shuts down, I don't want to lose one of the most important social spaces in my life. I want to keep in touch with my friends.

Thank you for your consideration.

-----  
Chris Colson - chrisspamblocker@gmail.com

Connected video game play is the majority of game playing these days. That's simple. Collaboration and sharing has increased a million fold since the internet was created. That's why games are produced as online only, e.g. Titanfall. I haven't even played the storyline on COD in 3 years; its multiplayer online only. Thus, companies that understandably have to shutdown shouldn't be able to kill the games I own. if the community wants to pay to keep it alive and fund their own servers they should. The companies have abandoned that particular IP and the community should be able to pickup where they left it.

Thank you for your consideration.

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Matthew Schoendorf - matt.schoendorf@gmail.com

There are countless A-List blockbuster video games sold today which ONLY have online multiplayer. Playing video games online with friends through the most convenient method possible is a major way that games hold their value over time.

Thank you for your consideration.

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jon parker - par00036@hotmail.com

Hi. I bought a used game only to find that the multi player function was turned off after only 1 year of owning it. If I could stand up my own servers, this would increase the life of the game and make it more valuable to me and my family. I would love to share this game with my kids, but I can't any more because the corporation didn't want to expend the resources to keep the servers up. I understand that, but let me continue to host the servers even if they don't want to.

Thank you for your consideration.

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Noah Schnoll - noah.schnoll@gmail.com

The argument that online multiplayer does not affect the play experience is directly contradicted by the marketing and development strategies of digital

game developers and publishers. All major releases tout online multiplayer as a key aspect. Marketing campaigns focus on the ability to play games online with other users. As a game designer myself, I find the assertion that multiplayer gameplay is unnecessary in some situations to be laughable at best and deceptive in the worst way.

Many classic and modern games both literally require online capability to function in any meaningful way. For the game to exist, a user must be able to interact with the system. For the user to be able to interact with the system, there must be some facilitation of code. In many of these games, that is only possible via remote servers.

Thank you for your consideration.

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Patrick Marshall - marshall.patrick.j@gmail.com

Online multiplayer is a given in games. Take Titanfall for example, it doesn't even have an off line option.

Thank you for your consideration.

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Ned Horsted - nedhorsted@gmail.com

Usually I will not buy a game unless it has online multiplayer functionality. For a game to not work after an official server shuts down is kind of like being robbed of something you already paid for.

Thank you for your time and consideration.

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Harlan Lieberman-Berg - hlieberman@setec.io

As a gamer, online multiplayer is critical to the games that I play. Starcraft, one of the most important video games of all time, is still one of the most commonly played online games today, despite being over 17 years old. This only happens, though, because of the benevolence of its owner. The servers have been threatened on a few occasions, which would threaten tens of thousands of gamers' ability to play.

Thank you for your consideration.

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John Anderson - indomidable@hotmail.com

Several old games (Westwood studios comes to mind) and some new ones are requiring Online parts to play the whole game even several single player games. When and after these services get shut down, there is no way to play the full game, examples Microsoft's Freelancer, Newer would be Battlefield 2142, I know when battlefield 3 servers shut down there won't be a way to play it at all.

All these requirements do is planned obsolescence...well as soon as x servers shut down then no one can play their game they paid for... Everquest (whenever it finally closes will do the same). Unless it's legal for us to have a "Cloned server" after it's gone then there goes all the time energy etc.

Thank you for your consideration. Hopefully you can see the poor ramifications of the Law as applied to this topic.

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Nathan Horne - nathan@nkhorne.com

Online multiplayer functionality is a core part of any modern game. If it were not, then the producers and publishers of video games would not advertise this functionality so prominently in their media campaigns and even on the case the game comes in. Halting support of multiplayer servers for older games is sensible--it makes no sense for a company to continue paying for servers for a game they sold a decade ago and which very few people still play. But it makes no sense for such legacy games to be de facto excluded from online play because of consumers' inability to host their own servers. The only reason that this policy exists is to force players of older games who still desire to play online into purchasing newer versions of the game. It would cost the original company nothing to allow gamers to operate their own servers for legacy games, while allowing those gamers access to a core function of the game. The choice we face is between corporate intrusion into consumers' lives as they seek to dictate not just how their products are made and sold, but how they are used afterward. Provided my actions are legal, it is no one's business but mine how I use a video game, car, or tractor once I have purchased it. If corporations are allowed to control the use of their products past the point of sale there will be no more true ownership of the goods we purchase, and there will be less choice available to consumers, leading to lower quality and higher prices.

Thank you for your consideration.

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Chandler Reynolds - chandler.m.reynolds@gmail.com

Online multiplayer is the core reason that I am a gamer. Without the use of private servers for online games, then I would not be able to stay in contact as well with friends and family. When a publisher chooses to no longer support an older game, then it should absolutely not be illegal for a private individual to fund a server to run the game. In fact, private servers can actually help spur game sales long after the game has been released. Richard Burns Rally is an example of a game that is still alive thanks to a thriving modding and support community. Without the use of private servers run by individuals, the game would not see the sales that it has today.

I urge you to think logically and objectively about each of these issues and to gather your own data before making a ruling. Think about the smartphone in your own pocket and how you would react if it was illegal for you to make your own decision about which carrier to use with your phone. It is important to prevent plagiarism and knock-offs, but it is far more important to encourage competition and innovation. Taking ownership out of the consumer's hands will not benefit the general public, and will stifle competition and innovation in the future. Thank you for your consideration.

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Allan Graves - allan.graves@gmail.com

For me, online multiplayer is central to the gameplay of many of my games. I game with a group of friends that is scattered across the world. This is how we keep in touch. If a game does not have online multiplayer, it is not considered for our gaming experience. Removing the online experience for us requires us to

find a new game to play together.

In fact, taking a look at many ads for games, you can see that the online component of many games (Halo Series, EA Sports, etc) emphasizes the online component. To say that something you emphasize in ads is not central to the game experience seems odd to me.  
Thank you for your consideration.

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David Hoepelman - dhoepelman@gmail.com  
In numerous modern games online multiplayer (multiple people playing together through the internet) is an important, the most important or even the only available option. It is not financially feasible or interesting for the producer of the game to indefinitely support the servers and indefinitely modify games to support more recent environments (operating systems, hardware, networks).

Similar to us being able to enjoy an old painting, TV show or book from your childhood it is important to me that I am able to play games after the producer has stopped supporting it. This is only possible if consumers are allowed to run unofficial servers after the official servers have been shut down.  
Thank you for your consideration.

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J. Whitson - j.hardy.whitson@gmail.com  
I have been a longtime player of the 2001 games Tribes 2, originally published by the now-defunct Sierra Games and later acquired by Vivendi Universal. Tribes 2 was an entirely multiplayer-based game. There was literally nothing in it for single player except for a couple training missions. In 2007 or 2008, Vivendi shut down the master servers that would tell the gaming client where individual game servers were. Fortunately, the game was always highly modifiable and someone started a new master server and developed a patch for the game to direct the client to look at it for the server list instead of the old Vivendi server. Thousands of people were once again able to enjoy a game that had meant so much to them nearly a decade before.

This is all to say that the interpretation of the DMCA being put forth by the Electronic Software Association would prevent this kind of activity and forced Tribes 2 permanently offline. Further, even if peripheral services like leaderboards and points and a bunch of other useless ancillary services are offered with a multiplayer game, all of these services are moot if one cannot play the game for which they were designed. I urge you to reject this interpretation of the law and permit modification of game clients for whatever purpose - whether it be for connected to a new master server so the game can live again or so that someone can introduce some unique vehicle or graphic texture or communications protocol or a thing else. I urge you to take the position that rewards innovation - not outlaws it. Thank you.

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Isaac Lovin - ike4lovin@gmail.com  
Communities are built, often times, through the internet in the form of online multiplayer. Shutting down servers AND disallowing the community to continue to

interact in the main way that they do, through video games, is a huge blow to social connectivity. Please don't continue to allow this to happen.  
Thank you for your consideration.

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Alan Downing - adowning@fortressitx.com

The claim that multiplayer gameplay over the internet is not a core functionality of some video games is absurd. Titanfall, World of Warcraft, and Elite: Dangerous can \*only\* be played online. One of the largest selling points of Grand Theft Auto V was online multiplayer. This was touted as a huge innovation and step forward, and anecdotally is why a number of people I know bought it.

When servers for games like these shut down, it is in fact denying the ability to play the game, possibly entirely.  
Thank you for your consideration.

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Doug Wetzel - wetzel.doug@openmailbox.org

With the advent of the Internet and the ease for which consumers can connect with one another, inside and outside of games, multi-player gaming has become an essential and highly desirable feature in modern video games.

In the 90s and 00s, companies often provided the ability for gamers to host servers on their own, and it was and still is an important feature. However, some companies have realized that they can control access to their games if they require customers to play on servers they host themselves, and simultaneously refuse to provide a way for customers to host servers themselves.

As a person who has played video games, starting with Atari's Pong in the early 1970s, up to the very latest games on both computers and mobile devices today, I can say without any hesitation that multi-player gaming is a core feature of modern video games. It is ridiculous and false to assert otherwise.  
Thank you for your consideration.

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Samuel Hellerstein - acidic6@yahoo.com

It is highly ridiculous to say that multiplayer gameplay is not a core function of the game. There are numerous games where the ONLY function is online play, or where it would drastically harm the game experience for online play to be removed. DOTA and other MOBAs would be crippled without online play, as would fighting games like Street Fighter, shooters like Call of Duty (where online play is just as, if not more, important to the average consumer than the singleplayer mode), MMO games like World of Warcraft and World of Tanks, as well as games like Dark Souls and Bloodborne, which feature singleplayer-multiplayer fluidity as a vital part of the overall experience. If a game has been abandoned by the owner, then allow third parties to create freely accessible servers unless the owner would actually be harmed by the existence of said server.

Thank you for your consideration.

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Gaspar Garcia de Paredes - gaspargdep@gmail.com

The quote above on how online multiplayer is not a core functionality of a video game works only in complete ignorance of: 1) real world usage. The most popular games world-wide and the ones with the longest lifespan usually are online multiplayer (see: Halo 2; Counter-Strike; WoW; Call of Duty for the last decade; etc) and 2) how video game companies market this games. No advertising (at least none I've seen) ever touts chat communications, points, achievements, or updating roster information as a main feature of online connectivity.

A useful comparison to me would be claiming that people pay for the lines (rather than the rides) at Disney World because that's where they spend the most of their time. Similarly, even if leaderboards or rankings in, say Call of Duty, are relevant and important to players they are only meaningful as a companion to the actual online playing part of the game.

Features such as: "chat communications, sharing of user-generated content, leaderboards, points, badges and other achievement markers", or even updated roster information at a sports game are as relevant and the main gameplay aspect. No one cares about a leaderboard if there is no underlying competition. Similarly a chat room in a video game is useless unless there is something worth discussing: namely, the game itself.

There is a real disconnect between the traditional understanding of ownership and copyright of assets, goods, and intellectual property and how ownership and copyrights of software is being interpreted. The idea that purchasing software does not make you the owner of that copy of the program does not make sense to most consumers.

The perfect example is digital versus physical books. No one ever thinks in terms of buying a license when they purchase a Kindle books (similarly with music). You buy the book. Just like you used to buy a paperback or hardcover and its yours forever. Ask the average consumer and his answer will rarely be "I own a license to the books on my Kindle" or a "own a licence to the games on my iPad".

Everyone intuitively believes, even if they are mistaken (given what current interpretations of copyright law seem to be), that they own their digital copy of 50 Shades or their Justin Beiber single.

Thank you for your consideration.

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Derek Smith - Derek77503@yahoo.com

Not only is online multiplayer a valuable part of modern video games, many new games are marketed solely because of their multiplayer gameplay (which, of course, requires internet connectivity). Many of the largest titles in video gaming don't even create lengthy singleplayer experiences anymore, and opt to focus their efforts on the multiplayer portion of their product instead. Online multiplayer adds a human element to games, which cannot be replaced. Even electronic versions of classic board games would not be fun if they could only be played computer opponents instead of real people, so why should we believe the claim that multiplayer is not a core function of video games?

Thank you for your time and consideration, and I wish you the best of luck as you sift through all the comments!

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Riordan Frost - riordan.frost@gmail.com

Multiplayer functionality is integral to many modern day video games and is used and enjoyed (often extensively) by people who have legally purchased the game. If the original servers that host multiplayer are taken down, the company that sold the game is reneging on part of that gameplay provision and the decision of a third party to allow multiplayer play to continue on their servers is really more about sustaining a community committed to a certain game than taking money from the company that decided to shut down their servers in the first place. Ultimately, copyright reform should be about the citizens of the US - the consumers, researchers, artists, farmers, gamers, teachers, and more - everyday people, whose primary motivation is to lead a fulfilling life and contribute in some small way to society. It should not be about the companies whose primary motivation is profit. Thank you for your consideration.

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Ryan Satcher - rylesat@yahoo.com

Online multiplayer is a core part of almost every video game released in the past three years. Microsoft and Sony (and Nintendo) have spent billions in order to bring us gaming consoles and video games (for the PC as well) in order to play these games. Copyright law must be amended such that when a company decides that they do not want to run the servers anymore, the game be put into public domain such that a person or company can run the servers. It is hypocritical for game companies to release these games, claim after a few years that it is no longer profitable, then lock it away. If the game companies (and other software companies) no longer value the code it needs to be put into public domain; if necessary this must be codified into law. Thank you for your consideration.

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Drew Nevins - drewnevins@gmail.com

This is ridiculous. My little brother and I were just talking the other day about the greatest story told on the Xbox 360 - a game called Mass Effect 3 - that was known not only for it's amazing single-player storyline and gameplay, but its fun, strategic, and fast paced multiplayer gameplay as well. We remembered fondly how many hours we spent bonding by playing \*just\* the multiplayer part of the game together. Sometimes we would talk about issues that were effecting our lives while we played - issues that would otherwise be difficult to talk about without the common ground of video games. When EA (the video game publisher) finally shut down the multiplayer servers for Mass Effect 3, we were devastated. We openly talked about how much we would like to run our own Mass Effect 3 server so we could continue playing together, but we were unable to due to restrictions on operating custom servers. Please take a moment to consider how you would feel in this situation, as a private citizen who isn't attempting to break the law, but merely wants to enjoy a product they already purchased outside of what the sales and marketing team sold you the product to do.

Jeremy Kenyon - Lanthos@gmail.com

Typically the only games I buy these days are those with online multiplayer abilities so that I can play with my friends. Games aren't made to be played on the same console or system anymore like they used to. If you want the ability to play most games made in the last decade with your friends you have to have online multiplayer.

Thank you for your consideration.