Submission on behalf of Joint Creators and Copyright Owners
Class 14(a): Computer Programs – Preservation
Class 14(b): Video Games – Preservation

UNITED STATES COPYRIGHT OFFICE

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

[ ] Check here if multimedia evidence is being provided in connection with this comment

ITEM A. COMMENTER INFORMATION

The Motion Picture Association, Inc. ("MPA") is a trade association representing some of the world's largest producers and distributors of motion pictures and other audiovisual entertainment for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the internet. The MPA's members are: Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

Alliance for Recorded Music ("ARM") is a nonprofit coalition comprising the many artists and record labels who together perform, create, and/or distribute nearly all of the sound recordings commercially released in the United States. Members include the American Association of Independent Music ("A2IM"), the Music Artists Coalition ("MAC"), the Recording Industry Association of America, Inc. ("RIAA"), hundreds of recording artists, the major record companies, and more than 600 independently owned U.S. music labels.

The Entertainment Software Association ("ESA") is the United States trade association serving companies that publish computer and video games for video game consoles, handheld video game devices, personal computers, and the internet. It represents nearly all of the major video game publishers and major video game platform providers in the United States.

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ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 14(a): Computer Programs – Preservation (including digital materials dependent upon a computer program as a condition of access)

Proposed Class 14(b): Video Games – Preservation

ITEM C. OVERVIEW

MPA, ARM, and ESA ("Joint Creators and Copyright Owners") support legitimate, lawful preservation efforts and did not oppose the renewal of the existing exemptions applicable to circumvention for preservation of video games and computer programs. The motion picture, recorded music, and video game industries all participate in preservation efforts and work with selected non-profit institutions focused on preservation, including the Library of Congress, the Smithsonian and various universities. However, we must oppose the expanded exemptions requested by Cyberlaw Clinic at the Berkman Klein Center for Internet and Society ("Berkman"), The Software Preservation Network ("SPN"), and Library Copyright Alliance ("LCA"), which would permit an undefined set of libraries, archives, and museums that do not need to have a physical site dedicated to research and scholarship to circumvent access controls for the purpose of providing "off-premises" access that could include access by the general public for entertainment purposes.[1]

First, Petitioners' argument that off-premises access is noninfringing is off-base. They argue that, if a work is not commercially available at a particular point in time, preservation and/or study causes no potential market harm then, or in the future.[2] They also argue that making a preserved work available to the public for study is transformative if the work is not commercially available at that point in time.[3] But the proposed regulatory language does not limit usage of unauthorized copies created through circumvention in any way.[4] It instead appears to allow for the provision of unauthorized, remote access to complete works for the general public, including for entertainment purposes, and even if the copyright owner has since reissued the work (or issued a derivative version of the work) or may do so in the future. The provision of that type of unauthorized access is contrary to copyright law's fundamental principles because it would strip copyright owners of the ability to decide when, if, and how, to exercise their exclusive rights. While preservation is a desirable goal, allowing third parties to satisfy marketplace demand for works during or after periods of time where copyright owners elect not to commercially exploit their works is not.

This is especially true of video games, which can be considered audiovisual works and are primarily played for entertainment purposes.[5] As such, they are distinct from many other types of software-based works. While there may be a limited potential future market for older word processing programs, architectural design software, or operating systems, there is substantial evidence that older "retro" and legacy video games are in increasing demand and are available in

[1] Berkman, SPN and LCA, Class 14 Long Comment at 4 (Dec. 14, 2020) ("Berkman *et al*. 2020 Comment") ("This comment proposes modification of the current exemption to remove premises limitations and permit authorized users to access digital materials remotely.").

[2] Berkman *et al*. 2020 Comment at 20-21.

[3] *Id.* at 20.

[4] *Id.* at 1-2.

[5] *See* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 807.7(A) (1) (3d ed. 2021) ("Generally, a videogame contains two major components: the audiovisual material and the computer program that runs the game.").

the marketplace at consumer-friendly price points.[6] Lumping together video games with productivity software creates a false equivalency that Petitioners try to use to support their flawed arguments. We incorporate by reference the separate comments of ESA opposing Proposed Class 14(b), which touch upon these points and with which we fully agree.[7]

Second, as ESA's comments also address, the proposals are not focused on access controls impeding preservation of works for researchers, teachers and future generations.[8] The existing exemptions address those needs, the proposed expansions instead focus on providing the *public* with the ability to use works without limitation and without compensation to copyright owners, including as a means to generate publicity for the preservationists and raise money for their own parochial interests.

Third, to the extent that the proposed expansion related to videogames would permit circumvention of access controls on video game consoles other than by responsible organizations under tightly controlled conditions, it would also increase the threat that consoles could be used to play unauthorized copies of games or make unauthorized copies of other kinds of media available on consoles, including motion pictures and sound recordings, and, as a result, undermine the value of copyrighted works.

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

Petitioners seek to circumvent access controls that protect non-game computer programs and access controls that protect video games distributed as complete products in physical or downloaded formats, as well as access controls on video game consoles used by eligible organizations in authorized preservation activities. As a result, the technological protection measures and methods of circumvention at issue vary dramatically.

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[6] *See, e.g.*, Brian Ashcraft, *Game consoles and famous franchises get spruced-up*, THE JAPAN TIMES (Feb 7, 2021) (explaining that legacy games are often remastered to take advantage of the graphic capabilities of new consoles); Jenni Lada, *Mega Man Switch Sale Discounts Legacy Collections*, SILICONERA (Feb. 6, 2021) (an example of a legacy game collection available in the marketplace at a low price); Will Daniel, *Activision Blizzard Spikes 12% As The Gaming Giant Gives Strong Guidance Following A Surge In Holiday Sales*, MARKETS INSIDER (Feb. 5, 2021) ("The company's Blizzard unit also outperformed in 2020, buoyed by the now 17-year-old "World of Warcraft" MMORPG. The game saw strong engagement, increasing net bookings by 40% year-over-year in large part due to the continued success of Classic-a retro version of the now nearly decades-old game"); Jahla Seppanen, *The 7 Best Retro Game Consoles in 2021*, THE MANUAL (Feb. 1, 2021). *See also* ESA Opposition Comment – Proposed Class 14(b) at 2-4 (Feb. 9, 2021).

[7] Given that the Joint Creators and Copyright Owners' coalition does not currently include associations focused on copyrights in other forms of computer programs, these comments focus on why it would be misguided to recommend the proposed exemption for off-premises access to video games. However, the proposed scope of the exemption for other programs is also troubling and unprecedented. For example, motion pictures and sound recordings are often distributed in digital formats accessible via computer programs. Class 14(a) would seem to potentially permit circumvention of access controls on such computer programs to copy and provide public access to the motion pictures and sound recordings. Such access is infringing, just as in the case of video games. We are also submitting, and incorporate by reference, comments opposing Proposed Class 5, covering "preservation" of motion pictures acquired on discs.

[8] Berkman *et al*. 2020 Comment at 1-2.

It is important to understand that eliminating the on-premises requirement from the existing exemptions would significantly expand the scope of who could perform circumvention. Even though the exemptions are discussed in the comments at times as if they are available only to nonprofit libraries, archives, and museums with a mission to promote research and scholarship and a public reading room in which to carry out that mission, Petitioners' proposed regulatory language does not define the terms "library, archive, and museum." Absent a requirement that preservation be conducted by an organization with physical premises and a requirement that access only be provided in physical premises, any organization or person purporting to have a preservation purpose could potentially circumvent and make works available to the public for any purpose.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

In 2018, the Copyright Office recommended, and the Library of Congress granted, a new exemption for preservation of computer programs, and "digital materials dependent upon a computer program as a condition of access," by libraries, archives and museums.[9] The reasoning underlying granting the exemption was primarily based on (i) contentions from proponents concerning a lack of marketplace harm resulting from the commercial unavailability of covered programs and (ii) a prohibition against off-premises access to the preserved works.[10] The Copyright Office also expanded an exemption for video game preservation, primarily focusing on the same factors.[11] Now, Petitioners seek to do away with the second, critically important limitation for both exemptions.

Petitioners superficially focus on "preservation" by libraries, archives and museums, but the proposals to allow off-site access have little to do with traditional notions of preservation. While the Copyright Office has previously concluded that preservation is a legitimate or "favored" activity within certain parameters, the proposed language lacks such parameters and enables copying for the sake of copying to obtain works in formats that enable institutions, and perhaps individuals, to reproduce and disseminate works that remain under copyright, without permission

[9] *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies Final Rule, 83 Fed. Reg. 54010, 54022 (Oct. 26, 2018). The scope of what the exemption allows with respect to software dependent materials is unclear because the Copyright Office elected not to define the term and to instead limit the exemption to gaining access to dependent materials only for lawful purposes. *See* SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS, 254 (2018) ("2018 Rec.") ("[I]n lieu of including the phrase 'computer program-dependent materials' as a defined term, the recommended exemption simply provides that circumvention is permitted for the purpose of 'lawful preservation . . . of digital materials dependent upon a computer program as a condition of access.' For the reasons discussed above, the Acting Register believes this language adequately addresses proponents' desire for clarity, making it unnecessary to define the class of dependent materials eligible for preservation—an issue best left for case-by-case determination under existing copyright law."). In our view, motion pictures are treated differently than other works under Section 108(i), and no record was established during the 2015 proceeding to allow for any use of motion pictures or sound recordings under the existing computer programs exemption. *See* our comments on *Proposed Class 5: Audiovisual Works – Preservation*, which we incorporate by reference.

[10] 2018 Rec. at 241, 252.

[11] *Id.* at 281.

from copyright owners. Using the word "preservation" in the submission does not *ipso facto* render the activities at issue either lawful or desirable.

If we understand the proposed classes properly, they would allow a physical or *virtual* library, museum or archive (or, given the lack of definitions for those terms, a potentially broader class of users claiming such a status) to circumvent access controls on all computer programs that are not at the time being commercially exploited, to create unauthorized copies of those programs and potentially all materials rendered accessible through them in a collection, and to utilize those copies to provide patrons (both in-person and remotely) with the ability to use the works for free, regardless of whether they do so for entertainment purposes or for academic research or teaching. A patron could be any member of the general public. Indeed, the proponents specifically contemplate that the exemption will be relied upon by "public libraries" and "community support services offered by small or rural libraries."[12] There is no limitation to faculty and students or even to card-carrying library patrons (which by itself could cover millions of people, especially online, with no specific research needs or even any research agendas at all).

Moreover, the proposed language does not on its face limit the covered libraries, museums, and archives to nonprofit institutions, and the requirement that preservation not have a purpose of "commercial advantage" does not clearly prevent institutions from engaging in uses of preserved works that are arguably noncommercial but nonetheless generate revenue by making organizations eligible for grant funding, providing publicity, or promoting donations and memberships. The proponents specifically link their proposal to efforts to garner increased funding for eligible organizations.[13] The proposal for unlimited remote public access is more akin to space and format-shifting services of the kind rejected in prior proceedings than it is to true preservation uses.[14]

The fair use analysis is crucial here, as it is clear that the proposal is not targeting conduct allowed by Section 108.[15] It is not fair to label the "preservation" copies contemplated here as even premature "replacement" or "back-up" copies. It appears that Petitioners may want to create new copies that they never paid for, and, in any event, they propose to use the copies obtained through circumvention in ways in which lawful copies never could have been used. The fact that one library acquired one copy of a video game 20 years ago does not entitle the

[12] Berkman *et al*. 2020 Comment at 6 (n.31).

[13] *Id*. at 4, 6 (n.31), 7.

[14] *See* Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking, 85 Fed. Reg. 65293, 65305 (Oct. 15, 2020) ("NPRM") ("[I]n the 2006, 2012, 2015, and 2018 rulemakings, the Librarian rejected proposed exemptions for space-shifting or format-shifting, finding that the proponents had failed to establish under applicable law that space-shifting is a noninfringing use.").

[15] In 2018, the Joint Creators and Copyright Owners provided in their opposition comments an overview of the Copyright Office's treatment of preservation/obsolescence issues throughout prior rulemaking cycles. *See* Joint Creators and Copyright Owners, Class 9 Opposition (Feb. 12, 2018). We incorporate that overview here by reference. In short, the Copyright Office initially insisted on a focus upon conduct covered by Section 108, but then in 2015 and 2018, the Copyright Office strayed from this approach to apply a fair-use-oriented approach that remains untested in judicial precedents or blessed by legislative action. Predictably, that has led us to the type of broad proposals put forward during this current proceeding. As discussed in our comments of pending *Proposed Class 5: Audiovisual Works – Preservation*, incorporated here by reference, Section 108 should remain central to the analysis.

entire world to use that work without copyright owner permission or compensation, in perpetuity.

Moreover, productivity software is quite distinct from video games, which are far more expressive and primarily played for entertainment purposes. Enabling exemption beneficiaries to create internet arcades featuring access to playable video games, simply because they were not being commercially exploited at the time of the circumvention, would constitute a significant and troublesome shift in the scope of permitted circumvention.

As discussed in ESA's comments, the Section 107 factors do not weigh in favor of a conclusion that the proposed conduct is generally lawful.

- **First factor**: The purpose and character of the use is not transformative: the exemption beneficiaries would simply create new copies of works and provide access to them to patrons who would view them in their entirety, all without payment to copyright owners. Under *Napster, Wall Data*, and other cases, this renders the copying commercial even if consumers do not pay nonprofit institutions for access or use because it supplants marketplace transactions.[16] This is especially true because the proposed language includes no requirement to implement proper security measures. Moreover, as discussed above, the proponents candidly acknowledge that their proposal is motivated by a desire to garner increased funding for the circumventing organizations.

  There is no legitimate comparison between a case such as *Bill Graham Archives v. Dorling Kindersley Ltd.*, which involved the use of reduced-size images of concert posters in a book chronicling the history of the Grateful Dead, and libraries making available videogames and other software-accessible creative works for off-site public consumption.[17] *Bill Graham Archives* involved the creation and distribution of a transformative book involving historical analysis and commentary, whereas the proposal here would provide works to the public in the exact same form and for the exact same purpose for which they were initially created. While Petitioners distract from this fact by focusing on how researchers or academics could make use of remotely accessible video games or other works, the proposal is not limited to such uses and Petitioners offer no workable definition of research or academic study or how it would be possible for exemption beneficiaries to engage in due diligence to identify researchers or academics.

- **Second factor**: The works at issue would include thousands of highly creative video games of the kind at the heart of the Copyright Act's objective to protect

[16] *See Wall Data Inc. v. Los Angeles Cty. Sheriff's Dep't*, 447 F.3d 769, 781–82 (9th Cir. 2006) ("We believe that 'widespread use' of hard drive imaging in excess of one's licenses could seriously impact the market for Wall Data's product."); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001), *as amended* (Apr. 3, 2001) ("Having digital downloads available for free on the Napster system necessarily harms the copyright holders' attempts to charge for the same downloads.").

[17] *See generally Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

expressive works, as well as other kinds of creative works accessible with productivity software or playable on game consoles. These works are not functional.

- **Third factor**: The proposed reproductions/public performances/distributions would be of entire works. Although Petitioners would have the Copyright Office ignore this fact as unimportant, this factor remains a key part of the fair use analysis especially when the use contemplated is not transformative.[18]

- **Fourth factor**: Existing and potential markets for the works would be negatively impacted because more than 100,000 institutions would be enabled to provide free or reduced-cost access to video games and other creative works using methods of digital dissemination.[19] The limitation of the proposal to software titles not commercially available at the time of circumvention should not alter this analysis.[20] There is a vibrant market for retro and legacy games, and reissues, which ESA members and others actively embrace, as explained in detail in ESA's separate comments. And copyright owners of motion pictures and sound recordings regularly make their creative works available, even as player software that can be used to access them comes and goes.[21] Congress intended that it should be a copyright owner's choice when it comes to determining when, if, or how to reissue their works during the term of copyright.

The Copyright Office's prior considerations of space and format-shifting proposals are instructive.[22] Indeed, here, the end users need not even own copies of the video games to gain access to the games that would be reproduced. The libraries may own or lawfully possess copies, and then let others remotely enjoy them. As the Copyright Office has repeatedly concluded, this proceeding was not created to "break new ground on the scope of fair use."[23] By proposing an extremely broad exemption, Petitioners have ignored this cautionary instruction.

Petitioners do not establish that access controls are the cause of their purported problems. Their comments instead focus on demand for remote access to copyrighted works, and the increased funding opportunities and patronage that will be available to institutions that meet that demand.[24]

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[18] *See Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 268 (4th Cir. 2019) ("[U]nless the use is transformative, the use of a copyrighted work in its entirety will normally weigh against a finding of fair use.").

[19] LCA states that its members alone constitute 100,000 institutions. Berkman *et al*. 2020 Comments at 1.

[20] *See Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000) ("Even an author who had disavowed any intention to publish his work during his lifetime [is] entitled to protection of his copyright . . . because he has the right to change his mind.").

[21] We reiterate that the existing exemption for computer program preservation should not be read to allow for unauthorized uses of motion pictures and sound recordings. *See* note 9, *supra*.

[22] *See, e.g.*, 2018 Rec. at 120-23 (discussing prior analyses of Section 107 factors).

[23] SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS 109 (2015).

[24] Berkman *et al*. 2020 Comment at 4 ("If preservationists cannot provide users remote access to preserved software, archival traffic and patronage will languish at low levels despite potentially strong research and teaching interest.").

But, explaining that a researcher may not want to travel to a library or that a patron may provide funding if an organization serves its "community" by allowing that community to play video games or enjoy other software-accessible media content, does not identify any impediment to preservation activities created by access controls. Petitioners' proposal is also based on other choices made by institutions that are unrelated to access controls preventing preservation, such as universities deciding to provide little or no classroom space within libraries, thereby rendering it difficult for them to engage in on-premises instruction (not preservation).[25]

When Petitioners' identified concerns are weighed against the market harm to copyright owners, they do not justify an exemption. The potential for market harm is also increased to the extent that the video games preservation exemption is expanded to allow additional organizations to circumvent access controls on video game consoles. Those access controls are critical to preserving the secure ecosystems that authenticate legitimate copies of video games and enable streaming and downloading of other types of entertainment content, including works owned by ARM and MPA members.

ITEM F. DOCUMENTARY EVIDENCE

We have included hyperlinks to webpages/documents within the body of this document. We are not submitting any other documentary evidence.

Respectfully submitted:

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[25] *Id.* at 13 ("Finally, the coronavirus pandemic has only highlighted and elevated the pressing need for this off-site exemption. Major libraries and archival institutions across the country have closed their doors, relying on digital access for preservationists, researchers, teachers, and students."). We acknowledge the importance of distance education during the COVID-19 pandemic. However, the proposals are not limited to providing off-site access during the pandemic, or even during other emergencies. Accordingly, we urge the Copyright Office and the Library of Congress to consider the proposals within the parameters of copyright law, as the analysis of the proposals will have long-term impact.