



Mx. Kendra Albert
Clinical Instructor
Cyberlaw Clinic

Direct Dial: 617-998-1558
Email: kalbert@law.harvard.edu

May 13, 2021

Submitted via email to jril@copyright.gov and kamer@copyright.gov

Re: Docket No. 2020-11 Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works

Dear Mr. Amer and Mr. Riley,

Thank you for the opportunity to submit post-hearing comments on our proposed expansion of the class 14 exemption. We do not wish to submit additional documentation regarding the materials cited in our original comment and reply.

As far as additional regulatory language, we would be willing to accept a usage restriction for video game copies produced under the exemption.¹ Although we initially proposed a restriction based on section 108, we would also be open to more direct language that covers fair uses discussed in our filings.

We believe the best way to accomplish this is by eliminating the premises requirement and adding a requirement that distribution must be for teaching, scholarship, or research. In addition, we suggest harmonizing the eligibility requirements across the software preservation exemptions to include a reasonable security requirement.

We have included proposed language below.

¹ We do not believe that opponents have provided evidence of the necessity of a similar restriction for the non-video game exemption.

May 13, 2021
Re: Docket No. 2020-11 Class 14
Post-Hearing Comments
Page 2 of 5

Regards,

A handwritten signature in black ink, appearing to read "Kendra Albert". The signature is written in a cursive style with a large initial "K" and a long, sweeping tail.

Kendra Albert

On Behalf of Proponents

Software Preservation Network

Library Copyright Alliance

Proposed Exemption:

Strikethroughs indicate language removed from the 2018 exemption, italics indicate language that has been added.

(12)(i) Video games in the form of computer programs embodied in physical or downloaded formats that have been lawfully acquired as complete games, when the copyright owner or its authorized representative has ceased to provide access to an external computer server necessary to facilitate an authentication process to enable gameplay, solely for the purpose of:

(A) Permitting access to the video game to allow copying and modification of the computer program to restore access to the game for personal, local gameplay on a personal computer or video game console; or

(B) 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 ~~not~~ distributed or made available ~~outside of the physical premises of the eligible library, archives, or museum.~~ *for teaching, research, or scholarship.*

(ii) Video games in the form of computer programs embodied in physical or downloaded formats that have been lawfully acquired as complete games, that do not require access to an external computer server for gameplay, and that are no longer reasonably available in the commercial marketplace, solely for the purpose of preservation of the game in a playable form by an eligible library, archives, or museum, where such activities are carried out without any purpose of direct or indirect commercial advantage and the video game is ~~not~~ distributed or made available ~~outside of the physical premises of the eligible library, archives, or museum.~~ *for teaching, research, or scholarship.*

(iii) Computer programs used to operate video game consoles solely to the extent necessary for an eligible library, archives, or museum to engage in the preservation activities described in paragraph (b)(12)(i)(B) or (b)(12)(ii) of this section.

(iv) For purposes of this paragraph (b)(12), the following definitions shall apply:

(A) For purposes of paragraph (b)(12)(i)(A) and (b)(12)(ii) of this section, “complete games” means video games that can be played by users without accessing or reproducing copyrightable content stored or previously stored on an external computer server.

(B) For purposes of paragraph (b)(12)(i)(B) of this section, “complete games” means video games that meet the definition in paragraph

(b)(12)(iv)(A) of this section, or that consist of both a copy of a game intended for a personal computer or video game console and a copy of the game's code that was stored or previously stored on an external computer server.

(C) "Ceased to provide access" means that the copyright owner or its authorized representative has either issued an affirmative statement indicating that external server support for the video game has ended and such support is in fact no longer available or, alternatively, server support has been discontinued for a period of at least six months; provided, however, that server support has not since been restored.

(D) "Local gameplay" means gameplay conducted on a personal computer or video game console, or locally connected personal computers or consoles, and not through an online service or facility.

(E) ~~A library, archives, or museum is considered "eligible" when 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~~

For purposes of the exemption in paragraph (b)(12)(i) and (b)(12)(ii) of this section, a library, archives, or museum is considered "eligible" 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)(12).

(13)(i) Computer programs, except video games, that have been lawfully acquired and that are no longer reasonably available in the commercial marketplace, solely for the purpose of lawful preservation of a computer program, or of digital materials dependent upon a computer program as a condition of access, by an eligible library, archives, or museum, where such activities are carried out without any purpose of direct or indirect commercial advantage. ~~and the program is not distributed or made available outside of the physical premises of the eligible library, archives, or museum.~~

(ii) For purposes of the exemption in paragraph (b)(13)(i) of this section, a library, archives, or museum is considered “eligible” 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).