



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

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ITEM A. COMMENTER INFORMATION

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On behalf of The Software Preservation Network (SPN)

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The Software Preservation Network coordinates software preservation efforts to ensure long term access to software. It connects and engages the legal, public policy, social science, natural science, information & communication technology, and cultural heritage preservation communities that create and use software.

On behalf of the Library Copyright Alliance (LCA)

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The Library Copyright Alliance consists of three major library associations in the United States: the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries. These associations represent over 100,000 libraries in the United States employing more than 300,000 librarians and other personnel. An estimated 200 million Americans use these libraries over two billion times each year. These libraries spend over \$4 billion annually acquiring books and other copyrighted material.

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 14(b): Video Games – Preservation

Eligibility Restrictions, Imported from 14(a)

If the Copyright Office deems eligibility concerns worthy of accommodation, SPN and LCA are open to limitations that would harmonize institutional eligibility requirements with those already required under Class 14(a):

A library, archives, or museum is “eligible” under the 14(a) exemption if and only if:

¹ Primary contact.

Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (PL 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.

- (A) The collections of the library, archives, or museum are open to the public and/or are routinely made available to researchers who are not affiliated with the library, archives, or museum;
- (B) The library, archives, or museum has a public service mission;
- (C) The library, archives, or museum's trained staff or volunteers provide professional services normally associated with libraries, archives, or museums;
- (D) The collections of the library, archives, or museum are composed of lawfully acquired and/or licensed materials; and
- (E) The library, archives, or museum implements reasonable digital security measures as appropriate for the activities permitted by paragraph (b)(13).²

Preferred Proposed 14(b) Exemption

Permitting access to the video game to allow copying and modification of the computer program to restore access to the game on a personal computer or video game console when necessary to allow preservation of the game in a playable form by an eligible library, archives, or museum, where such activities are carried out without any purpose of direct or indirect commercial advantage.

Restricted Proposed 14(b) Exemption

SPN and LCA are open to considering alternative use restrictions and have provided even narrower proposed expansion language of 37 C.F.R. § 201.40(b)(12) for the Register's consideration:

Permitting access to the video game to allow copying and modification of the computer program to restore access to the game on a personal computer or video game console when necessary to allow preservation of the game in a playable form by an eligible library, archives, or museum, where such activities are carried out without any purpose of direct or indirect commercial advantage and the video game is **only** distributed or made available outside of the physical premises of the eligible library, archives, or museum **where the library, archives, or museum has had no notice that access to the work would be used for any purpose other than private study, scholarship, or research.**

² These limitations are drawn from updates to section 108's eligibility criteria proposed by the Copyright Office. *See* UNITED STATES COPYRIGHT OFFICE, SECTION 108 OF TITLE 17: A DISCUSSION DOCUMENT OF THE REGISTER OF COPYRIGHTS 18–19 (Sept. 2017), <https://www.copyright.gov/policy/section108/discussion-document.pdf> [hereinafter 108 Discussion Document].

ITEM C. OVERVIEW

To respond to the concerns raised by the Electronic Software Association (“ESA”)³ and Joint Creators and Copyright Owners (“Joint Creators”),⁴ this comment focuses on Class 14(b), the video game preservation exemption. Opponents offer only speculative concerns about potential harms caused by non-game preservation, and by their own admission, do not represent non-video game software industry groups.⁵ As a result, opposition to Class 14(a) should not receive serious weight.

Regarding Class 14(b), LCA and SPN seek a modest exemption to expand the permissions granted in the 2018 Rulemaking process to off-site research use. These exemptions have been used without issue – without false claims of library status or increases in downstream infringement – for three years. But the exemption as currently written inhibits long-term research projects and preservation. Opposition comments imagine that, if SPN and LCA’s requests were granted, libraries would see skyrocketing demand for their preserved materials, specifically preserved video games. But this is not the case. The same concerns were raised during the last Rulemaking and dismissed. As Dr. Henry Lowood of Stanford University articulated “[Stanford has] provided access to games in our media center . . . for at least 15 years . . . [a]nd the use has been entirely either research use or instructional use . . . for courses.”⁶ “Contemporary players . . . much prefer to play the more recent versions of games . . . [t]heir interest is . . . low in the older historical versions.”⁷

Despite the low likelihood that any of the concerns raised by opponents would come to pass, LCA and SPN are willing to include additional restrictions on the proposed exemption: applying the Class 14(a) eligibility restrictions to Class 14(b), and, if necessary, clarifying that the off-site access is only permissible where the library, archives, or museum has no reason to believe the user has any purpose other than private study, scholarship, or research. In addition to providing additional examples and outlining these proposed limitations, this comment further expands on the fair use analysis laid out in our Long Comment, and finally addresses the matter of reissues raised in the opposition comments.

³ See generally Entertainment Software Association, *Class 14 Opposition Comment*, (Feb. 9, 2021), https://www.copyright.gov/1201/2021/comments/opposition/Class_14b_Opp'n_Entertainment%20Software%20Association.pdf [hereinafter ESA Comment].

⁴ See generally The Motion Picture Association, Alliance for Recorded Music, & The Entertainment Software Association, *Class 14 Opposition Comment* (Feb. 9, 2021), https://www.copyright.gov/1201/2021/comments/opposition/Class_14a%20and%2014b_Opp'n_Joint%20Creators%20and%20Copyright%20Owners.pdf [hereinafter Joint Creators Comment].

⁵ See Joint Creators Comment at 3 n.7 (“Joint Creators and Copyright Owners’ coalition does not currently include associations focused on copyrights in other forms of computer programs [than video games]”). It is also worth noting that representatives of non-game software industries, such as The Software Alliance (“BSA”), did not register opposition to the proposed revisions to Class 14(a).

⁶ Dr. Henry Lowood, Testimony at the U.S. Library of Congress, Copyright Office Section 1201 Roundtable (Apr. 12, 2018) in PUBLIC HEARINGS TRANSCRIPTS, at 238.

⁷ *Id.* at 249.

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

The relevant modes of DRM and circumvention for software are well-known and have been documented in these proceedings for more than a decade as the Librarian has considered and approved multiple exemptions in this area.⁸ The relevant TPMs are defined by reference to SPN and LCA’s 2018 comment.⁹ As this proposal merely seeks to shift the scope of the exemption and does not change the underlying works, no additional TPMs are implicated, unless the ESA or Joint Creators are privy to TPM advances that need defining.

ITEM E. ASSERTED ADVERSE EFFECTS ON NON-INFRINGEMENT USES

I. Opposition to Class 14(a) is Abstract and Speculative and Should Not Receive Serious Weight

The comments received during the opposition period contained only abstract speculation about the potential harms of offsite access to non-video game software. The only comment addressing 14(a) came from the Joint Creators who acknowledge that their coalition does not include organizations concerned with copyrights in non-video game computer programs.¹⁰ The horrors introduced in passing by Joint Creators have little to do with on-premises or off-premises use, rather, the secondary infringement that they discuss could more easily be accomplished on modern operating systems than the emulated, controlled environments proposed in our earlier comment.¹¹ Because these concerns were not raised by organizations with a stake in the software affected by this exemption, they should not be given serious weight.

The negligible impact of proposed Class 14(a) on industry stakeholders in non-game software is evinced by the lack of opposition from general software industry organizations to the Class 14(a) proposal. For instance, BSA | The Software Alliance (“BSA”) “the leading advocate for the global software industry,” chose not to oppose the 2021 Class 14(a) exemption despite registering its concerns (which were later addressed) regarding previous circumvention exemptions for non-game software and the previous iteration of this exemption.¹² As the ESA notes in their separate comment opposing Class 14(b), video games and productivity software encompass different markets and serve different uses,¹³ rendering arguments in opposition from the video game sector on these issues of little relevance to non-game software. Given the strong interest from its supporters, and the lack of opposition from industry stakeholders, proposed Class 14(a) should be recommended for adoption by the Librarian of Congress as laid out in SPN & LCA’s original long comment.

⁸ See generally *Rulemaking Proceedings under Section 1201 of Title 17*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/1201/> (last visited Mar. 7, 2021).

⁹ ESA indicates no difficulty with identifying the referenced definitions. See ESA Comment at 8 n. 49 (citing the SPN & LCA Comment at 4 n.16, which refers readers to Item D in SPN’s 2018 Initial Long Comment).

¹⁰ *Id.* at 1, 3 n.7.

¹¹ *Id.* at 5.

¹² See generally The Software Alliance (“BSA”), *Class 9 Opposition Comment*, 2018 SECTION 1201 TRIENNIAL PROCEDURE (Feb. 12, 2018), https://cdn.loc.gov/copyright/1201/2018/comments-021218/class9/Class_09_Opp'n_BSA.pdf.

¹³ ESA Comment at 5.

II. Although Additional Limits Risk Undermining the Purpose of this Proceeding, SPN and LCA Are Open to Familiar Limitations on Eligible Institutions and Use Purposes.

Proposed Class 14(b) did not include additional limitations on institutional eligibility or user purpose for a variety of reasons, but the most important is that every layer of additional complexity and novelty in a regulation creates additional barriers to use for law-abiding, risk-averse institutions and individuals.¹⁴ The high perceived risk associated with copyright law only exacerbates the chilling effect associated with new and complex copyright regulations. A needlessly complex and unfamiliar regulation will make desirable activity (here, circumvention for the lawful, socially beneficial purposes of preservation for education and research) less likely, frustrating the legislative intent that this triennial proceeding *reduce* the law's burden on otherwise lawful activity, especially educational and scholarly uses.

Perhaps as important as this overall chilling effect, novelty and complexity have a disparate impact on individuals and institutions based on their access to resources such as legal counsel or specialized copyright staff, and their ability to tolerate perceived risk and uncertainty. Just as the premises limitation itself creates haves and have-nots among students and researchers interested in studying out-of-commerce games, a new rule permitting off-premises access will be a dead letter for most institutions if it includes complex new technical requirements.

Conversely, no amount of narrowing or limiting language will deter users who would willfully misconstrue or misrepresent the exemption as a pretext for unlawful uses. Opponents' comments are preoccupied with these users, at times seeming to imply that we secretly represent such users and at others suggesting that we may be their unwitting accomplices. In any event, no result in this proceeding will curb the activities of bad faith actors. As we explain in Section IV below, opponents' preoccupation with scofflaws turns the exemption process on its head. The quest for language that cannot possibly be misconstrued or misused by bad actors will lead to a rule that cannot be construed or used by the intended beneficiaries of this proceeding.

If the Register is nevertheless persuaded that additional limitations are needed, the following changes may be a reasonable compromise. Because they are drawn from existing exemptions and statutory provisions, libraries, archives, and museums may be more comfortable complying with these additional constraints than with new restrictions custom-made for this rulemaking.

A. The Copyright Office Should Harmonize the Institutional Eligibility Language Between Classes 14(a) and 14(b).

Opposition parties' primary concerns pertain to the alleged potential for abuse of this exemption, due to a perceived lack of restrictions on eligible institutions, permitted users, and acceptable uses.¹⁵ In reality, the proposal is limited in several ways, and these limitations sufficed to support granting the exemption, including allowing access to preserved materials on the premises of the collecting institution, in the previous cycle. In the past, of course, courts have not struggled to

¹⁴ See generally Jonathan Band, *The Complexity Dialectic: A Case Study from Copyright Law*, POLICYBANDWIDTH (Mar. 10, 2015), <http://infojustice.org/wp-content/uploads/2015/03/band03102015.pdf>.

¹⁵ See, e.g., ESA Comment at 6, 8, 14; Joint Creators Comment at 2–4.

define “library” or “archives” appropriately.¹⁶ The Opposition Comments do not cite a single instance of an individual or “arcade” posing as a library or archives and falsely claiming 1201 exemption eligibility, nor do any such instances appear to exist.

However, if the Copyright Office deems eligibility concerns worthy of accommodation, a familiar set of limitations already exists: the definition of eligible institutions under Class 14(a). A library, archives, or museum is “eligible” under the 14(a) exemption if and only if:

“(A) The collections of the library, archives, or museum are open to the public and/or are routinely made available to researchers who are not affiliated with the library, archives, or museum;

(B) The library, archives, or museum has a public service mission;

(C) The library, archives, or museum's trained staff or volunteers provide professional services normally associated with libraries, archives, or museums;

(D) The collections of the library, archives, or museum are composed of lawfully acquired and/or licensed materials; and

(E) The library, archives, or museum implements reasonable digital security measures as appropriate for the activities permitted by this paragraph (b)(13).”¹⁷

These requirements are drawn from the Copyright Office’s Section 108 Discussion Document.¹⁸ Each balances the need to restrict access to protect rightsholder interests with the need to promote scholarship and study. The “public service mission” requirement, for instance, “aims to exclude solely privately-directed institutions . . . to ensure the exception furthers the public policy goals of copyright.”¹⁹ Likewise, the “trained staff or volunteers” requirement “exclude[s] the hobbyist or amateur collector,”²⁰ neutralizing opponents’ concerns that “any organization or person purporting to have a preservation purpose could potentially circumvent [under the exemption.]”²¹

Perhaps most significantly, the existing Class 14(a) restrictions impose a requirement that an eligible institution implement reasonable digital security measures, reflecting the Copyright Office’s understanding that there must be “sufficient flexibility and ability to adapt to current and future practices and technologies” without posing an “unduly burdensome requirement,” setting

¹⁶ See 108 Discussion Document at 18 (citing *Pac. & S. Co., Inc. v. Duncan*, 744 F.2d 1490, 1494 n.6 (11th Cir. 1984) (addressing a for-profit newspaper clipping service’s activities and finding that the business fell outside the meaning of “archive” in section 108); *Elsevier, Inc. v. Comprehensive Microfilm & Scanning Serv., Inc.*, No. 3:10-CV-2513, 2013 WL 1497946, at *8 (M.D. Pa. Apr. 10, 2013) (acknowledging the factual dispute over whether a microfilm scanning service and the institutions that provided the service with print journals fell within the 108 library or archive exception)).

¹⁷ 108 Discussion Document at 18–21.

¹⁸ *Id.*

¹⁹ *Id.* at 19.

²⁰ *Id.*

²¹ Joint Creators Comment at 4.

a standard that is informed by “measures other institutions of similar size and mission have adopted.”²² As the Copyright Office has recognized, individual institutions can set up appropriate access controls to prevent Joint Creators’ fearful vision that “one library [that] acquired one copy of a video game 20 years ago . . . [could] entitle the entire world to use that work[.]” Through emulation, time-limited loans, and other, similar measures, eligible institutions could reasonably prevent mass circulation of these works.

Harmonizing these requirements across both classes of software eliminates the core concern raised by Joint Creators and the ESA. Moreover, the change would create a unified criterion for institutions eligible to preserve and provide access to non-video game software and video game software under the exemption. The Copyright Office favors these limitations, which have already proven workable for institutions managing the preservation and on-site use of non-video game software. They can easily be applied to determine institutional eligibility for Class 14(b) as well.

B. Purposes for Off-Premises Access Can Be Limited to Private Study, Scholarship, and Research.

Opponents likewise express concern that the exemption could create “internet arcades” where users can access preserved materials for any reason, including personal entertainment.²³ SPN and LCA do not believe that libraries, archives, and museums should be expected to ensure that all users are bored or unhappy for the duration of their interactions with our collections, but we are comfortable taking on the traditional use constraints in section 108(d) and (e) – namely, that we only serve users where we have “no notice that access is for reasons other than private study, scholarship, or research.” We contend that such a limitation is unnecessary, as there is no evidence of “arcades” claiming archive or library status under the existing exemption, and even if they did, opponents would be free to pursue unlawful activity via infringement lawsuits against bad actors.²⁴ Nevertheless, if the familiar language from section 108 would provide an acceptable level of additional assurance that the uses are in the public interest, that would be a workable change for most libraries, archives, and museums.

Parallel language in 17 U.S.C. §108(d) and (e) has been effective at protecting the rights of copyright holders in the context of other works for nearly half a century. Because these provisions were drafted to preserve individual scholarly rights to access works for long-term study outside the library premises (where lending was infeasible), a similar limitation for offsite software scholarship should prove effective and workable.²⁵ Libraries making section 108 copies of traditional print material can *only* make those copies if they have no reason to believe that the users are engaged in other-than-scholarly pursuits.²⁶ Libraries take this requirement seriously, incorporating it into their internal legal compliance materials.²⁷ Libraries have been making

²² 108 Discussion Document at 21.

²³ Joint Creators Comment at 6. *See also* ESA Comment at 7–8 (discussing the preservation of *Habitat* at MADE).

²⁴ *See* Lowood, *supra* note 6 at 200.

²⁵ *See* MARY RASENBERGER & CHRIS WESTON, OVERVIEW OF THE LIBRARIES AND ARCHIVES EXCEPTION IN THE COPYRIGHT ACT: BACKGROUND, HISTORY AND MEANING 1–2 (2005), [http://www.section108.gov/docs/108BACKGROUND.PAPER\(final\).pdf](http://www.section108.gov/docs/108BACKGROUND.PAPER(final).pdf), archived at <https://perma.cc/YEK3-LHHE>.

²⁶ 17 U.S.C. § 108.

²⁷ *See, e.g.*, Kenneth D. Crew, *Copyright Checklist for Libraries: Providing Copies for Private Study*, COLUMBIA UNIV. LIBR. (Jul. 29, 2009),

copies for users pursuant to section 108 for decades with no discernible impact on fraudulent copying, much less the kind of collapse of the publishing industries that opponents suggest could result from our proposal.

Imposing the same restriction on offsite use under this exemption would preclude the creation of “internet arcades” accessible to the broad public, especially when read together with the eligibility requirement that each qualifying institution “implements reasonable digital security measures as appropriate for the activities permitted by this paragraph.” At the same time, this language allows individual scholars who want to study obscure, preserved works to do so without the needless burden of traveling to the premises of the collecting institution. Thus, it falls in line with the traditional right of scholarly copying protected by section 108. Eligible institutions are already well accustomed to making similar assessments under section 108, and a comparable limitation in the requested exemption would further preclude non-academic use.

C. Out of Commerce is Sufficiently Specific

Similarly, the opposition comments voiced concern that permitting research access to out-of-commerce game software would somehow threaten the market for reissued games sold for play on contemporary gaming platforms.²⁸ The opponents view the out-of-commerce language in proposed Class as overly broad, implicating their ability to recommence exploitation of copyrighted works. But the out-of-commerce requirement is not so flimsy. Rather, this limitation ensures that the exemption applies only to works that are not being commercially exploited by their owners at the time the work is preserved or that access is provided. To the extent that a game is made available by its creators, it would not be eligible for the exemption. Again, this is the exact approach taken under 17 U.S.C. § 108(e) and 108(h), as well as in the Music Modernization Act. Before providing a research copy under section 108(e), for example, the library or archives must make a market check to ensure that “a copy . . . of the copyrighted work cannot be obtained at a fair price[.]”²⁹ Works that publishers exploit through identical reissues would not satisfy the exemption’s market-check requirement.

III. The proposed activities, preservation, research, and scholarship, are non-infringing

Opponents’ repeated assertions that the law grants rightsholders an absolute right to decide when works should be made available does not square with the balanced approach in the Copyright Act, which provides a laundry list of situations in which the rightsholder has no such authority.³⁰ Similarly, the notion that this absolute right is among copyright’s “fundamental principles” is inconsistent with the Supreme Court’s repeated holding that fair use, the broad public right to make unlicensed uses, is itself among the “traditional contours” of copyright law.³¹ Perhaps most importantly, it is inconsistent with the purpose of this rulemaking, which was designed as “a

<https://library.columbia.edu/content/dam/libraryweb/services/preservation/copyrightchecklist108privatetestudy.pdf>, archived at <https://perma.cc/ND47-BPUG>.

²⁸ Joint Creators Comment at 2. See also ESA Comment at 2–4, 7 (discussing reissues).

²⁹ 17 U.S.C. § 108.

³⁰ See 17 U.S.C. § 107 (“notwithstanding . . . sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright”); 17 U.S.C. § 108 (“notwithstanding the provisions of section 106 . . .”); 17 U.S.C. § 109–122 (similarly permitting unlicensed uses in a variety of contexts).

³¹ *Eldred v. Ashcroft*, 537 U.S. 186, 191 (2003); *Golan v. Holder*, 565 U.S. 302, 329 (2012).

‘fail-safe’ mechanism . . . [to] monitor developments in the marketplace for copyrighted materials. . . *to prevent a diminution in the availability* to individual users of a particular category of copyrighted materials.”³²

The section 107 factors weigh in favor of fair use, indicating that remote access, for purposes of preservation, research, or education, is non-infringing.³³ Courts have increasingly recognized tensions between section 107’s fair use and the DMCA provisions regarding technical protection measures, noting that “[t]echnological access control measures have the capacity to prevent fair uses of copyrighted works.”³⁴ In consideration of the opponents’ concerns regarding public access to out-of-commerce games, we have included potential language that would restrict downstream uses to enable only transformative uses, which have no impact on traditional markets even when those markets are actively exploited. Qualifying institutions are capable of limiting remote access to authorized users and purposes; these conditions further ensure that remote access to video games will be fair use.³⁵

1. *Purpose and character of the use*: In response to opponents’ concerns regarding the scope of access, SPN and LCA have clarified that the proposed expansion will only extend to authorized uses including preservation, research, and education, which are transformative and non-infringing.³⁶ Gameplay for research purposes serves a distinct purpose from primary entertainment and aesthetic value and facilitates research, comment or critique on the game. While opponents point to the Register’s 2015 fair use analysis which found that copying for unlimited personal uses was non-transformative, the Register also found that “the reproduction and modification of functional aspects of video game and console software to enable noncommercial preservation and research activities at qualified institutions are likely to be fair uses.”³⁷ More recently, in 2018, the Acting Register recognized that library and archival preservation of video games “is a favored purpose under the fair use analysis.”³⁸ The

³² H.R. REP. NO. 105-551, pt. 2, at 35–36 (1998) (emphasis added).

³³ 17 U.S.C. § 107.

³⁴ *Apple Inc., v. Corellium, LLC*, 19-81160-CIV, 2020 WL 8642269, at *16 (S.D. Fla. Dec. 29, 2020) (citing *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1196–97 (Fed. Cir. 2004)). See, e.g., *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 950 n.12 (9th Cir. 2010), opinion amended and superseded on denial of reh’g, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011) (“Like the [court in] *Chamberlain* . . . we need not and do not reach the relationship between fair use under § 107 of the Copyright Act and violations of § 1201 . . . Accordingly, we too leave open the question whether fair use might serve as an affirmative defense to a prima facie violation of § 1201.”).

³⁵ See, e.g., Univ. of Mich., *Use the Archive*, COMPUTER AND VIDEO GAME ARCHIVE, <https://www.lib.umich.edu/locations-and-hours/computer-and-video-game-archive/use-archive> (last visited Feb. 28, 2021), archived at <https://perma.cc/JDH3-SHVU> (The University of Michigan provides authorized users with extended access to video games if they request special permission for qualifying research projects.); HathiTrust, *Membership Eligibility*, HATHITRUST DIGIT. LIBR. (Feb. 2020), https://www.hathitrust.org/eligibility_agreements, archived at <https://perma.cc/XB4Y-993H> (HathiTrust Digital Library ensures that archived works are used appropriately by (1) extending access to member institutions, (2) requiring user authentication, (3) requiring users to agree to a use-policy).

³⁶ SPN & LCA Comment at 14–16.

³⁷ See REGISTER’S RECOMMENDATION, SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING 338, 343 (2015), <https://cdn.loc.gov/copyright/1201/2015/registers-recommendation.pdf> [hereinafter 2015 Recommendation].

³⁸ See ACTING REGISTER’S RECOMMENDATION, SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING 242 (2018), https://cdn.loc.gov/copyright/1201/2018/2018_Section_1201_Acting_Registers_Recommendation.pdf [hereinafter 2018 Recommendation].

contemplated proposal would enable remote use for qualifying transformative purposes such as preservation and research, which the SPN and LCA's long comment discusses in detail.

While the ESA's main argument against fair use is that the proposed uses are not transformative, courts continue to accept fair use as a defense to claims involving transformative uses of software.³⁹ In December, the Southern District of Florida held that the research platform Corellium's use of Apple's iOS software in its virtual model software was a transformative use because it used the software for research purposes, supporting a finding of fair use.⁴⁰ Corellium's use is similar to the present case as Corellium's service also enabled remote access to iOS instances running on servers in support of transformative research purposes. The Joint Creators argue that *Bill Graham Archives* is disanalogous because it involved the creation and distribution of historical archival uses in a limited format,⁴¹ however out-of-commerce games made accessible to remote researchers in emulation platforms *are* analogous because they are studied for their historical and cultural value⁴² and emulated games would not supplant the traditional market for recreational access (if there were one) as their quality and features are only available in reduced formats.⁴³

Contrary to our opponents' position, the proposed uses are disanalogous from *Wall Data*, a Ninth Circuit case involving a sheriff department's excessive installation of software.⁴⁴ In that case, the uses were held not to be transformative because the department copied the software for its primary business commercial purposes, a purpose identical to that of the original software; the copying was merely to avoid purchasing additional software licenses that were then available on the market.⁴⁵ Preservation and research involving out-of-commerce works does not supplant primary or reissue markets because their use serves a different purpose than simply running the software or playing the game. Unlike direct copying to avoid paying licensing fees, the proposed purposes further the copyright goals of advancing knowledge and the arts by building upon historical archives, scholarship, research, and education, all transformative uses.

Even if the uses were not transformative, they would not interfere impermissibly with the market for the work. Again, the ESA's reliance on *Wall Data* is misguided because in that case, copying constituted a direct commercial substitution: the defendants chose to copy commercial software instead of purchasing additional licenses.⁴⁶ In the present case, out-of-commerce games are no longer available for purchase – definitionally, there is no market to supplant. Furthermore, the proposed exemption would increase access to out-of-commerce works for non-profit purposes. Contrary to the ESA's suggestion, non-profit activities do not become commercial activities

³⁹ See, e.g., *Apple Inc., v. Corellium*, No. 19-81160-CIV, 2020 WL 8642269, *15 (S.D. Fla. Dec. 29, 2020).

⁴⁰ *Id.* at *12.

⁴¹ Joint Creators Comment at 6.

⁴² *Warren Pub. Co. v. Spurlock*, 645 F. Supp. 2d 402, 419–20 (E.D. Pa. 2009) (finding that historical artifacts can be transformative). See also *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1077–78 (2d Cir. 1992) (characterizing one researcher's reuse of a predecessor's work as fair use because the defendant "builds upon [the predecessor's] work to further develop our store of knowledge in this area" by providing historical and theoretical contributions).

⁴³ See Brandon Hesse, *The Best Console Emulators (NES, SNES, Genesis, and More)*, DIGITALTRENDS (Jan. 26, 2021), <https://www.digitaltrends.com/gaming/best-emulators/>, archived at <https://perma.cc/3EZC-EXZA> (discussing limitations and benefits of different emulators).

⁴⁴ *Wall Data Inc. v. L.A. County Sheriff's Dept.*, 447 F.3d 769, 774–75 (9th Cir. 2006).

⁴⁵ *Id.* at 778–79.

⁴⁶ *Id.* at 781–82.

simply by virtue of receiving grant funds.⁴⁷ If reliance on grant funding were to support a finding of commercial use, this would shift the fair use analysis substantially, as over thirty percent of nonprofit revenue is funded by government grants.⁴⁸ There is no indication that Congress intended to narrow fair use in this way.

2. *Nature of the Work*: While video games involve creative components, this factor is never dispositive and often weighs neutrally when the creative works are used for transformative purposes, like the proposed preservation, research, and educational uses.⁴⁹ We are willing to modify our proposal to further ensure that expressive aspects of games will only be accessible to authorized users of qualifying institutions for limited purposes.

3. *Amount of the Work*: This factor is rarely weighed against the user where the use is transformative. It is judged in light of whether the amount presented is appropriate in light of the transformative purpose, and whether it provides to the public a sufficient market substitute for purchase of the work.⁵⁰ As previously discussed, preservation often requires the entire work and the amount users may access is reasonable in relation to the purposes of research and education. Because the works are not available on the market, there is no threat of substitution. Accordingly, this factor favors fair use.⁵¹

4. *Market Impact*: The proposed exemption is limited to out-of-commerce works which are unavailable on primary markets. Even if there were a market, exempted uses would not disrupt

⁴⁷ Opponents cite *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000) to support the notion that copying by a non-profit can be commercial, but in that case, the church copied religious texts to avoid paying licensing fees, which is not transformative, nor a favored use. Additionally, the finding of commerciality was supported by the fact that the church used the text to attract members who tithe ten percent of their income. In the present case, qualifying archival institutions do not garner funds from users and their use out-of-commerce software does not supplant the primary market because *there is no primary market*.

⁴⁸ NATIONAL COUNCIL OF NONPROFITS, NONPROFIT KNOWLEDGE MATTERS 19 (2019), <https://www.nonprofitimpactmatters.org/site/assets/files/1/nonprofit-impact-matters-sept-2019-1.pdf>, archived at <https://perma.cc/CQJ9-SSFH>.

⁴⁹ See, e.g., *Kane v. Comedy Partners*, No. 00-CIV-158, 2003 WL 22383387, at *5 (S.D.N.Y. Oct. 16, 2003) (stating that because the use was transformative, the nature of the work is less significant); *Blanch v. Koons*, 467 F.3d 244, 254–255 (2d Cir. 2006) (giving this factor limited weight despite the creative nature of the work because the new use was transformative); *Warren Publ'g Co.*, 645 F. Supp. 2d at 423 (finding that although factor two disfavored fair use, its impact in the overall fair use calculus was limited because the use was transformative); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006) (giving this factor limited weight because the use was transformative); *Mattel, Inc. v. Walking Mt. Prod.*, 353 F.3d 792, 803 (9th Cir. 2003) (noting that courts find that “this . . . factor typically has not been terribly significant in the overall fair use balancing” where the purpose was also transformative); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (finding that the creative nature of the original work was “not much help” in the fair use analysis because the work was transformative); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 115 (2d Cir. 1998) (citing *Campbell*, 510 U.S. at 586).

⁵⁰ See, e.g., *Perfect 10, Inc. v. Google, Inc.*, No. 04-CV-9484, 2010 WL 9479060, at *12–13 (C.D. Cal. July 30, 2010) (finding the third factor to be neutral, despite the fact that Google copied the entirety of the work, because Google’s critical and research purposes were considered to be transformative); *Gaylor v. United States*, 85 Fed. Cl. 59, 70 (Fed. Cl. 2008) (implying that factor three’s weight in the overall analysis was less because the use was transformative); *Campbell*, 510 U.S. at 586–88 (finding that transformative uses often require the most important parts of well-known works to achieve their transformative purposes); *Leibovitz*, 137 F.3d at 116 (finding that the third factor carries little weight where the first and fourth factors are transformative and weigh in favor of fair use).

⁵¹ See *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 101 (2d Cir. 2014).

the market because these uses are transformative.⁵² While game production firms may occasionally cycle works out of commerce as a market strategy (which would not be disrupted by transformative teaching and research purposes), the vast majority of out-of-commerce works are essentially abandoned and will never be reissued or translated to newer environments.⁵³

Congress did not intend to grant rightsholders total market control or an inalienable right over all markets. The fourth factor is not a dispositive factor in the 107 inquiry, and courts have long expressed concern that this factor not be rendered circular by undue deference to markets that do not exist.⁵⁴ The proposed exemption is limited to research and academic uses which do not supersede market transactions because the proposed exempted works are *out-of-commerce*, which are definitionally unavailable and often unusable on modern consoles or computers. Relying on the market to preserve these games will result in an incomplete historical record.⁵⁵

⁵² *Bill Graham Archives*, 448 F.3d at 615–16 (holding that where uses are transformative from their original purpose, like in this case, the “copyright holder cannot prevent others from entering fair use markets merely ‘by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work . . . [C]opyright owners may not preempt exploitation of transformative markets’ (citing *Castle Rock Ent., Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 146 n.11 (2d Cir. 1998)); *A.V. ex rel. Vanderhuyse v. iParadigms, L.L.C.*, 562 F.3d 630, 643 (4th Cir. 2009) (holding that an online plagiarism service used essays in a transformative way, thus having little effect on the market).

⁵³ See SPN & LCA Comment at 19–20 for broader discussion. See also Devin Monnens, Zach Vowell, *Before It’s Too Late*, 2 AM. J. OF PLAY 139, 143 (2009) (“Only a few game platforms have ever had backwards compatibility, and even then, compatibility of older games with newer platforms has rarely been complete.”).

⁵⁴ See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929 n.17 (2d Cir. 1994) (“[W]ere a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would *always* favor the copyright holder”); *deFontbrune v. Wolfsy*, 409 F.Supp.3d 823, 843 (N.D. Cal. 2019) (holding that transformative reproductions or compilations may be published where the original work is no longer available on primary markets); *A.V. ex rel. Vanderhuyse*, 562 F.3d 630, 643 (“a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create” [citation omitted]).

⁵⁵ Despite ESA’s laudable efforts to support preservation of its members’ video games by third-parties like the Smithsonian, smaller or independent game developers are often excluded from such efforts and eventually become abandonware. Over 2,300 game development companies are operating in the U.S. while the ESA’s membership only extends to thirty-eight of the top video game companies. *Compare Membership*, ESA, <https://www.theesa.com/about-esa>, archived at <https://perma.cc/J5JJ-H57N> (listing ESA’s members. Notably, ESA membership does not extend to the International Game Developers Association (IGDA), the largest non-profit membership organization serving independent game developers) with Stephen E. Siwek, *Video Games in the 21st Century*, ESA 11 (2017) <https://www.theesa.com/wp-content/uploads/2019/03/2017-EIR-National-Report.pdf>, archived at <https://perma.cc/MD22-GXFH> (ESA report providing data on U.S. video game industry trends). See, e.g., Nathan Grayson, *The Crazy Journey to Save Grim Fandango*, KOTAKU (Nov. 5. 2014), <https://kotaku.com/the-crazy-journey-to-save-grim-fandango-1655133550>, archived at <https://perma.cc/R48V-QC27> (while developing a remaster, the game producer, LucasArts, failed to correctly preserve the game in full, leading to loss of the original 1998 game); *Caper in the Castro*, LGBTQ GAME ARCHIVE, <https://lgbtqgamearchive.com/2015/08/23/caper-in-the-castro/> (last visited Mar. 8, 2021), archived at <https://perma.cc/B53P-HE25> (*Caper in the Castro* is culturally significant as the first queer computer game, but was nearly lost as the indie producer did not preserve the game outside of physical formats; it took a team of professionals to get the game in a playable format); *GayBlade*, LGBTQ GAME ARCHIVE, <https://lgbtqgamearchive.com/games/games-by-decade/1990s/gayblade/> (last visited Mar. 8, 2021), archived at <https://perma.cc/6KV3-B6TZ> (while *Gayblade* received widespread press coverage after its release, the source code was lost until it was rediscovered by the creator in 2019. As a result of the delay in preservation, some game features and playability are limited); *Foobar Trilogy*, LGBTQ GAME ARCHIVE, <https://lgbtqgamearchive.com/2018/07/16/foobar-vs-the-dea/> (last visited Mar. 8, 2021), archived at

Exemption beneficiaries, including libraries, museums, and digital archives have been able to provide access to authorized users for limited preservation, research, and scholarship purposes while implementing reasonable digital security measures without undermining the primary markets.⁵⁶

Despite the opponents' speculative arguments, the video game reissue market will not be harmed by the proposed expansion. In 2020, over 10,200 games were released on Steam alone.⁵⁷ Despite the rerelease market peaking last year, rereleases are limited to mainstream games that were popular when initially available.⁵⁸ In 2018, the Register found that “[t]here is no evidence that the current exemption has harmed the market for video games, including reissued games or sequels” and there is no reason to believe that expanding the exemption to include remote access for discontinued and commercially unavailable video games would change the analysis.⁵⁹ The opponent's claimed market harms are speculative. They have not adequately demonstrated that the harmed market is one that the copyright owner intends to enter and has a right to control.⁶⁰ Limiting access to qualifying preservation, research, and educational purposes even goes a step further, and the outdated nature of the games serves as an additional control for preventing game play for entertainment purposes.

IV. Statutory Factors

The proposed exemption satisfies the section 1201(a)(1)(C) statutory factors.⁶¹ The exemption inquiry considers whether anti-circumvention restrictions adversely affect non-infringing uses, and two of the statutory factors are explicitly implicated here: (1) the availability for use of works for nonprofit archival, preservation, and educational purposes; and (2) the impact of the proposed anti-circumvention provision on criticism, comment, news reporting, teaching, scholarship, or research. The potential market effect is just one statutory factor in 1201(a)(1)(C), and opponents' arguments on this issue are purely speculative.⁶²

<https://perma.cc/AZW8-RUBK> (preservationists have been unable to locate and study the second two games in this trilogy).

⁵⁶ See *HathiTrust Response to Covid-19*, HATHITRUST DIGITAL LIBR. (May 20, 2020), <https://www.hathitrust.org/covid-19-response>, archived at <https://perma.cc/6CBE-VZQA> (Since May 2020, HathiTrust has provided HathiTrust members with the Emergency Temporary Access Service which limits access to authorized members for limited purposes); 14(a) (access restrictions were imposed at the last triennial cycle and expansion has not been opposed by interested parties indicating no significant market disruption).

⁵⁷ J. Clement, *Number of Games Released on Steam Worldwide from 2004 to 2020*, STATISTA (Feb. 1, 2021), <https://www.statista.com/statistics/552623/number-games-released-steam/>, archived at <https://perma.cc/TK8Q-T69X>.

⁵⁸ Hayes Madsen, *2020 Has Way Too Many Video Game Remakes (But They're Good)* SCREENRANT (Apr. 8, 2020), <https://screenrant.com/2020-remakes-remasters-video-games-too-many/>, archived at <https://perma.cc/QVS6-E6W7>; Discussion with Dr. Adrienne Shaw, Temple University (Mar. 1, 2021).

⁵⁹ 2018 Recommendation at 278.

⁶⁰ See, e.g., *Perfect 10, Inc.*, 508 F.3d at 1165; *Am. Geophysical Union*, 60 F.3d at 925.

⁶¹ 17 U.S.C. § 1201(a)(1)(c). Indeed, this exemption sits at the very center of the field of uses legislators intended to protect by enacting this provision. While the drafters of section 1201 were hopeful that digital distribution models would increase access to works for educational and scholarly uses, they were “concerned that marketplace realities may someday dictate a different outcome, *resulting in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors.*” H.R. Rep. 105-551, pt. 2, at 35-36 (emphasis added).

⁶² ESA Comment at 13-14.

A. Effect of Circumvention on the Market for or Value of Copyrighted Works

The opponents ask the Register to turn the 1201 factor inquiry on its head, giving dispositive weight to speculative, abstract claims about market harm to works literally not in the market, while discounting tangible harms to preservation, research, and education, which go to the heart of the exemption inquiry. The proposed expansion only relates to out-of-commerce video games, which have no active market. These games are unavailable from the rightsholders and will not affect the reissue market because the works are out-of-commerce and unavailable for license. As a concession, SPN and LCA are willing to accept additional limitations on eligibility and access which should further minimize any potential harm to the market and will further ensure the contemplated uses are fair.⁶³

B. Availability for Use of Works in Nonprofit Archival, Preservation, or Educational Purposes

Video game studies is a robust academic discipline, now several decades old.⁶⁴ The opponents acknowledge the cultural and historical relevance of video games (touting their presence in museums), and they highlight the preservation of games in research collections at the University of Michigan and the University of California, Santa Cruz.⁶⁵ The collections at museums and leading research institutions are indeed worth celebrating, but there are at least forty-five PhD Programs that either have faculty specializing in games studies, departmental ties to game design programs, or that support interdisciplinary digital scholarship including video game research.⁶⁶ Only a handful of these programs can boast local access to world-class software collections. The topics covered within the field range from exploring video games as artworks⁶⁷ to analyzing game narratives through the lens of critical race theory⁶⁸ and queer theory,⁶⁹ to the efficacy of different approaches towards educational games development⁷⁰ and an array of other academic topics.

⁶³ See *infra* Part II.

⁶⁴ See, e.g., BO RUBERG & ADRIENNE SHAW, *QUEER GAME STUDIES* (2018); *GAME STUDIES* (Benjamin Beil et al. eds., 2017); *THE ROUTLEDGE COMPANION TO VIDEO GAME STUDIES* (Mark J.P. Wolf et al. eds., 2016); GRAEME KIRKPATRICK, *AESTHETIC THEORY AND THE VIDEO GAME* (2011); FRANS MÄYRÄ, *AN INTRODUCTION TO GAME STUDIES: GAMES AND CULTURE* (2008); YASMIN KAFAI, JILL DENNER AND CARRIE HEETER, *BEYOND BARBIE AND MORTAL KOMBAT: NEW PERSPECTIVES ON GENDER AND GAMING* (2008); *THE VIDEO GAME THEORY READER* (Mark J.P. Wolf et al. eds., 2003).

⁶⁵ ESA Comment at 4, 18.

⁶⁶ Bo Ruberg, *Getting a Game Studies PhD: A Guide for Aspiring Video Game Scholars*, OUR GLASS LAKE (Apr. 2019), <http://ourglasslake.com/getting-into-game-studies/>, archived at <https://perma.cc/53UF-EMU7>.

⁶⁷ See, e.g., Martin Picard, *Machinima: Video Game as An Art Form?* 1 *BORDERS* 1, 1–2 (2007).

⁶⁸ See, e.g., TreaAndrea M. Russworm, *A Call to Action for Video Game Studies in An Age of Reanimated White Supremacy*, 81 *VELVET LIGHT TRAP* 73 (2018); David J. Leonard, *Not a Hater, Just Keepin' It Real: The Importance of Race- and Gender-Based Game Studies* 1 *GAMES AND CULTURE* 83 (2006).

⁶⁹ Discussion with Dr. Adrienne Shaw, Temple University (Mar. 1, 2021); Discussion with Dr. Bo Ruberg, UC Irvine (Mar. 8, 2021).

⁷⁰ Yasmin B. Kafai, *Playing and Making Games for Learning: Instructionist and Constructionist Perspectives for Game Studies*, 1 *GAMES AND CULTURE* 36, 36–37 (2006).

Each of these fields of inquiry necessarily involves the pedagogical examination of games as source material. More fundamentally, to be academically complete, they require access to preserved games from throughout the history of the industry—not just popular games with mainstream releases and continuous reissues, but niche materials that hold more interest for academics than players. For example, Sega’s *Heavyweight Champ*, which has not been on market as either an original or a remake since 1987, was the first video game to feature a Black character.⁷¹ Due to its unpopularity, however, no working copies of *Heavyweight Champ* seem to exist.⁷² With an improved exemption, archival institutions can serve educators in the diverse array of academic programs where video game study is relevant, and the increased educational access will help ensure that historically significant software does not become degraded or lost, providing controlled access to researchers who want to help us understand our shared cultural heritage.

C. Impact on Teaching, Scholarship, and Research

After acknowledging the cultural importance of game software, opponents ESA trivialize the unmet scholarly interest in access to out-of-commerce games.⁷³ Software collections exist primarily to provide access in support of teaching and research, not to give artistic bona fides and a free dark archive to commercial actors.

Opponents tout the re-release of select vintage titles for play on contemporary platforms, but the scope and scale of their re-release efforts are far too modest to serve the needs of scholarly and educational users. As one scholar told us, “[producers are] very selective in the kinds of games that they do end up rereleasing or reproducing, which is not an actual record of what that industry produced . . . we’re leaving too much up to the industry itself to document history as opposed to treating it as a media industry that has a scholarly approach.”⁷⁴ This phenomenon is best exemplified by the Mario titles that ESA cites in their opposition comment. These titles represent just a tiny fraction of the games produced over the years, their reissue is due to their association with a successful long-running franchise, and several of the retro games rereleased on their Switch eShop, including Super Mario 3D All-Stars, Super Mario Bros. 35, and Game & Watch, will be retired from sale on March 31, 2021.⁷⁵ Not only would these titles be of limited value to scholars, due to potential alterations discussed below, but their quick removal from the eShop reveals the flaws of industry-driven preservation or relying on reissues for scholarly and educational access.

⁷¹ Rico Norwood, *Coding Blackness: A History of Black Video Game Characters*, WIRED (Feb. 26, 2021), <https://www.wired.com/story/black-character-history-video-games/>, archived at <https://perma.cc/4BZS-E37G>.

⁷² *Heavyweight Champ* (lost SEGA arcade boxing game 1976), LOST MEDIA WIKI, [https://lostmediawiki.com/Heavyweight_Champ_\(lost_SEGA_arcade_boxing_game;_1976\)](https://lostmediawiki.com/Heavyweight_Champ_(lost_SEGA_arcade_boxing_game;_1976)) (last visited Mar. 7, 2021), archived at <https://perma.cc/5XS5-LF6V>.

⁷³ ESA Comment at 20.

⁷⁴ Discussion with Dr. Adrienne Shaw, Temple University (Mar. 1, 2021).

⁷⁵ Chris Carter, *Nintendo Reiterates That Yes, They Will Pull Various Mario Products and Games from Sale at the End of March*, DESTRUCTOID (Mar. 1, 2021), <https://www.destructoid.com/stories/nintendo-reiterates-that-yes-they-will-pull-various-mario-products-and-games-from-sale-at-the-end-of-march-621318.phtml>, archived at <https://perma.cc/G34F-885E>.

As it currently stands, many scholars must conduct their research by “piecing together information about the content of [relevant games] from non-game sources” including chat rooms, walkthroughs, and player guides.⁷⁶ This approach is fundamentally inadequate because it requires scholars to rely not on primary source materials themselves, but instead on what other people have *said* about those sources. This leaves scholars with source material that is “basically hearsay,” especially for older games.⁷⁷ The lack of primary source material can be particularly challenging for those in more specialized academic areas, who may wish to examine specific parts of the game that haven’t been preserved in walkthroughs “because nobody bothered to record [them] and put [them] up.”⁷⁸ Relying on secondary materials can also introduce additional issues for scholars, who may need to rely on videos with offensive voiceovers (particularly common in the field of queer game studies, where videos often feature homophobic and transphobic commentary).⁷⁹ These materials are also ephemeral – the accounts of streamers who post game walkthroughs may be taken down when the users decide to cease updating their content.⁸⁰

Scholars also have demonstrated need to interact with gaming environments. To understand representation within games, context is essential. Dr. Adrienne Shaw explains “[For an] LGBTQ character . . . [scholars] can write about that character but [it’s not] until [they’ve] actually played the game and realized [the character’s appearance] is a five-minute interaction in five thousand hours of play [that they fully understand that] regardless of how good that character is, [they’re] a blip on the screen. You can also find out how easily missed that content is . . . [in] *Indigo Prophecy* . . . if you play through the dialogue in a certain procession, [a character] never mentions being gay . . . [w]hereas in another dialogue tree, that’s all he talks about . . . That’s a different kind of representation . . . [and a difference you only] notice if you play through the game and understand . . . how the dialogue tree operates. Fans who create walkthroughs of the game don’t necessarily care that there are twelve different ways to talk to [the character] and only one of the branches leads to him being gay. That’s not something that gets covered in fan culture, [but rather] something I know because I played the game with my researcher hat on to determine how you produce certain moments of representation[.]”⁸¹ Simply put, scholars cannot rely on secondary materials to provide an accurate or complete historical record of game software.

The current regime unduly hinders the teaching of courses that would logically be taught using preserved video games. Dr. Shaw, for instance, explained that many game studies courses assign students to use games from their personal collections for assignments, since assigning a single title to an entire class is infeasible without library-facilitated emulation.⁸² Likewise, Dr. Bo Ruberg views remote access as essential because teachers “cannot assume that [their] students have the money, resources, and computing power to play things [instructors] want them to play.”⁸³ Dr. Ruberg typically brings in their personal source materials, and has students play

⁷⁶ Discussion with Dr. Adrienne Shaw, Temple University (Mar. 1, 2021).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Discussion with Dr. Bo Ruberg, UC Irvine (Mar. 8, 2021).

through relevant titles collectively in the classroom – an approach made impossible by remote learning.⁸⁴ This approach is a major deviation from all other branches of media studies, where classes collectively study and analyze seminal texts from the development of the medium.⁸⁵ It also hinders students’ understanding of their field. Because understudied works from the 1980s and ’90s influenced the development of modern games, the cultural underpinnings of more contemporary works are fundamentally misunderstood.⁸⁶

As a field, video game studies has also drawn critique for its comparatively narrow scope, and tendency to focus on whatever game is newest.⁸⁷ These limitations, however, reflect the fact that researchers must work with whatever materials they can access.⁸⁸ Scholars end up drawing on their personal collections, since libraries and universities are reluctant to invest in acquiring hardware and software that will become obsolete in a handful of years and where they may be limited in their legal preservation options.⁸⁹ Even where an institution has access to a specific game, if two PhD students want to conduct research on the same title they often must share a single access computer in a single lab on campus.⁹⁰ This resource-sharing can drive students away from pursuing projects that would be of scholarly value and interest to the general public.⁹¹ Absent the broadened exemption, the scope of this area of scholarly study can never fully encompass less-popular antique software.⁹² Multiple scholars have identified that elimination of the on-premises requirement from the exemption would result in more robust, equitable scholarship.⁹³

The burden of on-site access falls particularly hard on game historians with the fewest resources. Where research becomes “a matter of money, resources, and travel” restrictions “affec[t] those most marginalized” in particular “grad students, undergrads, [and] especially . . . women, queer students, students of color, [those groups that are marginalized] within game studies.”⁹⁴ PhD students in particular have found that their work, under current COVID research conditions, “has often become impossible” because “they can’t travel to their field sites, they can’t travel to their archives, [and] they’re having to totally reimagine the work that they’re doing.”⁹⁵ Those students whose research does not focus on the most mainstream, current games find that they cannot

⁸⁴ *Id.*

⁸⁵ Discussion with Dr. Adrienne Shaw, Temple University (Mar. 1, 2021).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* See also Interview with Phil Salvador, American University (2020); Discussion with Dr. Bo Ruberg, UC Irvine (Mar. 8, 2021).

⁹³ Discussion with Dr. Adrienne Shaw, Temple University (Mar. 1, 2021), Interview with Dr. Fenwick McKelvey, University of Concordia (Oct. 14, 2020); Discussion with Dr. Bo Ruberg, UC Irvine (Mar. 8, 2021) (“[Remote access] is so slim already. I don’t know a time where I’ve tried to find a game that was really hard to find and I’ve thought, ‘maybe a games library has this available to me via remote access or an emulator.’ . . . So, imagining a world where you can go online and say, ‘I would like access to this game’ the same way that I am currently logged into a VPN right now accessing text remotely blows my mind.”)

⁹⁴ Discussion with Dr. Bo Ruberg, UC Irvine (Mar. 8, 2021).

⁹⁵ *Id.*

physically go to spaces where the games are available, and remote access is “the only thing that [would] make[] it possible for them to continue doing their work.”⁹⁶

The ESA comments are remarkably dismissive of the implications of the COVID-19 pandemic for access to software collections (and other materials), both in the short- and longer-term. A swift end to the pandemic would be welcome by all, but timeline estimations are still developing and uncertain.⁹⁷ Global health experts have indicated that expecting the pandemic to be over by next year is “premature” and “unrealistic.”⁹⁸ For the last year, projections of the country’s return to normalcy have shifted as quickly as they have been proclaimed.⁹⁹ It is entirely possible that social distancing measures will linger post-mass vaccination,¹⁰⁰ vaccine administration may progress more slowly than anticipated,¹⁰¹ or COVID-19 might spread more rapidly than expected with the emergence of new variant strains.¹⁰² The pandemic’s devastating financial impact on higher education is likely to reverberate for many, many years to come, limiting funding for research travel among many other continuing effects.¹⁰³

More broadly, experts have characterized the COVID-19 pandemic as a harbinger of future disruptions to critical infrastructure, urging maintainers of that infrastructure to take steps to adapt and prepare for similar occurrences:

COVID-19 is a window of opportunity for laying new foundations for how we design, operate, and manage infrastructure in the Anthropocene. In its early stages, the pandemic has shocked infrastructure demand and created tremendous uncertainty about the future. Going forward, infrastructure can be expected to be shocked in new ways that we

⁹⁶ *Id.*

⁹⁷ Harry Stevens, et al., *How a Sluggish Vaccination Program Could Delay a Return to Normal and Invite Vaccine-resistant Variants to Emerge*, THE WASHINGTON POST (Feb. 9, 2021), <https://www.washingtonpost.com/nation/interactive/2021/vaccination-pace-herd-immunity/>, archived at <https://perma.cc/FB4K-KZUC>.

⁹⁸ Maria Cheng & Jamey Keaten, *WHO: ‘Premature,’ ‘unrealistic’ COVID-19 will end soon*, AP NEWS (Mar. 1, 2021), <https://apnews.com/article/pandemics-coronavirus-pandemic-united-nations-c277943cdc46880297c960864027497a>, archived at <https://perma.cc/QH5G-8C5J>.

⁹⁹ Ruth Cummins, *Think the Rules on COVID-19 Keep changing? Here’s Why*, THE UNIV. OF MISS. MED. CTR. (Dec. 7, 2020), https://www.umc.edu/news/News_Articles/2020/12/COVID-19-Evolving-Information.html, archived at <https://perma.cc/8X4C-DLQD>; Michael Hollan, *More NYC Restaurants Sue Cuomo Over the State’s Constantly Changing Dining Regulations*, FOX BUSINESS (Jan. 12, 2021), <https://www.foxbusiness.com/lifestyle/more-nyc-restaurants-sue-cuomo-changing-dining-regulations>, archived at <https://perma.cc/J63U-PAFE>; Julie Loncich, *Brewery, Bar Owners in Massachusetts Growing Frustrated by Constant COVID-19 Rule Changes*, WCVB (Aug. 12, 2020), <https://www.wcvb.com/article/brewery-bar-owners-in-massachusetts-growing-frustrated-by-constant-covid-19-rule-changes-during-reopening/33590181#>, archived at <https://perma.cc/AB4V-BW57>.

¹⁰⁰ Robin Foster & Ernie Mundell, *New Recommendations on Social Distancing After Vaccination Are Coming: Fauci*, HEALTHDAY (Feb. 9, 2021), <https://consumer.healthday.com/2-9-new-recommendations-on-social-distancing-after-vaccination-coming-fauci-2650413330.html>, archived at <https://perma.cc/9XTT-KEJG>.

¹⁰¹ Stevens, *supra* note 97.

¹⁰² Emma Court, et al., *New York Covid-19 Variant Expands Reach in U.S. With 735 Cases*, BLOOMBERG (Mar. 1, 2021), <https://www.bloomberg.com/news/articles/2021-03-01/new-york-covid-19-variant-drawing-concern-from-fauci-cdc>, archived at <https://perma.cc/TUM3-ZSUG>.

¹⁰³ See, e.g., Paul N. Friga, *How Much Has Covid Cost Colleges? \$183 Billion*, CHRON. OF HIGHER ED. (Feb. 5, 2021), <https://www.chronicle.com/article/how-to-fight-covids-financial-crush>, archived at <https://perma.cc/D4GK-9XVS>.

probably have not yet experienced. The current window is important for structural change toward the future.¹⁰⁴

Libraries, archives, and museums who heed this advice will take steps to ensure their core functions can continue in a future where disruptions to on-premises access are sure to recur. Even if the Register decides that off-premises access may not be needed once institutions have overcome the effects of COVID-19, the exemptions need not be renewed if they are found to be unnecessary as circumstances change. The present global emergency warrants at least a temporary exemption to lessen its impact on research and scholarship. Should the exemption have adverse effects on the video game industry in the meantime, it is entirely within the purview of the Register to reconsider the exemption at the next rulemaking.

V. Opponents' Reliance on Reissues is Misplaced, as Few Games are Reissued and Most Reissues Do Not Serve Scholarly Purposes.

Both Joint Creators and the ESA express concerns about preserved games implicating the current market for retro software and reissues. The ESA in particular points to the “thriving” re-release market as evidence that out of commerce material is still commercially exploitable.¹⁰⁵ As discussed at length above, the market for reissued games would not be harmed by preservation activity, and filling the (substantial) gaps in market access for scholarly and teaching uses is the core intended function of this rulemaking. But there are two more fundamental problems with the argument advanced by ESA: the inability of re-releases to substitute for the original works, and their rarity.

The majority of industry rereleases do not serve researchers' purposes. Most reissued games feature changes to the software. Some are limited to compatibility modifications or bug fixes; however, it is common for rereleases to feature more significant changes to storylines (e.g., the change of two characters' sexualities in Baldur's Gate Enhanced Edition), dialogue trees, characters, and other game elements.¹⁰⁶ Those deviations make the games desirable to those who would play them for entertainment purposes. Updating the graphics or controls for new gaming

¹⁰⁴ Thomas Carvalhaes et al., *COVID-19 as a Harbinger of Transforming Infrastructure Resilience*, 6 FRONTIERS IN BUILT ENV'T 1 (Sept. 4, 2020).

¹⁰⁵ ESA Comment at 2–4, 7.

¹⁰⁶ Discussion with Dr. Adrienne Shaw, Temple University (Mar. 1, 2021) (“[R]e-released versions are not the equivalent of the original game and the updated versions add or change text space content or missions sometimes, like there are lots of things that get updated in these enhanced versions, especially in terms of LGBTQ+ characters, in Baldur's Gate Enhanced Edition they changed the sexuality of two of the characters in the rereleased version, so it's not the equivalent of the original[.]”) (one might call this the “Han Shot First” problem); Dale Bashir, *What Are the Differences Between Video Game Remasters, Remakes, and Rereleases?*, IGN (May 6, 2020), <https://sea.ign.com/final-fantasy-vii-remake/160108/news/what-are-the-differences-between-video-game-remasters-remakes-and-rereleases>, archived at <https://perma.cc/DGE4-Q2JP> (discussing the differences between remasters (updated graphics and HD support), remakes/reimagined (core game play is intact but the story or mechanics are upgraded), and port releases (straight rerelease of games on newer platforms with no additions). For an example of this phenomenon, Nintendo marked the 35th anniversary of Super Mario Bros. with the rerelease of an “optimized” version of Super Mario Bros. (for a limited time). See *Nintendo Marks the 35th Anniversary of Super Mario Bros. with Games, Products and In-Game Events*, NINTENDO (Sept. 3, 2020), <https://www.nintendo.com/whatsnew/detail/2020/nintendo-marks-the-35th-anniversary-of-super-mario-bros-with-games-products-and-in-game-events/>, archived at <https://perma.cc/8AAV-7RD8>. See also Carter, *supra* note 75 (reporting that the release lasted only six months).

hardware undoubtedly increases user enjoyment for most users. But those changes undermine the work's scholarly value, since the media no longer appears as it did at the time of release.

Preserved software, by contrast, is ill-suited to personal enjoyment. Gameplay is more difficult in emulated environments because bugs are preserved, features dependent on specialized hardware are unsupported, and formats may be incongruent as opposed to remastered versions that are compatible with modern game environments, support higher-quality graphics, and additional features. Thus, emulated versions of antique software serve scholarly purposes, but are unlikely to be taken up as alternatives to reissue purchases by the general public. A reliance on rereleases also means that “a sense of history itself gets lost” with video game companies “purposefully erasing their own history” by producing rereleases with improvements or erasure of older, problematic elements.¹⁰⁷ Games historians then struggle “to track history . . . [and] to connect certain games to historical moments, because [they're] fighting planned obsolescence . . . and . . . an industry that makes its money by constantly being new.”¹⁰⁸ As a result, there is “a lot of history that we don't know we don't know, because we can't see it anymore.”¹⁰⁹ This history matters because these games influence society and American culture more broadly.¹¹⁰

Even assuming that all rereleases and remasters would serve research purposes, only “a tiny fraction” of all commercially produced video games ever receive a reissue.¹¹¹ Games that are undoubtedly historically valuable – like *Moonmist*, a 1986 PC mystery adventure game which is the earliest known video game to feature a gay character,¹¹² and thus of interest to queer historians¹¹³ – will never receive rereleases because they were not popular with players, and they do not have the fan-favorite or cult classic status that typically drives a rightsholder to re-release a title.¹¹⁴ As Dr. Ruberg articulated, the general public often conceptualizes the games studies field as focusing on “grand Triple-A games like Grand Theft Auto or Fortnite” that have “a lot of visibility.”¹¹⁵ But there are “a huge array of games . . . from different [production] scales, [including] indie games [or] small games throughout history. These games aren't supported by their companies because their companies [no longer exist] . . . so they don't get rebooted [and] they don't get rereleased. Anything that doesn't fall into that mainstream gets left behind[.]”¹¹⁶

Should research and scholarship depend on the market availability of re-releases for study, they may be forced to rely upon the whim of large gaming companies which provide unreasonable access limitations that impede scholarship and research.¹¹⁷ As archival scholars remind us, the

¹⁰⁷ Discussion with Dr. Bo Ruberg, UC Irvine (Mar. 8, 2021).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* See also Discussion with Dr. Adrienne Shaw, Temple University (Mar. 1, 2021).

¹¹² *Moonmist*, WIKIPEDIA, https://en.wikipedia.org/wiki/Moonmist#cite_note-cobbett-2011-5 (last visited Mar. 2, 2021), archived at <https://perma.cc/G2KJ-3VLS>.

¹¹³ See *Moonmist*, LGBTQ VIDEO GAME ARCHIVE, <https://lgbtqgamearchive.com/games/games-by-decade/1980s/moonmist/> (last visited Mar. 7, 2021), archived at <https://perma.cc/PJU8-NDEY>.

¹¹⁴ See Discussion with Dr. Adrienne Shaw, Temple University (Mar. 1, 2021); Discussion with Dr. Bo Ruberg, UC Irvine (Mar. 8, 2021).

¹¹⁵ Discussion with Dr. Bo Ruberg, UC Irvine (Mar. 8, 2021).

¹¹⁶ *Id.*

¹¹⁷ See *Watch List*, DELISTED GAMES, <https://delistedgames.com/watch-list/> (last visited Mar. 8, 2021), archived at <https://perma.cc/6LSA-U8T8> (listing games scheduled to be removed from the market and providing examples of

works that are excluded from an archive (or made inaccessible for teaching and study) are just as significant as those that are included.¹¹⁸ Denying access to archives “has a significant impact on the ability of marginal groups to form social memory and history.”¹¹⁹ Where powerful industry players prevent certain types of works – those originating from indie studios, or those that are culturally significant to minority audiences that may not have the buying power to justify a reissue – from entering into the archive, they limit the scope of our collective knowledge and the integrity of our future scholarship. Detractors often view games studies under the “assumption that video games are just for entertainment” and that they do not constitute “important material for scholarship and research.”¹²⁰ But this perspective is too narrow. Games are important because they are “reflections of culture” with “strong impacts on culture” that we can analyze using familiar methods “from literature . . . film . . . and the social sciences[.]”¹²¹ This medium, that draws billions of players and constitutes a major industry, requires study as much as any other piece of technology and culture.¹²²

Scholars would like to produce work on games from the early 1980s and 1990s but cannot access those games. As a result, those games remain understudied, and their influences underappreciated, with scholars “constantly reinventing the wheel” (a fact doubly true for marginalized group representation in games).¹²³ Games historians have expressed intense interest in this exemption because there are whole areas of their field where study is precluded by access issues. As one researcher reports, “There are lots of [obsolete games] I might study . . . that don’t even occur to me right now . . . *because* I don’t have access to them. [This exemption] would spark work . . . that we’re not even thinking of yet.”¹²⁴ Additionally, digital media scholars’ needs are not served by reissue markets as reissues do not function as historical records; directing digital media scholars to reissues is tantamount to denying access.¹²⁵ Researchers typically seek to study primary sources and original versions of games to study both expressive and functional game features in their appropriate historical and technological context.¹²⁶

There Is No Need for a Premises Requirement, Either Explicitly or Implicitly, in the Rule

The Copyright Office itself concluded in its Section 108 Discussion Document that an on-site use limitation for preserved works in digital formats “would unduly handicap section 108.”¹²⁷ The logic is simple: archival institutions’ ability to preserve and provide access to their materials

games that have been delisted only to be re-released months later). *See also* Carter, *supra* note 75 (Nintendo re-released Super Mario Bros. 35 for less than five months; its “[eShop removal death date](#)” is on March 31, 2021).

¹¹⁸ *See, e.g.,* Rodney G.S. Carter, *Or Things Said and Unsaid: Power, Archival Silences, and Power in Silence*, 61 ARCHIVARIA 215 (2006).

¹¹⁹ *Id.*

¹²⁰ Discussion with Dr. Bo Ruberg, UC Irvine (Mar. 8, 2021).

¹²¹ *Id.*

¹²² *Id.*

¹²³ Discussion with Dr. Adrienne Shaw, Temple University (Mar. 1, 2021).

¹²⁴ Discussion with Dr. Bo Ruberg, UC Irvine (Mar. 8, 2021).

¹²⁵ Discussion with Dr. Adrienne Shaw, Temple University (Mar. 1, 2021).

¹²⁶ *Id.*

¹²⁷ 108 Discussion Document at 18 n.82.

to interested scholars has never been limited to on-site access, nor was it ever intended to be. The purpose of preservation is access.

For the vast majority of students and scholars, a ban on remote access has always been tantamount to a ban on studying these materials. The COVID-19 pandemic merely expanded that ban to include the privileged class of scholars for whom travel to a collecting institution would otherwise have been feasible. The core purpose of preservation, and of this proceeding, is ensuring equitable access for scholarship and teaching when the market fails to do so, and the Register should reject the Opponents' arguments to the contrary.