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

Item 1. Commenter Information

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Item 2. Proposed Class Addressed

Proposed Class 23: Abandoned software – *video games requiring server communication*.

Item 3. Interest and Views of eBay

eBay has established a leading reseller marketplace for connected video games and their consoles. In initial comments supporting a Class 11 exemption filed jointly with Gazelle ("e-Bay Class 11 Comments"), eBay provided a declaration by Vice President and Deputy General Counsel Tod Cohen that stated: "With 155 million active buyers globally, eBay is one of the world's largest online marketplaces, where practically anyone can buy and sell practically anything. Founded in 1995, eBay connects a diverse and passionate community of individual buyers and sellers, as well as small businesses. Their collective impact on ecommerce is staggering, and more than 700 million items are listed on eBay."[1]

In 2014, eBay sellers sold 3,800 video consoles per day in the United States. Seventy-four percent of these consoles were used. Used consoles and video games on eBay offer consumers additional choice and value. But that value plummets without justification if those games can no longer be used because of digital access controls that serve no copyright purpose. For example, if a gaming company shuts down servers that match or authenticate people using multiplayer games, those games and their consoles lose significant value unless users can access third-party servers to replace the functionality once supplied by the gaming company. Such inability to use the games and consoles runs counter to federal competition policy, which encourages a market in

[1] eBay Class 11 Comments at 11.

previously owned products and content. Just as the market for used autos enhances consumer choice and value, so does the market for used consoles and games.

Any DMCA liability for obtaining access to a game's functions should be based on actual copyright infringement of protected content — not circumvention that is unlikely to lead to infringement. For a reseller or owner of a game or console to obtain access in order to enable play of lawfully acquired games is not likely to lead to infringement of copyright-protected content.[2] Nor, contrary to suggestions by opponents, is it a violation of copyright to provide or establish a device platform for playing games that are both lawfully and unlawfully acquired.[3] Circumvention of digital access controls by a game or console owner to use abandoned software lawfully therefore does not violate any protected copyright interest and should receive the proposed exemption.

[2] As the Sixth Circuit ruled, "Manufacturers of interoperable devices such as computers and software, game consoles and video games, printers and toner cartridges, or automobiles and replacement parts may employ a security system to bar the use of unauthorized components. … To the extent compatibility requires that a particular code sequence be included in the component device to permit its use, the merger and scènes à faire doctrines generally preclude the code sequence from obtaining copyright protection." *Lexmark Intern. v. Static Control Components*, 387 F. 3d 522, 548 (6th Cir. 2004). Additionally, the Register has recognized that, to the extent copyright-protected content of embedded software is involved, there is a strong basis for finding fair use. 2012 Report at 73.

[3] Altering the capacity of a device does not directly infringe copyright, nor, where there are substantial non-infringing uses of the device, does it contribute to copyright infringement. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984). Nor can such alteration of a device or its software induce infringement in the absence of a "clearly voiced" objective to infringe and a "culpable" purpose. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd*., 545 U.S. 913, 923–24, 934–35 (2005).