

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

Entertainment Software Association

Gina M. Vetere
Senior Vice President & General Counsel
Benjamin E. Golant
Chief Counsel for Intellectual Property Policy
601 Massachusetts Avenue, NW
Washington, DC 20001
Telephone: (202) 223-2400
Email: bgolant@theesa.com

Represented by
Steven R. Englund
Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
Telephone: (202) 639-6000
Email: senglund@jenner.com

Cayman C. Mitchell
Jenner & Block LLP
919 Third Avenue
New York, NY 10022
Telephone: (212) 891-1600
Email: cmitchell@jenner.com

These comments are submitted by the Entertainment Software Association (“ESA”), the U.S. trade association serving companies that publish computer and video games for game consoles, handheld devices, personal computers, and the internet. ESA represents the major video game console makers and platform providers and almost all of the major video game publishers in the United States.¹

ESA’s member companies are leaders in bringing creative and innovative products and services into American homes and have made major contributions to the U.S. economy. The U.S. video game industry generated \$56.9 billion in total revenue during 2020,² and directly employed more than 143,000 people across the United States.³ But the video game industry’s

¹ A complete list of ESA’s member companies is available at <http://www.theesa.com/about-esa/> (last accessed Jan. 17, 2021).

² Marie Dealessandri, *2020 sees record US games spending at \$56.9bn*, GamesIndustry.biz (Jan. 15, 2021), <https://www.gamesindustry.biz/articles/2021-01-15-2020-sees-record-us-games-spending-at-usd56-9bn-us-annual-report>.

³ Press Release, Entertainment Software Association, *Report: Video Games Contribute \$90 Billion+ to U.S. Economy* (Dec. 3, 2020), <https://www.theesa.com/press-releases/report-video-games-contribute-90-billion-to-u-s->

Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office Web site and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

contributions to the U.S. economy are even greater than that: in 2019, the industry generated \$90.3 billion in annual economic output, supporting nearly 429,000 jobs.⁴

Not only are major new game titles released nearly every week, but the industry has shown that it will continue to innovate and be a leader on the frontiers of new technologies through its ongoing research and development and creativity. Traditional console games have rapidly expanding online components, and video games offer increasing opportunities for online multiplayer gameplay.⁵ The power of mobile computing, combined with the broadband speeds of expanding 5G networks, is enabling continued large-scale growth in mobile gaming. Video game companies are currently advancing software and hardware systems for emerging virtual reality and augmented reality technology, and the industry is continuing its legacy as an early technology adopter by incorporating and developing artificial intelligence both as a tool within games for advancing storylines and as a tool to streamline the development of games and their coding.⁶

Video games, like other types of creative works, are also regularly reintroduced or reimagined. In fact, there is a vibrant and growing market for authorized “retro” or “legacy” games and consoles. Here are just a few examples:

- Microsoft has made thousands of older titles available to the public by offering backwards-compatibility, as well as digital download, through its Xbox consoles.⁷
- In 2020, Nintendo released the Nintendo Game & Watch: Super Mario Bros. (a second generation of Nintendo’s first ever handheld gaming system, the Nintendo Game & Watch, originally released in 1980),⁸ and *Super Mario 3D All-Stars* (a “compilation game” for the Nintendo Switch, which revives three prior games in the

economy/ (“*Video Games in U.S. Economy Press Release*”). In fact, about three-fourths of U.S. households are home to at least one person who plays video games. See Entertainment Software Association, *2020 Essential Facts About the Video Game Industry* (July 2020), https://www.theesa.com/wp-content/uploads/2020/07/Final-Edited-2020-ESA_Essential_facts.pdf (“*2020 ESA Essential Facts*”); see also Simon Tripp et al., *Video Games in the 21st Century: The 2020 Economic Impact Report* (Dec. 2020), <https://www.theesa.com/wp-content/uploads/2019/02/Video-Games-in-the-21st-Century-2020-Economic-Impact-Report-Final.pdf> (“*Video Games 2020 Economic Impact Report*”).

⁴ See *Video Games in U.S. Economy Press Release*, *supra* note 4.

⁵ Games have historically offered multiplayer gameplay through several different mechanisms, including by connecting several controllers to a single console, by connecting several consoles through a Local Area Network (“LAN”), or by offering online play. See U.S. Copyright Office, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights, at 345 (Oct. 2015), <https://www.copyright.gov/1201/2015/registers-recommendation.pdf> (“Register’s 2015 Recommendation”). Each of these mechanisms carry separate and additional technological protection measures.

⁶ See *Video Games 2020 Economic Impact Report* at 33–37 (describing how video games are a driver of technological innovations).

⁷ Microsoft: Xbox One: Backward Compatible Game Library, <https://www.xbox.com/en-US/xbox-one/backward-compatibility#faqSection> (last accessed Jan. 17, 2021).

⁸ See *Game & Watch: Super Mario Bros.*, Nintendo (last accessed Jan. 17, 2021), <https://gameandwatch.nintendo.com/>.

Mario franchise, originally released in 1996, 2002, and 2007).⁹ Additionally, Nintendo provides Nintendo Switch Online, a subscription service, which includes over 90 classic NES and Super NES games.¹⁰

- Sony’s PlayStation Classic is a replica of the original PlayStation, pre-installed with 20 retro games.¹¹
- In 2019, Sega released the Sega Genesis Mini, a classic version of its SEGA Genesis, containing 42 pre-installed legacy games.¹²
- Blizzard has relaunched an early version of the game *World of Warcraft*.¹³ And the most recent expansion to *World of Warcraft* introduced “Timewalking Campaigns,” which effectively allow players to engage with all previous expansions of the game’s content as it would have been at the time of those expansions.¹⁴
- In 2019, Konami introduced the TurboGrafx 16 Mini, a replica of a 1987 home console with 57 legacy titles pre-installed.¹⁵
- In 2020, Blaze Entertainment released a handheld console called the Evercade Retro Games Console, which runs cartridges of authorized emulated games from various title creators.¹⁶ Over 200 games are already available with new cartridges arriving in 2021.
- Atari recently announced a new console called Atari VCS 800, which will include over 100 pre-installed “Atari classic console and arcade games,” and will ship in Spring 2021.¹⁷

⁹ See *Super Mario 3D All-Stars*, Nintendo Wiki (last accessed Feb. 3, 2021),

https://nintendo.fandom.com/wiki/Super_Mario_3D_All-Stars.

¹⁰ See Nintendo Switch Online, Nintendo (last visited Jan. 17, 2021), <https://www.nintendo.com/switch/online-service/>; Nintendo Entertainment System – Nintendo Switch Online (last visited Feb. 3, 2021),

<https://www.nintendo.com/games/detail/nintendo-entertainment-system-nintendo-switch-online-switch/>; Super Nintendo Entertainment System – Nintendo Switch Online, Nintendo (last visited Feb. 3, 2021),

<https://www.nintendo.com/games/detail/super-nintendo-entertainment-system-nintendo-switch-online-switch/>.

¹¹ See *Announcing PlayStation Classic’s Full Lineup of 20 Games*, Sony PlayStation Blog (Oct. 29, 2018),

<https://blog.playstation.com/2018/10/29/announcing-playstation-classics-full-lineup-of-20-games/>.

¹² See *SEGA Genesis Mini*, SEGA (last accessed Jan. 17, 2021), <https://genesimini.sega.com/>.

¹³ Blizzard Entertainment, Inc., *World of Warcraft Classic*, <https://worldofwarcraft.com/en-us/wowclassic> (last accessed Jan. 22, 2021).

¹⁴ Blizzard Entertainment, Inc., *Level Characters with Timewalking Campaigns!* (Nov. 25, 2020),

<https://worldofwarcraft.com/en-us/news/23574988/level-characters-with-timewalking-campaigns>.

¹⁵ See *TurboGrafx 16 Mini*, Konami (last accessed Jan. 17, 2021), <https://www.konami.com/games/pcemini/us/en/>.

¹⁶ See *Evercade*, Blaze Entertainment (last accessed Jan. 17, 2021), <https://www.evercade.co.uk/>.

¹⁷ See *Atari VCS 800 Black Walnut All-In Bundle*, Atari (last accessed Jan. 17, 2021), <https://atarivcs.com/walnut-all-in-bundle/>.

- Individual titles are regularly re-released on new consoles by a variety of video game publishers. Some examples just in the last month include Titan Quest,¹⁸ Mass Effect,¹⁹ Braid,²⁰ Disco Elysium,²¹ and Nier Replicant.²²

Mobile applications make it even easier for video game companies to re-release games from their back catalogs. Numerous classic games have been re-released for mobile devices,²³ including games from Rock Star,²⁴ Square Enix²⁵ and Sega.²⁶

There is no doubt that video games are a significant form of creative expression.²⁷ In fact, video games of all types are now being recognized by art museums across America.²⁸ The

¹⁸ Mikhail Madnani, 'Titan Quest: Legendary Edition' Is Finally Available on iOS alongside a Major Update to 'Titan Quest HD', TouchArcade (Feb. 2, 2021), <https://toucharcade.com/2021/02/02/titan-quest-legendary-edition-available-now-price-dlc-upgrade-download-size-ios-android-handly-games/>.

¹⁹ Liana Ruppert, *Mass Effect Legendary Edition Gameplay Trailer Revealed, Coming This May*, GameInformer (Feb. 2, 2021), <https://www.gameinformer.com/2021/02/02/mass-effect-legendary-edition-gameplay-trailer-revealed-coming-this-may>

²⁰ Joe Juba, *Five Re-releases I Can't Wait to Play (Again)*, GameInformer (Jan. 25, 2021), [https://www-gameinformer-com.cdn.ampproject.org/c/s/www.gameinformer.com/2021/01/25/five-re-releases-i-cant-wait-to-play-again?amp](https://www.gameinformer-com.cdn.ampproject.org/c/s/www.gameinformer.com/2021/01/25/five-re-releases-i-cant-wait-to-play-again?amp).

²¹ *Id.*

²² *Id.*

²³ See, e.g., Andrew Williams & Vic Hood, *Best console games you can play on a phone or tablet*, TechRadar (Feb. 4, 2020), <https://www.techradar.com/news/best-console-games-on-phone-or-tablet>; David Nield, *12 retro games that turn your smartphone into an old-school arcade*, Popular Science (Nov. 24, 2018), <https://www.popsoci.com/retro-games-on-smartphone/>.

²⁴ Rockstar Games, Browse by Game Platforms: Mobile, <https://www.rockstargames.com/games?platform=mobile> (last accessed Jan. 17, 2021).

²⁵ Square Enix, Games, Mobile, <http://www.square-enix.com/na/game/mobile/> (last accessed Jan. 17, 2021).

²⁶ Sega Forever, Classic Games Collection, <http://forever.sega.com/about>, (last accessed Jan. 17, 2021).

²⁷ In *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011), the U.S. Supreme Court recognized that video games, as expressive works, are fully protected by the First Amendment. That is because “[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages.” *Id.* at 790.

²⁸ Many institutions have recognized video games' place among established forms of art. For example, in 2020, the Smithsonian American Art Museum staged a limited-time virtual program allowing exploring “how video games act as a medium for expanding the way Americans tell and experience stories.” Smithsonian American Art Museum, SAAM Arcade, <https://americanart.si.edu/events/saam-arcade> (last accessed Jan. 22, 2021). In 2019, the Akron Art Museum opened a special exhibition entitled “Open World: Video Games & Contemporary Art” examining the influence of video games on contemporary art. Akron Art Museum, Open World: Video Games & Contemporary Art, <https://akronartmuseum.org/exhibitions/open-world-video-games-contemporary-art/> (last accessed Jan. 22, 2021). Since 2012, the Museum of Modern Art in New York City has been displaying video games in its galleries. See Allan Kozinn, *MoMA Adds Video Games to Its Collection*, N.Y. Times: Artsbeat (Nov. 29, 2012, 1:45 PM), <https://artsbeat.blogs.nytimes.com/2012/11/29/moma-adds-video-games-to-its-collection/>. The MoMA selects video games to acquire using the same criteria the museum uses for other collections, including “historical and cultural relevance, aesthetic expression, functional and structural soundness, innovative approaches to technology and behavior, and a successful synthesis of materials and techniques.” *Id.* Moreover, the Strong National Museum of Play in Rochester, which houses the World Video Game Hall of Fame, recognizes individual video games that have exerted influence on the industry or on popular culture and society in general. See World Video Game Hall of Fame, Strong Nat'l Museum of Play, <http://www.museumofplay.org/about/world-video-game-hall-fame> (last visited Jan. 17, 2021); see also, Nathan Reese, *An Exhibition That Proves Video Games Can Be Art*, N.Y. Times (Feb. 10, 2016), <https://www.nytimes.com/2016/02/10/t-magazine/art/jason-rohrer-video-games-exhibit-davis-museum.html> (reviewing *The Game Worlds of Jason Rohrer*, a video game art exhibit which was on view at the Davis Museum in

creative nature of the medium is evident from the treatment of video games in the popular press, which reports on and reviews video games like other copyrighted works, such as literature, movies, television, and theater.²⁹ This is all the more true in light of the global COVID-19 pandemic; video games have not only kept people in lockdown entertained, but also have served as a vehicle for the types of social connections lacking in isolation.³⁰

As described further below, ESA and its member companies are committed to, and actively support, serious professional efforts to preserve video games and recognize the industry’s creative contributions under circumstances that do not jeopardize game companies’ rights under copyright law. However, the industry’s innovation and economic activity depends on strong copyright protection for the software and other creative works that are its lifeblood. Thus, ESA member companies have a strong interest in maintaining effective copyright protection, including protection against circumvention of technologies that control access to copyrighted video game software, where such circumvention is undertaken in circumstances that would lead to the unauthorized public exploitation of games.

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 14(b): Video Games—Preservation. These comments do not address non-game software (proposed Class 14(a)).³¹

ITEM C. OVERVIEW

While Class 14(b) is styled as pertaining to video game preservation, in reality, the proposal is a veiled attempt to provide the public with broad online access to video games. Specifically, the proposal is to change the current video game preservation exemption in 37 C.F.R. § 201.40(b)(12) by deleting the physical premises limitation currently set forth in Section 201.40(b)(12)(ii). That deletion has nothing to do with *preservation*, as that term is properly

Wellesley, Massachusetts in 2016). And in 2016, a museum entirely dedicated to videogames opened in Frisco, Texas, entitled the U.S. National Videogame Museum. See National Videogame Museum, <http://nvmusa.org/> (last visited Jan. 17, 2021).

²⁹ See, e.g., Maya Salam, *The Video Games That Got Us Through 2020*, N.Y. Times (Dec. 17, 2020, updated Dec. 20, 2020), <https://www.nytimes.com/2020/12/17/arts/video-games-pandemic.html>; Stephen Totilo, *The Best Video Games to Get Lost In This Holiday Season*, N.Y. Times (Nov. 20, 2020, updated Dec. 18, 2020), <https://www.nytimes.com/2020/11/20/arts/best-new-video-games.html>.

³⁰ See, e.g., Taylor Lorenz, *Everyone’s Playing Among Us*, N.Y. Times (Oct. 14, 2020; updated Jan. 8, 2021), <https://www.nytimes.com/2020/10/14/style/among-us.html> (describing how the video game *Among Us* “has begun to serve as a default social platform for young people stuck in quarantine”); Imad Khan, *Why Animal Crossing Is the Game for the Coronavirus Moment*, N.Y. Times (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/arts/animal-crossing-covid-coronavirus-popularity-millennials.html> (“Animal Crossing offers a haven [during the COVID-19 pandemic] and can give players a feeling of empowerment and community, particularly at a moment when many are being told to stay at home.”).

³¹ ESA addresses Class 14(a) in the joint comment it is filing with the Motion Picture Association, Inc. and the Alliance for Recorded Music. ESA notes that video games and productivity software embody very different types of authorship, are commercialized in separate markets, are used in very different ways, and raise significantly different preservation and access issues. The SPN/LCA Comment tends to lump them together and attempts to justify Class 14(b) with arguments about software in general. The Office’s analysis should recognize the distinct issues each raises.

understood. Instead, the change would permit organizations that have preserved games to circumvent access controls to allow the public to play them online without any apparent restriction. Despite their repeated references to research and scholarship, it is apparent that such public access is not merely a regulatory drafting oversight, but is in fact among the proponents' objectives.³² That is not preservation; that is offering an online arcade in violation of the exclusive rights of video game copyright owners, and to the detriment of an important market that such copyright owners can and do exploit and defend. The exemption request should be denied.

Since its enactment in 1976, the current Copyright Act has distinguished between preservation—maintaining a work so that it will be available to future generations for scholarly research and study—and providing the public access to works for more general purposes.³³ Previous rulemaking proceedings under Section 1201 have recognized this distinction. For example, when the predecessor of current Section 201.40(b)(12)(i) was adopted in 2015, the Register recognized a distinction between, and separately analyzed, the effects of the anti-circumvention provisions of the Copyright Act for “libraries, archives and museums that seek to preserve individual video games and make them available for research and study” and “people who wish to continue to play physical or downloaded copies of video games.”³⁴ The Register rebuffed the proponents’ “broad view” that “preservation activities overlap with a mere opportunity for continued play.”³⁵ In doing so, the Register noted “Congress’s acknowledgment of copyright owners’ concern over unrestricted copying under the guise of preservation.”³⁶ Given that concern, she specifically limited her analysis of preservation to “preserving games in playable condition to enable research and study.”³⁷ She specifically excluded “exhibit[ion] to the public in playable form,” recognizing that activity as “markedly different activity than efforts to preserve or study the game in a dedicated archival or research setting.”³⁸

Similarly, in the 2018 proceeding, the Register grounded the exemption in Section 201.40(b)(12)(ii) in a need “that video games be preserved to promote future scholarship of these games . . . as opposed to recreational gameplay”³⁹

³² See, e.g., Comments of the Software Preservation Network and Library Copyright Alliance at 2 (referring to NARA’s plans for “providing improved access to the public”) (“SPN/LCA Comment”); *id.* at 6 & n.31 (“cultural heritage institutions exist to serve the needs of the public”; “[l]ibraries and archival institutions structure their resource allocation to meet public demands”).

³³ Compare 17 U.S.C. § 108(b), (h), with 17 U.S.C. § 108(a), (d).

³⁴ See Register’s 2015 Recommendation at 322; see also *id.* at 336, 340.

³⁵ *Id.* at 340.

³⁶ *Id.* at 341.

³⁷ *Id.* at 342.

³⁸ *Id.*

³⁹ See U.S. Copyright Office, Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights, at 277 (Oct. 2018), https://cdn.loc.gov/copyright/1201/2018/2018_Section_1201_Acting_Registers_Recommendation.pdf (“Register’s 2018 Recommendation”); see also *id.* at 278 (characterizing 2015 recommendation as “drawing a distinction between preservationist uses and recreational play” because “the piracy risks were tempered within the confined limits of the preservationist class”).

Preservation of video games—as the concept of preservation has been understood in the Copyright Act and by the Office—is addressed adequately by the current exemption in Section 201.40(b)(12), the renewal of which ESA did not oppose, and which the Office has said it intends to renew, as well as efforts by copyright owners to preserve games themselves and in cooperation with preservation organizations.⁴⁰ By contrast, the change to Section 201.40(b)(12)(ii) proposed by the Software Preservation Network (“SPN”) and Library Copyright Alliance (“LCA”) would transform the exemption from one directed at preservation (as historically understood) to an exemption directed at permitting unauthorized persons to provide an online arcade available to the public.⁴¹

In this proceeding, SPN and LCA may intend to promote only “research and educational purposes [that] use video games as a tool of study, not to merely enjoy the game for its aesthetic and commercial entertainment purposes.”⁴² However, their proposed exemption would do nothing to limit use of games made available online by eligible organizations. There is substantial market demand for legacy games, as the examples above clearly show, and providing the public access to legacy games for purposes of recreational gameplay is the prerogative of the copyright owner. In fact, publisher-authorized emulators of legacy games are an important existing and potential market for video game copyright owners. For example, Nintendo offers legacy games for purchase through its Virtual Console Games portal.⁴³ Infringing uses of legacy games are a serious issue, and copyright owners have active content protection programs to enforce their copyrights in the very games the proponents would allow libraries to make publicly available.⁴⁴

Further, SPN and LCA try to draw a connection between preservation and their proposal for more convenient access to archived works by arguing that works will only be preserved if preservationists are able to meet demand for online access.⁴⁵ Yet, the 2018 proceeding made clear that the demand for preservation of video games is driven primarily by a desire for recreational play of legacy video games. The principal proponent of a video game preservation exemption in 2018 was the Museum of Art and Digital Entertainment (“MADE”). While its facility is temporarily closed due to the global COVID-19 pandemic, it was (and promises to again be) a venue for the public to play video games. Its comments in the 2018 proceeding highlighted that it preserved the game *Habitat* to make it available “for players around the

⁴⁰ See NPRM, 85 Fed. Reg. at 65,301.

⁴¹ It does not appear that the Office or the proponents propose to delete the similar language in 37 C.F.R. § 201.40(b)(12)(i)(B). See NPRM, 85 Fed. Reg. at 65,307 n.213 (citing Section 201.40(b)(12)(ii)); SPN/LCA Comment at 2 (stating “Proposed Exemption” as Section 201.40(b)(12)(ii) without the physical premises limitation). Because the proponents have not made a case for deleting the similar language in Section 201.40(b)(12)(i)(B), and the Office has not given notice of its intention to consider such a possibility, it would be improper to make such a change.

⁴² SPN/LCA Comment at 18–19.

⁴³ See Virtual Console Games, Nintendo (last accessed Feb. 3, 2021), <https://www.nintendo.com/games/virtual-console-games/>.

⁴⁴ By way of example, in 2020, Nintendo alone organized customs seizures of over 100,000 consoles preloaded with infringing copies of legacy games globally, and seizures of over 15,000 such consoles at the U.S. border.

⁴⁵ SPN/LCA Comment at 4.

globe.”⁴⁶ Numerous other 2018 commenters underscored the desire to preserve games primarily for recreational play.⁴⁷

In the 2018 proceeding, MADE proposed allowing an ill-defined group of “affiliate archivists” to circumvent technological protection measures under the auspices of libraries, archives or museums. While that proposal was more limited than what SPN and LCA propose here, since the affiliate archivists were at least ostensibly to be involved in preservation efforts rather than merely being users of archived works, the Register found that she “cannot agree that the use of affiliate archivists, as contemplated by MADE, is likely to constitute a fair use.”⁴⁸ The change proposed by SPN and LCA would permit MADE and others to circumvent technological protection measures to make video games available online to a public audience. That use is not preservation as the Copyright Act and Register have used that term; it is an infringement unless authorized by the copyright owner. The proposal should be denied.

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

While SPN and LCA’s comment completely omits Item D of the Office’s comment form,⁴⁹ it should be understood that both video game copies and video game platforms are typically protected by access controls that work together to limit infringement by making only legitimate game copies playable.⁵⁰ Like the current exemption, the proposed exemption would apply broadly to circumvention of access controls on video games distributed as complete products in physical or downloaded formats, as well as access controls on consoles used by eligible organizations in authorized preservation activities.

As discussed in further detail below, the proposed expansion of the preservation exemption does not change the works subject to the exemption, nor does it change the types of technological protection measures subject to circumvention. Instead, the proponents seek to eliminate a critical limitation on the *use* of circumvented, already-preserved video games, and hence expand the permitted goals of authorized circumvention.

Eliminating the physical premises requirement currently contained in 37 C.F.R. § 201.40(b)(12)(ii) would greatly expand the scope of who would be eligible to perform circumvention. While the exemption is ostensibly available only to a “library, archives, or museum,” those terms are not defined. Without the need for a physical premises to provide a point of access, any organization (or potentially any individual) professing to have a preservation purpose, making its “collections” available to unaffiliated persons, and not acting for “commercial advantage” would arguably be eligible. *See* 37 C.F.R. § 201.40(b)(12)(ii), (iv)(E). The commenters also propose no meaningful limitations on the public access goals of the circumvention. For example, there is no restriction to access by faculty and students of educational institutions, much less any restriction to verified research needs. Thus, the effect of

⁴⁶ 2018 Class 8 Comments of MADE at A-1; *see also* 2018 Class 8 Comments of ESA at 27; <https://frandallfarmer.github.io/neohabitat-doc/docs/>.

⁴⁷ 2018 Class 8 Comments of ESA at 28.

⁴⁸ Register’s 2018 Recommendation, at 274.

⁴⁹ *See* SPN/LCA Comment at 4 & n.16 (skipping from Item C to Item E, but referring the Office to their 2018 comment).

⁵⁰ *See* ESA 2018 Comment, at 11–12 (describing critical access controls subject to the now-current exemption).

the proposal is to transform an exemption focused on certain types of organizations with a physical premises truly dedicated to preservation and scholarly research, into an exemption potentially available to anyone interested in providing online gameplay without a purpose of commercial advantage. This has the potential to cause substantial harm to the legitimate market for games.

Further, if anyone with a collection of legacy games, with the intent of making them freely available online, qualified as a preservationist, the proposal would greatly expand eligibility to circumvent the TPMs on consoles pursuant to Section 201.40(b)(iii). Video game consoles could then be used to play unauthorized infringing games and render other media in an unprotected environment without the supervision one would expect in a professional scholarly organization. As the Register has repeatedly concluded, “jailbroken consoles are strongly linked to piracy of video games.”⁵¹

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

The Office’s Notice of Proposed Rulemaking (“NPRM”) describes Class 14(b) as being related exclusively to the *preservation* of video games.⁵² While the proponents give lip service to this goal, beginning their comment with a lofty idealization of the National Archives, they obfuscate the boundary between preservation and mere online gameplay: “the value of preserved software and games lies not in the mere storage of resources, but rather in providing access to collections in usable formats”⁵³ But preservation as that term has always been understood in a copyright context—maintaining a work so that it will be available to future generations for scholarly research and study—does not entail providing the public unrestricted online access to copyrighted games in “usable formats.” It is copyright owners, rather than archives (or self-styled archives), that have the right to choose when to release, withdraw, port to new consoles, or otherwise reissue their copyrighted works, and the right to decide *not* to do any of those things.⁵⁴

⁵¹ Register’s 2015 Recommendation at 339-40; *see also* Register’s 2018 Recommendation at 273; U.S. Copyright Office, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 50 (Oct. 2012), https://www.copyright.gov/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf (“Register’s 2012 Recommendation”).

⁵² *See* NPRM, 85 Fed. Reg. at 65,307 (even the expanded proposed class would be limited to preservation “by eligible libraries, archives, and museums”).

⁵³ SPN/LCA Comment at 3; *see also id.* at 18 (“Off-site access is necessary for researchers . . . [who] struggle to access or find time to play on premises” (citation omitted)); *id.* at 11 (describing a researcher who found it “impractical” to “travel to a video game museum each time he needs to *play a game*” (emphasis added)); Register’s 2015 Recommendation at 340–41 & n.2313 (noting that proponents of the now existing exemption acknowledged belief that there is not a “strong line of demarcation” between preservationists and individuals who want to continue to play games (quotation marks omitted)).

⁵⁴ *See, e.g., Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1208 (Fed. Cir. 2018) (“[A] copyright holder has the exclusive right to determine when, whether and in what form to release the copyrighted work into new markets.” (internal quotation marks and citations omitted)); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1182 (9th Cir. 2012) (same); *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 was entitled to protection of his copyright . . . because he has the right to change his mind.”).

As the Register has consistently reiterated, proponents “bear the burden of establishing that the requirements for granting the exemption have been satisfied.”⁵⁵ In the 2018 proceeding, the Register explained that this burden means that the proponents must prove that (1) the class includes copyrighted works; (2) “the proposed use . . . is or is likely to be noninfringing”; (3) “the statutory prohibition on circumventing access controls is the cause of the adverse effects”; and (4) “users are either adversely affected, or are likely to be adversely affected, in their ability to make noninfringing uses during the next three years,” as analyzed under Section 1201(a)(1)(C)’s statutory factors.⁵⁶ Here, the proposed class undoubtedly includes copyrighted works—satisfying item (1)—but none of the other three requirements are met. As set forth below, all concerns about preservation as the Copyright Act and Register have interpreted that term, are adequately addressed by the current exception.

The inability to make video games available outside the four walls of a library, museum, or archive does not adversely affect the ability of those institutions to make noninfringing preservation uses of video games, nor are such adverse effects likely to emerge over the next three years. Proponents seek to provide expanded *access* to already-preserved video games, but nothing in the proposed class would increase preservation itself. Because the proposed expansion will enable infringing use of copyrighted material, because the alleged harms are not caused by TPMs, and because proponents will not suffer adverse effects under the existing exemption, the Register should reject the proposed expansion.

1. The proposed class includes copyrighted works.

As noted, it is undisputed that the proposed class includes copyrighted works. As the Register has stated, “video games are highly expressive and thus at the core of copyright’s protective purposes.”⁵⁷

2. The additional uses will involve or enable infringement.

Proponents bear the burden to show that “the proposed use . . . is or is likely to be noninfringing.”⁵⁸ The proponents argue that what they propose to do with the broadened exemption is noninfringing because it is a fair use.⁵⁹ However, the proponents propose to

⁵⁵ Register’s 2018 Recommendation, at 12.

⁵⁶ *Id.* at 14–16.

⁵⁷ Register’s 2015 Recommendation, at 338.

⁵⁸ Register’s 2018 Recommendation, at 14–16.

⁵⁹ SPN/LCA Comment, at 14. The proponents also say that “in some cases” the uses they address “may also be protected by 17 U.S.C. §§ 108 and 117.” *Id.* However, they never identify the cases they think might be covered by Section 108 or 117 and do not argue that those provisions are materially relevant. *See id.* at 26 (“The uses anticipated in this comment fall within the spirit of 108 even if they aren’t protected by its letter. Fair use exists precisely to fill such gaps.”). Because the proponents do no more than gesture at Sections 108 and 117, they have not met their burden of proof with respect to those provisions, and this comment need not address them further. The SPN/LCA Comment also includes brief mentions of the Technology, Education and Copyright Harmonization Act (“TEACH ACT”) and Music Modernization Act, suggesting that there is congressional support for remote access. SPN/LCA Comment, at 26–27. However, the proponents do not even claim that those enactments are relevant to an infringement analysis of their proposed use of video games. Further, their proposal does not incorporate the limitations of those enactments. Specifically, the proponents highlight that the TEACH ACT is limited to “mediated instructional activity and . . . ‘accredited’ non-profit institutions,” SPN/LCA Comment, at 26, while their proposal

expand an existing exemption, which the Office has said it intends to recommend for renewal. In such a case, the infringement analysis must focus on the expansion that is proposed, rather than on the underlying exemption. The Office made that principle plain in the NPRM.⁶⁰

The uses that are covered only by the modified exemption—as opposed to those already covered by the existing exemption—are infringing (or at least largely infringing). Because the proponents have proposed eliminating the physical premises requirement to allow off-premises access without restriction, the proposed exemption would enable every public library or school library in America⁶¹ and any self-described museum or archive to provide a collection of playable games accessible to anyone with an internet connection and a browser. And this is no mere hypothetical. Such an archive already exists, containing unauthorized emulated arcade games⁶² and emulated MS-DOS games.⁶³ And a Google search for “play retro games online” readily reveals unauthorized game sites whose operators might well choose to style themselves as preservationists to clothe themselves with a patina of legitimacy if the proposed exemption were adopted.

This kind of use is clearly infringing absent authorization of the copyright owner. While video games are implemented in computer software, video games are also audiovisual works, since they “consist of a series of related images which are intrinsically intended to be shown by the use of machines.”⁶⁴ The copyright owner of an audiovisual work has the exclusive right to “to perform the copyrighted work publicly,”⁶⁵ which means “to show its images in any sequence,” including by transmitting those images to the public.⁶⁶ Providing an unauthorized online arcade clearly implicates a copyright owner’s public performance right, and to the extent that copies of game content may reside on users’ devices, the reproduction and distribution rights as well.

In 2018, the Register found that a more limited proposal for online access by “affiliate archivists” was unlikely to constitute a fair use.⁶⁷ Thus, she chose to “limit[] the exemption to on-premises preservation and scholarship,” to avoid concerns about “widespread, unsupervised

contains no such limitations. Likewise, they describe the provisions of 17 U.S.C. § 1401(c) concerning certain noncommercial uses of pre-1972 sound recordings. SPN/LCA Comment, at 26–27. However, they neglect to mention that rights owners have the option to opt out of such uses in their discretion, 17 U.S.C. § 1401(c)(1)(C), a feature that their proposal lacks. None of these enactments provides a basis for the Register to conclude that the use proposed here is noninfringing.

⁶⁰ See NPRM, 85 Fed. Reg. at 65,301 (“In cases where a class proposes to expand an existing exemption, participants should focus their comments on the legal and evidentiary bases for modifying the exemption, rather than the underlying exemption . . .”).

⁶¹ See SPN/LCA Comment, at 6 & n.29 (describing purpose of public libraries); *id.* at 6 n.31 (describing grant programs for public libraries); *id.* at 24 n.152 (describing a model for online access through public libraries); *id.* at 25 n.157 (same).

⁶² See Internet Arcade, Internet Archive (last accessed Jan. 20, 2021), <https://archive.org/details/internetarcade>.

⁶³ See Software Library: MS-DOS Games, Internet Archive (last accessed Jan. 20, 2021), https://archive.org/details/softwarelibrary_msdos_games?tab=collection.

⁶⁴ 17 U.S.C. § 101.

⁶⁵ 17 U.S.C. § 106(4).

⁶⁶ 17 U.S.C. § 101 (definitions of “perform” and publicly”).

⁶⁷ Register’s 2018 Recommendation, at 274, 278.

internet play by . . . consumers.”⁶⁸ Similarly, in 2015, the Register focused her analysis on “reproductions and modifications of video game and console software made for the purpose of preserving games in playable condition to enable research and study.”⁶⁹ The Register specifically noted that “exhibit[ion] to the public in playable form . . . implicate[s] the exclusive section 106 rights of public performance and display.”⁷⁰ She thus found “[t]he performance and display of a video game for visitors in a public space [to be] a markedly different activity than efforts to preserve or study the game in a dedicated archival or research setting.”⁷¹ For that reason, she specifically *excluded* from the exemption “exhibition activities involving public performance or display.”⁷²

The proponent’s fair use arguments do not negate a finding of infringement for uses within the scope of the proposal to expand the exemption, because there is nothing fair about preempting copyright owners’ decisions about when and how to pursue an important market for their creative works.⁷³ Taking the familiar fair use factors in turn:

- *Purpose and character of the use.* In 2015, the Register found that “the playing of video games” is “the same use of the copyrighted work as before” and so “not transformative.”⁷⁴ And the current exemption’s requirement that a circumventing party have no purpose of commercial advantage does not mean that all uses permitted by the exemption are noncommercial within the meaning of Section 107, because the proponents explicitly tie their proposal to efforts to garner increased funding for eligible organizations.⁷⁵ Uses of preserved works that generate revenue for circumventing organizations by making them eligible for grant funding or increasing donations or memberships is a commercial use.⁷⁶ Further, “[d]irect economic benefit is not required to demonstrate commercial use.”⁷⁷ “[R]epeated and exploitative copying of copyrighted works,” even by a nonprofit organization, is considered commercial in a fair use analysis.⁷⁸

The proponents’ treatment of this factor hides the ball by addressing primarily the preservation activities that the existing exemption already addresses, and then assuming conditions on remote access that their proposal does not contain, such as

⁶⁸ Register’s 2018 Recommendation, at 279.

⁶⁹ Register’s 2015 Recommendation, at 342.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ As the Office has repeatedly noted, Section 1201 rulemakings are not a place to “break new ground on the scope of fair use.” Register’s 2015 Recommendation, at 109.

⁷⁴ Register’s 2015 Recommendation, at 337.

⁷⁵ SPN/LCA Comment, at 4, 6 & n.31, 7.

⁷⁶ *See, e.g., Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110, 1117-19 (9th Cir. 2000) (church’s use of religious text was commercial because it profited from providing work to members at no cost, attracting new members and their donations, and enabling the organization’s growth); *Lish v. Harper’s Magazine Found.*, 807 F. Supp. 1090, 1101 (S.D.N.Y. 1992) (non-profit organization’s sale of magazine was a commercial use).

⁷⁷ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

⁷⁸ *Wall Data Inc. v. Los Angeles Cty. Sheriff’s Dep’t*, 447 F.3d 769, 779 (9th Cir. 2006).

that preserved items will be presented “as historical artifacts for research and teaching purposes,”⁷⁹ and that remote access will be employed by persons with “disabilities that prevent travel”⁸⁰ or “researchers studying obscure computer games.”⁸¹ Focusing on the full scope of activity that would be enabled by the actual proposal, and only that activity, this factor militates against a finding of fair use.

- *Nature of the work.* The Register has stated that “video games are highly expressive and thus at the core of copyright’s protective purposes.”⁸² The proponents grudgingly acknowledge as much, while pointing to asserted functional aspects of certain games and arguing that this factor should be “discounted” when “scholars examine and critique them for transformative research and learning purposes.”⁸³ However, the proponents’ actual proposal would enable online enjoyment of the expressive aspects of video games and not limit access to authenticated researchers pursuing scholarly purposes. This factor also argues against a finding of fair use.
- *Amount and substantiality of the portion used.* The proposal would allow online access to the full expressive content of games, and the proponents do not argue otherwise. Instead, they seek to minimize the factor by pointing to allegedly transformative purposes that supposedly justify use of the whole works.⁸⁴ However, as explained above, and as the Register has found, the activity that would be enabled by the proposal is not transformative. This factor counsels against a finding of fair use.
- *Effect of the use on the market.* In 2015, the Register found the very limited copying necessary to allow circumvention by eligible organizations for purposes of preservation and research to present little risk to the market.⁸⁵ The proponents urge a similar conclusion here.⁸⁶ However, the nature of the activity that would be enabled by the proposal here is very different. The proposal is to enable remote gameplay by the public without restriction. That poses a very significant risk of harm to the substantial and growing market for both derivative works and reissues of video games.

Contrary to the proponents’ arguments, the mere fact that a copyright owner chose to withdraw a game from the market at one point in the past does not mean that the copyright owner has not reissued it (or issued a successor version) or will not reissue it (or issue a successor version) in the future. For example, re-release cycles have long been common in the markets for motion pictures, television programming and sound recordings. Video game companies likewise may desire to give a title a rest

⁷⁹ SPN/LCA Comment, at 16.

⁸⁰ *Id.* at 15.

⁸¹ *Id.* at 18.

⁸² Register’s 2015 Recommendation, at 338.

⁸³ SPN/LCA Comment, at 18–19.

⁸⁴ *Id.* at 19.

⁸⁵ Register’s 2015 Recommendation, at 344.

⁸⁶ SPN/LCA Comment, at 19–22.

until nostalgia would help support renewed demand. Similarly, many popular video games are part of franchises with many games in a series. If a copyright owner chooses to suspend commercialization of an older game to help drive demand for a successor to that game, its new title should not have to compete with the predecessor version made available to the public by a self-styled archives. The decision of whether and when to reissue a copyrighted work is a prerogative of the copyright owner.⁸⁷

Furthermore, and as described above, eliminating the physical premises requirement in 37 C.F.R. § 201.40(b)(12)(ii) would expand the universe of those eligible to perform circumvention by making the exemption available to entities without a physical premises devoted to preservation and scholarly research—which could potentially include anyone with a collection of legacy games they want to make available online without charge. That would, in turn, entitle the additional organizations to circumvent the TPMs on consoles pursuant to Section 201.40(b)(iii). The linkage between hacking consoles and piracy has been thoroughly explored in past proceedings and remains a serious issue today. As the Register has repeatedly concluded, “jailbroken consoles are strongly linked to piracy of video games.”⁸⁸ The infringement effects of circumventing TPMs on consoles are also not limited to video games. The access controls in consoles protect various forms of media that are accessible on video game consoles, including movies, television, music, and live-sports programming that is provided by ESA’s members and a wide range of content partners.⁸⁹ All of that media would likely be rendered susceptible to infringing uses if the proposed exemption significantly broadened the universe of organizations eligible to circumvent the access controls on consoles.

The commenters’ very different views of the propriety of the use that would be enabled by the proposal stems from the proponents’ myopic view of their proposal. SPN evidently views the beneficiaries of its proposal as limited to its members and describes emulation as a service as providing “controlled access” only for “research purposes.”⁹⁰ The proponents’ presumably good intentions aside, what matters is the regulatory language they have proposed. In fact, the proponents have not proposed significant limitations on organization eligibility or described how an eligible organization could possibly provide effective supervision of individuals in remote locations or any meaningful verification of the individuals’ identities, credentials, or intentions. Thus, the proposal would not merely allow an accredited university faculty member to briefly explore a game from her office rather than a distant library’s reading room over a secure and

⁸⁷ See, e.g., *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1314 (11th Cir. 2008) (out-of-print status did not favor fair use because copyright owner reserved decision on whether or not to reissue); *Robinson v. Random House, Inc.*, 877 F. Supp. 830, 843 (S.D.N.Y. 1995) (“[T]he fact that the Daley Book currently is out of print is not dispositive—the statute focuses on the potential market for the original work.”); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1533 (S.D.N.Y. 1991) (“[D]amage to out-of-print works may in fact be greater since permissions fees may be the only income for authors and copyright owners.”).

⁸⁸ Register’s 2015 Recommendation, at 339-40; see also Register’s 2018 Recommendation, at 273; Register’s 2012 Recommendation, at 50.

⁸⁹ See, e.g., Microsoft, All your entertainment all in one place, <https://www.xbox.com/en-US/entertainment?xr=shellnav> (last visited Jan. 24, 2021); Nintendo Switch Hulu, <https://www.nintendo.com/games/detail/hulu-switch/> (last visited Jan. 24, 2021); Sony Interactive Entertainment, PlayStation Network, <https://www.playstation.com/en-us/playstation-network/> (last visited Jan. 24, 2021).

⁹⁰ SPN/LCA Comment, at 7–8.

authenticated connection. Rather, it would allow anyone claiming the status of a library, archives or museum to circumvent TPMs to allow the *public* to play video games.

This concern is particularly acute because in 2015, the proponents of what is now the existing exemption acknowledged that there is not a “strong line of demarcation” between preservationists and individuals who want to continue playing video games.⁹¹ While some organizations may be capable and responsible enough to genuinely supervise a handful of carefully-selected scholars who receive extremely limited remote access to only the confirmed subjects of their research, others will lack the desire or capacity to effectively police individuals that may wish to take advantage of remote access. Proponents fail to explain how they would cabin offsite use of preserved video games to prevent widespread online gameplay and infringement of works accessed through circumvention.

Simply put, this is just the kind of risk that the Register sought to avoid not only in 2018,⁹² but also in 2015, when she recommended that “any digital copies or adaptations of the video games or console software created by the institution as a result of preservation efforts must not be distributed or otherwise made accessible beyond the physical premises of the institution.”⁹³ Thus, just as the last Register found in 2018 that she “cannot agree that the use of affiliate archivists, as contemplated by MADE, is likely to constitute a fair use,” the current Register should conclude that the current, broader proposal to enable preservation organizations to provide remote access to preserved works without restriction is not a fair use.⁹⁴

3. The alleged adverse effects are not actually caused by TPMs.

Proponents also have not met their burden of proving that “the statutory prohibition on circumventing access controls is the cause of the adverse effects.”⁹⁵ An exemption may only be granted in this proceeding if an asserted adverse effect on noninfringing uses arises “by virtue of” the prohibition on circumvention in Section 1201.⁹⁶ As in the case of the infringement issues addressed in the previous section, the analysis here must focus on the expansion that is proposed, rather than on the underlying exemption.⁹⁷ The asserted adverse effects associated with an inability to access video games in playable condition online are not actually caused by TPMs or the prohibition against circumventing TPMs.

Proponents devote significant attention to arguing that they could provide greater access to their collections online than on-premises, although those arguments are devoted more to productivity software, such as CAD software used to access architectural designs, rather than to video games.⁹⁸ But notably, they never argue that TPMs or the prohibition on circumvention of

⁹¹ Register’s 2015 Recommendation, at 340–41 & n.2313 (quotation marks omitted).

⁹² See Register’s 2018 Recommendation, at 279.

⁹³ Register’s 2015 Recommendation, at 352.

⁹⁴ Register’s 2018 Recommendation, at 274; see also NPRM, 85 Fed. Reg. at 65,307–08.

⁹⁵ Register’s 2018 Recommendation at 15.

⁹⁶ See *id.*; 17 U.S.C. § 1201(a)(1)(B); see also 17 U.S.C. § 1201(a)(1)(C) (“adversely affected by the prohibition”).

⁹⁷ See NPRM, 85 Fed. Reg. at 65,301 (“In cases where a class proposes to expand an existing exemption, participants should focus their comments on the legal and evidentiary bases for modifying the exemption, rather than the underlying exemption . . .”).

⁹⁸ See SPN/LCA Comment at 8–14.

TPMs cause an inability to provide noninfringing remote access that is not already addressed by the current exemption. Nor could they. The existing exemption already allows libraries, archives and museums to circumvent access controls to preserve works and make them available on-site, including by using emulators if that is desired.⁹⁹ No additional *circumvention* is necessary to provide remote access, and the proponents never claim that it is. Rather, the proponents' real complaint is with copyright law, which grants copyright owners the exclusive right to control public performance, reproduction and public distribution of their works.

4. Proponents fail to demonstrate the requisite adverse effects on noninfringing use.

Finally, and related to the points discussed above, proponents have not met their burden to demonstrate that the current prohibition against circumvention, *as modified by the existing exemption*, is causing (or will in the coming three-year period cause) an adverse effect on noninfringing uses. The Register has explained that the requisite adverse effects should be analyzed in reference to the nonexclusive statutory factors. These are: “(i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, new reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Librarian considers appropriate.”¹⁰⁰ In assessing these considerations, the Register “balances the harm identified by a proponent of an exemption with the harm that would result from an exemption.”¹⁰¹ “To prove the existence of adverse effects, it is necessary to demonstrate ‘distinct, verifiable and measurable impacts’ occurring in the marketplace.”¹⁰² The Register has repeatedly held that exemptions “should not be based upon *de minimis* impacts” and that “‘mere inconveniences’ or ‘individual cases’ do not satisfy the rulemaking standard.”¹⁰³

The showing made by the proponents falls well short of the required standard. Again, analysis at this stage of the proceeding must focus on the additional uses that have been proposed by the proponents of a broadened video game exemption.¹⁰⁴ The reason for this principle is clear: a perceived need for circumvention to enable noninfringing use that is adequately addressed by an existing exemption could not possibly justify a broader exemption. It bears emphasis that the analysis must focus on *noninfringing* uses. As described above, the proposal would enable a wide range of infringing recreational uses of preserved games, even as it may also enable some scholarly uses that are noninfringing. While giving lip service to this point,¹⁰⁵ the proponents try to justify their proposed broadening of the exemption based significantly on

⁹⁹ See *id.* at 7–8 (arguing in favor of libraries using emulation as a service to host preserved video games online).

¹⁰⁰ Register’s 2018 Recommendation, at 16.

¹⁰¹ *Id.* (citation and internal alterations omitted).

¹⁰² *Id.* at 17 (citation omitted).

¹⁰³ *Id.* (citation omitted).

¹⁰⁴ *Id.* (“In cases where a class proposes to expand an existing exemption, commenters should focus their comments on the legal and evidentiary bases for modifying the exemption, rather than the underlying exemption.”).

¹⁰⁵ See SPN/LCA Comment, at 4.

arguments concerning preservation in general, not the specific additional actions that the broadened exemption would enable, and ignore the infringing uses they would unloose.¹⁰⁶

Availability of copyrighted works (17 U.S.C. § 1201(a)(1)(C)(i))

In 2015 and 2018, the Register indicated that “a relatively narrow exemption” might allow preservation organizations to maintain access to video games “that would otherwise be lost,” favoring an exemption.¹⁰⁷ While that might have been true concerning a preservation exemption for video games in general, that is not the case for the modification proposed here. The proponents offer only speculation that greater access might indirectly increase preservation due the institutions’ funding allocation decisions.¹⁰⁸

Much of the proponents’ argument relies on the implicit assumption that only libraries and archives are interested in preserving video games.¹⁰⁹ This claim is unsupported and inaccurate. Video game companies have strong economic motivations to preserve their video game assets themselves. Like other copyright owners of valuable entertainment content, they do *not* routinely discard works that in many cases they paid millions of dollars to create. And like other copyright owners of valuable entertainment content, video game companies increasingly reissue works from or based on their back catalogs.

ESA and individual game companies are also engaged in external preservation efforts that involve collaboration with a range of well-resourced public institutions that adhere to high professional standards, are accustomed to working with scholars, and have the resources and expertise to ensure secure, long-term retention of video game artifacts for purposes of future scholarship. For example, several years ago ESA donated to the Library of Congress a collection of approximately 2,500 video games from several of its members, including original video game cartridges, discs, and consoles.¹¹⁰ ESA has also supported the Smithsonian’s preservation efforts, including assistance to its Lemelson Center, which is collecting, preserving, and interpreting artifacts and documents, including source code, related to early video games. And the industry has supported museum exhibitions too, including the *Game Changers* exhibition, which explored over 120 of “the most influential games” at various museums in the U.S. and Canada.¹¹¹ The industry similarly supports preservation efforts abroad, including at the National

¹⁰⁶ See, e.g., *id.* at 17 (“Off-site access for video game preservation, teaching, and research is also critical because video games are more prone to obsolescence than other media.”).

¹⁰⁷ Register’s 2018 Recommendation, at 276; Register’s 2015 Recommendation, at 348.

¹⁰⁸ See SPN/LCA Comment, at 4, 6–7.

¹⁰⁹ See SPN/LCA Comment, at 5 (“[A]s the market moves on to newer software, historically valuable items get left behind.”); *id.* at 5 n.20 (complaining that Microsoft no longer allows copies of Windows XP to be activated).

¹¹⁰ ESA, *ESA Visits the Library of Congress & Donates Games* (July 7, 2017), <https://www.youtube.com/watch/zyEuNz5ak8Q>.

¹¹¹ See *Game Changers: Live the Video Game Evolution*, Fort Collins Museum of Discovery (last accessed Feb. 3, 2021), <https://fcmof.org/gamechangers/>.

Videogame Museum in the U.K.,¹¹² the Australian Centre for the Moving Image,¹¹³ and the National Film and Sound Archive of Australia.¹¹⁴

Significant preservation efforts are also being undertaken at other large and reputable institutions with the professional staff and facilities necessary for archival storage of important materials over the long term. The University of Michigan’s Computer Video and Game Archive has more than 8,000 videogames and 60 consoles dating back to the 1970s.¹¹⁵ The University of California, Santa Cruz’s Science and Engineering Library has more than 2,000 commercial games, 300 student games, and 40 consoles.¹¹⁶ Organizations like the Strong National Museum of Play, with the assistance of the video game industry, have compiled enormous collections of video games, consoles, and other materials, like game packaging, game-related publications, and game-related consumer products. The Strong’s International Center for the History of Electronic Games alone has a collection of more than 60,000 items.¹¹⁷

These preservation efforts belie proponents’ asserted need for an expanded exemption to ensure that titles are not lost. The fact is that the most significant game titles are being preserved for legitimate scholarly use by public institutions that target scholarly use, often in cooperation with video game companies. Even without unrestricted online access, these efforts will ensure that future scholars can experience culturally significant contemporary games.¹¹⁸

Availability for nonprofit archival, preservation, and educational purposes (17 U.S.C. § 1201(a)(1)(C)(ii))

In 2015 and 2018, the Register found that a tailored exemption for preservation would promote preservation.¹¹⁹ However, as described above, preservation is fully addressed by the current exemption, and the proponents put forward no evidence that the proposed expansion would cause increased preservation. They do argue the proposed expansion would meet *demand*

¹¹² See National Videogame Museum: The UK’s National Cultural Centre for Videogames (last accessed Feb. 3, 2021), <https://thenvm.org/>.

¹¹³ See *About Us*, Austl. Ctr. for the Moving Image (last accessed Feb. 3, 2021), <https://www.acmi.net.au/about/> (describing itself as a “museum of screen culture” where visitors can “[n]avigate the universe of film, TV, videogames and art”).

¹¹⁴ See *NFSA to Collect and Preserve Australian Video Games*, Nat’l Film & Sound Archive of Austl. (last accessed Feb. 3, 2021), <https://www.nfsa.gov.au/nfsa-collect-and-preserve-australian-video-games>. In late 2019 to early 2020, the NFSA also held an exhibition entitled *Game Masters* with the support of the industry, which turned the museum “into Australia’s biggest video game arcade.” *Game Masters: The Exhibition*, Nat’l Film & Sound Archive of Austl. (last accessed Feb. 3, 2021), <https://www.nfsa.gov.au/events/game-masters-exhibition-now-closed>.

¹¹⁵ See Diana Panuncial, *Librarians, Start New Game: How academic librarians support videogame scholars*, American Libraries (Nov. 1, 2019), <https://newsdesk.si.edu/releases/smithsonian-s-lemelson-https://newsdesk.si.edu/releases/smithsonian-s-lemelson-center-announces-video-game-pioneers-archive-initiativecenter-announces-video-game-pioneers-archive-initiative>.

¹¹⁶ See *id.*

¹¹⁷ Strong National Museum of Play, The Strong’s Electronic and Video Games Collection, <https://www.museumofplay.org/press/fact-sheets/strong-s-electronic-and-video-games-collection> (last accessed Jan. 24, 2021).

¹¹⁸ This is true for console games, and even more true for mobile games and PC games. See, e.g., PC Gamer, *The best local multiplayer games on PC* (Dec. 24, 2017), <http://www.pcgamer.com/local-multiplayer-games/>.

¹¹⁹ Register’s 2018 Recommendation, at 276-77; Register’s 2015 Recommendation, at 348.

for playing preserved games online.¹²⁰ But preservation of video games and access to already-preserved games are completely separate. The former serves important societal purposes, and when carried out in limited circumstances by professional preservationists presents a low infringement risk. The latter, in similarly controlled and limited form, may benefit research, but in the unrestricted form proposed by the proponents, is infringement, pure and simple.

As the Register noted in its NPRM, “in the 2018 rulemaking, [the Office] declined to recommend a proposal to expand the video game preservation exemption to allow circumvention by affiliate archivists outside the premises of a covered institution, concluding that the proponents had failed to establish that such activity was likely noninfringing.”¹²¹ Indeed, the Register considered, and rejected, the argument that offsite access was necessary to alleviate noninfringing adverse effects, instead favoring a “narrowly crafted amendment” limited to “on-premises preservation and scholarship,” to avoid the possibility that online access “would in practice act as a fig leaf to enable widespread, unsupervised internet play.”¹²² Similarly, in 2015, the Register rejected “the proposition that anyone who seeks to continue playing a video game should be treated as a *de facto* preservationist” and cautioned against “blur[ring] the concept of preservation with a general exemption for the creation of backup copies.”¹²³ The Register acknowledged that exhibiting video games to the public “in playable form [was] undoubtedly an appealing prospect for many,” but that such “performance and display . . . is a markedly different activity than efforts to preserve or study the game.”¹²⁴

Nothing has changed warranting reversal of the Register’s past conclusions. Proponents’ proposal to allow off-premises access would do nothing to increase preservation, and would instead “enable widespread, unsupervised internet play,” which the Register recognized as a “concern” in 2018.¹²⁵ When addressing the Register’s request for “legal arguments not presented in the 2018 Rulemaking,” the best proponents could come up with is that “[t]he primary legal argument favoring remote access to preserved software for research and teaching is that it is protected by fair use.”¹²⁶ But this argument begs the question. Yes, using preserved software “for research and teaching” may be protected by fair use; it does not, however, follow that offsite access is needed for research and teaching, much less that providing online access to preserved video games *for everyone* is “for research and teaching.”¹²⁷

As proponents recognize, “[a]s a result of [the 2018] rulemaking, libraries, archives, museums, and other cultural heritage institutions can circumvent TPMs on lawfully acquired software to preserve software and software dependent materials.”¹²⁸ That should end the inquiry. The existing exemption protects legitimate preservation, research, scholarship, and teaching, and

¹²⁰ See *id.* at 6–7 (“[P]reservation is a function of demand for materials. . . . Libraries and archives exist to meet the needs of their users . . . , and those users expect offsite access.”).

¹²¹ NPRM, 85 Fed. Reg. at 65,307–08.

¹²² Register’s 2018 Recommendation, at 279.

¹²³ Register’s 2015 Recommendation, at 341.

¹²⁴ *Id.* at 342.

¹²⁵ Register’s 2018 Recommendation, at 279.

¹²⁶ SPN/LCA Comment, at 22.

¹²⁷ *Id.*

¹²⁸ *Id.* at 5.

does so without unnecessarily risking widespread piracy of video games. Proponents have not met their burden of proving that the modified exemption would address noninfringing adverse effects.

Impact on criticism, comment, news reporting, teaching, scholarship and research (17 U.S.C. § 1201(a)(1)(C)(iii))

In 2015 and 2018, the Register found that preservation of games in playable form would promote scholarship and perhaps “stimulate new copyrighted works offering commentary and analysis of video games.”¹²⁹ However, and again, the current exemption addresses preservation. The proponents make vague suggestions that online access to preserved games could increase game scholarship, but the principal reason they provide for that is travel restrictions due to the global COVID-19 pandemic.¹³⁰ Yet this argument needs little attention; with COVID-19 vaccines rapidly being administered around the country,¹³¹ and this rulemaking proceeding still in its early stages, any current heightened need for off-site access due to COVID-19 hopefully will be ameliorated by the time proposed Class 14(b) would ever take effect.

The proponents provide only one specific example of a researcher who has assertedly had difficulty accessing video games: Phil Salvador, a librarian whose hobby is blogging about games at <https://obscuritory.com>.¹³² And even in his case, the only data the proponents provide is that about half of the games in his personal collection are not also in the collection of one particular museum (the Strong Museum of Play).¹³³ That statistic provides no basis to conclude that TPMs are stymying the research of professional scholars or that the proposed exemption would lead to an outpouring of game scholarship that might outweigh the infringement risk presented.

Effect of circumvention on the market for or value of copyrighted works (17 U.S.C. § 1201(a)(1)(C)(iv))

In 2015 and 2018, the Register recognized that piracy risks were limited within the confined limits of a narrow preservation exemption.¹³⁴ The current proposal is to eliminate the critical limitation relied on by the Register to reach that conclusion, specifically by permitting recreational online gameplay without restriction. As described above, that use would supplant a market that copyright owners actively exploit and serve. It also risks enabling greater infringement by permitting self-styled preservationists without a physical premises to circumvent the TPMs protecting consoles, thereby enabling them to play pirated games and make unauthorized copies of other kinds of media rendered on game consoles. That would

¹²⁹ Register’s 2015 Recommendation, at 348; *see also* Register’s 2018 Recommendation, at 277.

¹³⁰ *See* SPN/LCA Comment, at 10, 13–14, 28–30.

¹³¹ *See, e.g.*, N.Y. Times, *See How the Vaccine Rollout Is Going in Your State* (last updated Feb. 3, 2021), <https://www.nytimes.com/interactive/2020/us/covid-19-vaccine-doses.html>.

¹³² SPN/LCA Comment, at 11–12; Phil Salvador, *The Obscurity: About*, <https://obscuritory.com/about/> (last accessed Jan. 24, 2021).

¹³³ SPN/LCA Comment, at 11.

¹³⁴ Register’s 2018 Recommendation, at 278; Register’s 2015 Recommendation, at 348.

unquestionably harm the market for video games and other copyrighted media in general, and the market for reissues and derivative works of games in particular.

* * * *

Because proponents have failed to meet their burden of proving all the requirements the Register identified in the 2018 proceeding (except that video games are copyrighted works), the Register should reject the proposed class. The Register imposed the physical premises limitation to tailor the game preservation exemption to the requirements of copyright law, and in particular to enable uses perceived as noninfringing to the exclusion of uses perceived to be infringing.¹³⁵ The Register should retain the physical premises limitation because it is required by copyright law, and its elimination would not address a problem created by Section 1201 given the current exemption.

¹³⁵ See Register's 2018 Recommendation, at 274, 279; Register's 2015 Recommendation, at 352; NPRM, 85 Fed. Reg. at 65,307–08.