

Docket (/docket/COLC-2020-0010) / Document (COLC-2020-0010-0075) (/document/COLC-2020-0010-0075) / Comment

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Class 08_InitialComments_Alisha Cunzio

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Comment

Under the Class 8 exemptions found in the final rulings for the seventh triennial proceedings, class (ii) indicates that “video games in the form of computer programs embodied in physical or downloaded formats that have been lawfully acquired as complete games, that do not require access to an external computer server for gameplay, and that are no longer reasonably available in the commercial marketplace, solely for the purpose of preservation of the game in a playable form by an eligible library, archives, or museum, where such activities are carried out without any purpose of direct or indirect commercial advantage and the video game is not distributed or made available outside of the physical premises of the eligible library, archives, or museum.”

However, the stipulation that games must “no longer reasonably available in the commercial marketplace” is unclear in what qualifies as reasonable availability in the commercial marketplace. As such, I would like to propose the following clarifications for this stipulation:

- Remakes – defined as “a video game closely adapted from an earlier title characterized by updated or changed assets, significantly altered text or plot, and/or major changes to gameplay” – do not constitute a renewal of the original copyright of the title and therefore do not qualify as reasonable availability;
- Remasters and re-releases – defined as “changing the quality of the sound or of the image, or both, of previously created recordings, either audiophonic, cinematic, or videographic” – qualify as reasonable availability so long as the new release maintains a faithful reproduction of the original gameplay, plot points, and general experience;
- Ports – defined as “adaptation of the original software to achieve playability on a different console or hardware” – qualify as reasonably available so long as the new release maintains a faithful reproduction of the original gameplay, plot points, and general experience;
- Marketplace pricing must not exceed the original price – adjusted for inflation – of the title unless significant additions have been made;
- Access to new listings must not be inhibited by a subscription fee or recurring payment model.
- Duplications/copies possessed by eligible institutions are not liable for copyright violation if a relevant remaster, re-release, or port is released after the institution has had their own duplications/copies available for public access.

These clarifications will better allow eligible institutions to determine the viability of legal duplication in order to provide continued access to video game titles that are no longer in circulation. The unspecific language of the current stipulations leaves institutions – many of which do not have the means to argue copyright violations in court, even if just – at risk of spurious claims and, potentially, will lead to reluctance to duplicate titles at risk of being lost due to electronic degradation.

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Comment Details

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