

Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS

**In the Matter of Section 1201 Exemptions to
Prohibition Against Circumvention of Technological
Measures Protecting Copyrighted Works**

Docket No. 2014-07

**Written Reply Comments of the Preservation and Reformatting Section of the American
Library Association in Support of Proposed Class 23**

The Preservation and Reformatting Section (PARS) of the Association for Library Collections and Technical Services (ALCTS) contributes to library service and librarianship through encouragement, promotion of, and responsibility for those activities relating to the preservation and reformatting of library materials in all types of institutions and provides leadership in the application of new technologies to assure continued access to library collections. ALCTS is the national association for information providers who work in collections and technical services, such as acquisitions, cataloging, metadata, collection management, preservation, electronic and continuing resources. ALCTS is a division of the American Library Association (ALA).

We submit these Reply Comments in support of Proposed Class 23: Abandoned Software—Video Games Requiring Server Communication

Overview

Video games and game consoles are one of the most significant cultural products of our era. They are already widely used as a primary source for scholarship and figure prominently in public discourse about the nature, values, and aims of contemporary society. Scholarship is progressive. It revisits the primary sources used in earlier eras through and reinterprets them in light of contemporary ideas. Libraries and other memory organizations must be able to provide access to these primary sources long after their manufacturers have discontinued support for them, and this requires circumvention of technological measures that are used in the present to control access to works protected under 17 U.S.C. 1201. We seek permission for nonprofit libraries, archives, museums, and educational institutions to alter the hardware or software of games and game consoles. These alterations include modifying games and game consoles that are no longer supported by their manufacturer, to allow for their re-use in creative or critical projects, through “jailbreaking” or creating alternatives to any server communication required for the use of the games or consoles.

Technological Protection Measures and Methods of Circumvention

Games and game consoles are protected by hardware and software measures that require physical or digital tokens, a key or other data, to allow access to their content or systems. These

tokens may be transmitted from a remote server, and when these servers are abandoned by their manufacturers, the content becomes unusable. These tokens may also be embedded in a physical device, such as an optical disk or ROM chip, and if these devices become unreadable, the content is likewise unusable. Both problems are highly likely, given the fragility of physical media used for storing digital information and the frequency with which game development companies ease business, change hands, or discontinue support for older titles in their catalogs. These measures can be bypassed by creating an alternative server or device, or by modifying the source code so that authentication is not required. In either case, these modifications can be made on local network or individual copies of the game or console owned by a not-for-profit library or similar organization, so that the circumvention serves a public good, and need not be widespread or hazardous to the video game marketplace.

Noninfringing Uses

Games and game consoles are used already as materials for artistic activity, teaching, and scholarship. Cory Arcangel, for example, modified Nintendo game cartridges to create works such as *Super Mario Clouds* (featured in the 2004 Whitney Biennial) and *Various Self-Playing Bowling Games* (featured in *Pro Tools*, a 2011 Guggenheim retrospective of Arcangel's work). Both works exist only because of circumvention and hacking and, as the platforms used for these works recede into history, it is imperative that instances of the games and consoles used exist in as close to an original format as possible, so that future scholars can understand these works.

Games studies are a recognized and established area of academic work, supported by a substantial and growing body of peer-reviewed literature. For example, the international journal *Game Studies* (ISSN: 1604-7982) just published its 14th volume, and *Games and Culture* (1555-4120) has been published quarterly since 2006. The *Journal of Games Criticism* (ISSN: 2374-202X) recently launched as a peer-reviewed open-access journal in this field, joining *Eludamos* (ISSN: 1866-6124), which has been published as a peer-reviewed open-access journal on computer game culture since 2007. The games discussed in these articles have become the primary sources for scholarship and as scholars build on one another's work, they must have access to those resources as they were experienced in their day. Libraries, archives, and museums are the institutions set apart to do exactly this type of stewardship of primary source materials.

Asserted Adverse Effects

Video games are now and will continue to be a primary source for understanding our world. Libraries, archives, and museums are the institutions that we rely upon to provide responsible stewardship of these resources. We cannot compromise the ability of libraries to do the preservation work that will make the resources of the present available to the researchers of the future. Those resources must include video games.

Video games are an enormous component of contemporary life. In 2012, the entertainment software association estimated that its industry grew four times faster than the US economy and added over \$6.2 billion to U.S. Gross Domestic Product, outpacing movie box-office sales, while DFC Intelligence estimated that the video game industry accounted for \$63 billion worldwide.

Libraries already work to preserve motion pictures against within an increasingly difficult legal environment, because it is clearly understood that the movies are an important part of American culture life. It is increasingly easy to argue that the same is true of video games. The right of our libraries to care for our nation's culture should not be curtailed.

Video games currently in the market include detailed 3D recreations of contemporary artifacts, and large sections of dozens of cities around the world, in far more detail than any map or atlas from the pre-video game era. Chicago, Long Beach, Los Angeles, New York, Pittsburgh, San Francisco, Seattle, in America, and abroad, São Paulo, Paris, Moscow, and many others are modeled in astonishing detail. These models will only grow in value as time passes, and the cities of contemporary video games diverge from these same cities as they grow and change in the future. Likewise, the creation of detailed simulations of hundreds of planes, in X-Plane or Microsoft Flight Simulator, or automobiles, in Forza or Gran Turismo, along with the airfields, cities, racetracks, and environments in between, provide us with a detailed model of our world and technologies at a particular moment in time. These resources are more valuable as time passes, by their nature and the nature of the research that they can support, and they are deeply at risk by any legislation that impedes libraries from taking preservation action.

Libraries have been given special exemptions to take preservation action precisely because they are responsible actors. Projects like Private LOCKSS and Portico have shown how libraries can work with publishers to entrust digital content to reliable third-parties, who only provide access after agreed upon trigger events. The long standing provision of Section 108 have always coexisted with a vibrant and growing publishing industry and in recent litigation, the courts have time and again confirmed that librarians act within the boundaries of law. Authors Guild v. HathiTrust affirmed that libraries had acted lawfully and within their fair use rights in digitizing books. The UCLA streaming media suit determined that UCLA had acted lawfully and abided by the terms of the public performance rights they had acquired from motion picture distributors.

“It was like Frogger,” or perhaps “that was like Tetris”, or maybe “it’s on like Donkey Kong!” To appreciate the way that even these colloquialisms evoke the crossing a busy street, loading a moving van, or anticipating a conflict, we must be able to preserve the video games that spawned them. If these problems seem minor, consider how they compound when we move from simple turns of phrase to complicated cultural debates.

Laws are written, ethics are debated, and people's lives are dramatically altered because of the way we use an interpret video games. When we reflect on how gender roles were shaped in the early 21st century, we will have to revisit #gamergate. When we consider the way that our society dealt with ideas about violence and criminality, we will have to revisit the debates about Grand Theft Auto. Today, when we want to understand the way the United States Armed Forces trains and recruits soldiers for deployment in counter-insurgency around the globe, we must understand that DARWARS Ambush and America's Army are built on the same platforms used to develop commercial combat games like Battlefield, Call of Duty, or Halo. Indeed, Halo has crossed markets and community's several times over, spawning films and books, and lending one of its characters persona's to Microsoft's virtual assistant, Cortana, which is being deployed across all of Microsoft's products.

Video games are at the heart of contemporary discussions that have profound effects on our social fabric. They shape our culture in way that is as profound as the influence of films, books, or music. But video game systems can be at the leading edge of technology and drive billions of dollars in sales one year, and be obsolete and unmarketable a few years later. Libraries must have a broad exemption under 17 U.S.C. 1201 to jailbreak consoles and recover abandoned software that requires serve communications.