



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

# SPN/LCA Reply Comment Regarding Proposed Exemption Class 6(a)

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

### 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. SPN consists of archivists, librarians, scholars, technologists, and legal experts committed to establishing and retaining access to software which would become inaccessible without careful and conscientious stewardship.

Library Copyright Alliance (LCA)

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The Library Copyright Alliance consists of two major library associations (the American Library Association and the Association of Research Libraries) and was established in order to safeguard the interests of librarians and archivists in the realm of copyright law. These two associations collectively represent over 300,000 information professionals and thousands of libraries of all kinds throughout the United States and Canada.

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**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 website 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.

## ITEM B. PROPOSED CLASS ADDRESSED

### Class 6(a) – Computer Programs – Preservation

*A proposed expansion of the software preservation exemption (37 C.F.R. § 201.40(b)(18)) to eliminate the requirement that the program not be distributed or made available to multiple users simultaneously outside of the physical premises of an eligible institution.*

The text of the proposed exemption is provided in Appendix A.

## ITEM C. OVERVIEW

The opposition comments filed in the 6(a) filing from the Entertainment Software Association (“ESA”), Motion Picture Association (“MPA”), Recording Industry Association of America (“RIAA”) (collectively, the “Joint Creators”) and the DVD Copy Control Association (“DVD-CCA”) (the Joint Creators and the DVD-CCA, collectively, the “Opponents”) have provided no significant rebuttals to the arguments for our proposed modification of the software preservation exemption. Many of the objections raised are to issues that the Copyright Office has previously settled, such as the applicability of section 107 and the limitations on the types of institutions that can claim the exemption.<sup>2</sup>

Indeed, Opponents appear to concede that the uses in question are fair,<sup>3</sup> as they should, since the Copyright Office already found that the uses were non-infringing in 2018 and again in 2021. The removal of the single user requirement is supported by case law and is in response to the adverse impact of the restrictions on the relevant preservation communities.

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

See previous filings.

## ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

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<sup>2</sup> Compare DVD Copy Control Association, *Class 6a & 6b Opposition Comment*, (Feb. 20, 2024) at 4 [hereinafter *DVD-CCA Comment*] (explaining that not all uses of software contemplated by SPN/LCA proposal are covered under section 108), Entertainment Software Association, Motion Picture Association, and Recording Industry Association of America, *Class 6a & 6b Opposition Comment*, (Feb. 20, 2024) at 6 n.17 [hereinafter *Joint Creators Comment*] (arguing that the Copyright Office should limit analysis to non-infringing conduct under § 108) with U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: EIGHTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS 268 (2021) [hereinafter 2021 RECOMMENDATION]; U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS 239–40 (2018). Compare *Joint Creators Comment* at 3 (expressing concern that the exemption might apply to institutions that are not non-profits) with U.S. COPYRIGHT OFFICE, SECTION 108 OF TITLE 17 22 (Sept. 2017) [hereinafter SECTION 108 DISCUSSION DOCUMENT] (arguing that restrictions on favored uses should focus on the activities and not the institution).

<sup>3</sup> See *Joint Creators Comment* at 6 (distinguishing between “productivity software” and video games).

Opponents' primary objections are with the Copyright Act, not our exemption. The proposed exemption does not "strip" rightsholders of their ability to decide how to exercise their exclusive rights or fail to provide "proper remuneration."<sup>4</sup> Rightsholders cannot, and have never been able to, control or profit from each and every use of their works.<sup>5</sup>

As a result, if any party in this proceeding is focused on its "parochial interests" to the detriment of society and the progress of science, it is the Opponents.<sup>6</sup> Opponents do not even represent the primary copyright owners of the works at issue in this exemption. Instead, they appear to intervene to advocate for a maximalist interpretation of copyright law without regard for the positive impact of this proposal for researchers and the lack of any opposition from companies or groups with an ownership stake in the out-of-commerce works at issue.<sup>7</sup>

Beyond that, many of Opponents' arguments represent a misunderstanding of the removal of the single user restriction. For example, the Joint Creators comment argues that the elimination of the single user restriction would "significantly expand the scope of who could perform circumvention," despite the fact that the eligibility requirements remain the same as under previous versions.<sup>8</sup> They argue that this circumvention could be performed by institutions that are not non-profits, which was also true under the existing exemption, as well as organizations without a physical premises, which is, again, true under the existing software preservation exemption.<sup>9</sup> Given that there is no evidence of circumvention-based harm under the existing exemption, the Copyright Office should decline to revisit the eligibility requirements. Likewise, the DVD-CCA comments seem to

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<sup>4</sup> See *Joint Creators Comment* at 4 ("The provision of unlimited, unauthorized access is contrary to copyright law's fundamental principles because it would strip copyright owners of the ability to decide when, if, and how, to exercise their exclusive rights."); *DVD-CCA Comment* at 4 ("Such conduct robs creators of proper remuneration for each copy of their work actually accessed and used.")

<sup>5</sup> See, e.g., 17 U.S.C. § 106 ("Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following...") (emphasis added); 17 U.S.C. § 107 ("Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work...is not an infringement of copyright.")

<sup>6</sup> See *Joint Creators Comment* at 5 (arguing that preservationists seek to preserve works and provide scholarly access to "raise money for their own parochial interests").

<sup>7</sup> The Joint Creators do briefly mention that the scope of the software preservation exemption might include circumvention of motion pictures and sound recordings. *Joint Creators Comment* at 3 n.6. The language currently used in the exemption to allow for coverage of software-dependent materials has been in place since 2018 and has allowed for off-premises access since 2021, and there is no indication that it has harmed the market for motion pictures or sound recordings.

<sup>8</sup> See *Joint Creators Comment* at 3.

<sup>9</sup> *Id.* The Copyright Office specifically rejected limiting institutions to those with physical premises in the context of the 108 Discussion document. SECTION 108 DISCUSSION DOCUMENT at 18 ("Considering that we are nineteen years on from the DMCA and nine years on from the Study Group Report, the Copyright Office, while respectful of the Senate's reasoning and the Study Group's lack of consensus, feels that to require that libraries, archives, and museums must operate from physical premises would unduly handicap section 108. Thus, the Office is not proposing a 'physical premises' requirement for libraries, archives, or museums in its Model Statutory Language.")

demonstrate some confusion as to the grounds under which the proposed modification to the exemption is non-infringing.<sup>10</sup> Although some uses covered by the existing exemption may be non-infringing under § 108, this modification does not rely on § 108.<sup>11</sup>

### **I. Proponents have met their burden to show that the uses are non-infringing.**

The bulk of comments from the Joint Creators regarding fair use address the video game exemption.<sup>12</sup> As a result, Opponents do not meaningfully engage with the fair use cases that specifically focus on software, such as the Eleventh Circuit in *Corellium*, or the Supreme Court in *Google*.<sup>13</sup> Instead, they argue that under *Warhol*, the uses contemplated under this exemption are not transformative, and, based on a district court's finding in *Hachette*, that uses by non-profit libraries may be, nonetheless, commercial.<sup>14</sup>

These arguments are unavailing. The types of works and uses at issue in this exemption are far more like *Google* or *Corellium* than they are like those in *Warhol*, and the Supreme Court explained in *Warhol* that this specific context mattered.<sup>15</sup> The exemption requires that uses of the works in question be for scholarship, teaching, research, and private study, favored purposes under fair use.<sup>16</sup> As in *Corellium*, emulated off-premises access is

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<sup>10</sup> See *DVD-CCA Comment* at 4 (arguing that the exemption is not covered by section 108).

<sup>11</sup> To the extent that this focus represents the goal of suggesting that the Copyright Office focus on § 108 for determining exemptions, the Copyright Office should decline the invitation to limit exemptions to conduct covered by § 108, as it has in the past.

<sup>12</sup> See *Joint Creators Comment* at 6-8 (arguing that the uses are not fair because of the market for legacy video games and because video games are creative works). Although the DVD-CCA comment mentions “the rise of the ‘retro’ market to meet the needs of those interested in... computer programs, and equipment,” *DVD-CCA Comment* at 6, it provides no factual basis or citation for this claim. The Copyright Office should disregard it.

<sup>13</sup> DVD-CCA argues that *Corellium* does not consider or address the number of users, *DVD-CCA Comment* at 3. On the contrary, of the district and appellate courts in *Corellium* explicitly discuss multiple users. *Apple Inc. v. Corellium, Inc.*, No. 21-12835, 2023 WL 3295671 at \*2 (11th Cir. May 8, 2023) (specifying that the CORSEC software “enables users to create a virtual iPhone”) (emphasis added); *Apple Inc. v. Corellium, LLC*, 510 F. Supp. 3d 1269, 1279 (S.D. Fla. 2020) (discussing the variety of different users and Corellium’s use of resellers and vetting). Corellium’s provision of research access to software to multiple users was held to be fair use even where the software at issue is still available on the market and where Corellium and its users were both engaged in commercial activity. Fair use applies *a fortiori* to the uses permitted by our proposed revisions to exemption 6(a), which implicate a narrower class of users and a class of works that is, by definition, beyond market harm.

<sup>14</sup> *Joint Creators Comment* at 6-7.

<sup>15</sup> See Software Preservation Network and Library Copyright Alliance, *Initial Comment on Class 6(a)* at 11-16 [hereinafter *SPN/LCA Comment*] (discussing the parallels between the conduct at issue in *Corellium* and the proposed uses under the exemption); *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 527 (2023) (“Because those principles apply across a wide range of copyrightable material, from books to photographs to software, fair use is a ‘flexible’ concept, and ‘its application may well vary depending on context.’” (citing *Google v. Oracle*, 141 S. Ct. 1183, 1197 (2021))).

<sup>16</sup> See *SPN/LCA Comment* at 11 (citing 2021 RECOMMENDATION at 276).

not “geared towards the same consumer-oriented function” but “giv[es] researchers the ability to examine and understand” the underlying work.<sup>17</sup>

With regards to the Opponents’ claim that uses that have previously been repeatedly found non-commercial are now commercial, we address this specific claim in our reply comment on 6(b).<sup>18</sup> Additionally, even if it were true that supplanting marketplace transactions renders a use commercial, there is no evidence that the proposed exemption supplants any marketplace transactions.<sup>19</sup>

DVD-CCA also suggests that institutions that make use of the exemption should follow the “rule of spontaneity,” an idea that derives from the “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions,”<sup>20</sup> a set of voluntary guidelines sent to Congress in the lead up to the passage of the 1976 Copyright Act.<sup>21</sup> Courts have rejected the appropriateness of the “rule of spontaneity” in determining the scope of fair use.<sup>22</sup> But indeed, even on their own terms, the guidelines that this “rule” stem from were only applicable to “copying from books and periodicals” and “not intended to apply to musical or audiovisual works,” let alone software.<sup>23</sup>

## **II. Absent an expanded exemption, adverse effects on favored uses are likely within the next three years.**

Limiting remote software access to one user at a time creates significant restrictions on scholarship, research, and teaching, given the downstream effect on access to software-dependent material and the difficulty of purchasing out-of-commerce software copies in the first instance. In contrast to Opponents’ claims, we have provided examples of adverse

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<sup>17</sup> *Apple Inc. v. Corellium, Inc.*, No. 21-12835, 2023 WL 3295671 at \*3 (11th Cir. May 8, 2023) (internal quotations and citations omitted).

<sup>18</sup> See Software Preservation Network & Library Copyright Alliance, *Class 6(b) Reply*, (Mar. 19, 2024) at 15 n.82-83.

<sup>19</sup> See *SPN/LCA Comment* at 15 n.86.

<sup>20</sup> To quote a contemporaneous statement by Obi-Wan Kenobi: “Now that’s a name I’ve not heard in a long time.” *STAR WARS: A NEW HOPE* (Lucasfilm 1977).

<sup>21</sup> See H.R. 94-1476 (explaining that the Agreement was drafted and submitted to Congress by “representatives of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, and of the Authors League of America, Inc., and the Association of American Publishers, Inc.”).

<sup>22</sup> See *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1245 n.12 (11th Cir. 2014) (“Whatever persuasive value the Classroom Guidelines may possess, we must keep in mind that they (1) were drafted by partisan groups, (2) ‘state the minimum and not the maximum standards of educational fair use under Section 107’, and (3) adopt the type of ‘hard evidentiary presumption[s]’ regarding which types of use may be fair that the Supreme Court has since repeatedly warned against.”).

<sup>23</sup> See U.S. COPYRIGHT OFFICE, *Reproduction of Copyrighted Works by Educators and Librarians* (Circ. 21), 6 (August 2014) (“...the agreement refers only to copying from books and periodicals, and it is not intended to apply to musical or audiovisual works.”), <https://www.copyright.gov/circs/circ21.pdf> [<https://perma.cc/C3XZ-U68>].

impacts, including continued deterioration of software and difficulty of access, Windows XP activation changes, and advances in emulation technology.<sup>24</sup>

To the extent that Opponents claim that the “retro” market is serving the needs of preservation or those potentially harmed by preservation activity, the examples are confined to the video game context.<sup>25</sup> Opponents have failed to provide any factual support for the idea of substitution or risk to copyright holders from removal of the single user restriction for non-video game software.<sup>26</sup>

Although the Copyright Office indicated support for these restrictions previously, it may not have anticipated the adverse impacts that the restrictions cause on software preservation and thus scholarship and other favored uses.<sup>27</sup> Restrictions on the number of users were not significantly discussed in the 2021 comments, and even copy numbers were only raised in passing by the Copyright Office during the hearing on the exemption.<sup>28</sup>

In its 2021 recommendation, the Copyright Office, in explaining its decision, wrote that the “single user” restriction stems from the Section 108 discussion document. In that document, the user restrictions are meant “to include appropriate additional conditions to prevent a material impact on the commercial exploitation of the affected works.”<sup>29</sup> Given the lack of any opposition from the relevant rightsholders and the lack of any evidence that the market would be harmed, such conditions are not necessary in this

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<sup>24</sup> Compare *DVD-CCA Comment* at 3 (“Proponents have not provided any new factual or legal developments that would warrant the Register removing the one-user limitation.”) with *SPN/LCA Comment* at 2-3 (providing a summary of the numbers of preserved copies available for key pieces of software), *id.* at 7 (explaining how the changes in Windows XP activation processes require additional circumvention), *id.* at 10 (discussing how the Supreme Court’s decision in *Google v. Oracle*, released after the completion of comments in 2021, bolsters our fair use claim), *id.* at 11-16 (explaining how the Eleventh Circuit’s decision in *Corellium* provides additional support for our fair use claims).

<sup>25</sup> *DVD-CCA Comment* at 4-5, *Joint Creators Comment* at 8.

<sup>26</sup> The DVD-CCA Comment cites a 2001 report on the effect of digital technologies on § 109 and § 117, claiming that it articulates “the precise scheme advanced by Proponents[.]” *DVD-CCA Comment* at 5-6, see U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT (2001), <https://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> [<https://perma.cc/5CU2-DUHT>]. SPN/LCA do not rely on § 109 or “digital first sale,” and there is no effect on the copyright owner’s market when the works in question are not available for purchase. See *SPN/LCA Comment* at 15-17, see also 2021 RECOMMENDATION at 275 (“In light of the lack of evidence of a market for legacy software . . . , the Register finds there is a low risk of market harm based on the software use cases described in Class 14(a).”).

<sup>27</sup> The single user restriction stems from the Section 108 discussion document. 2021 RECOMMENDATION at 279 n.1562. Additionally, in granting the off-premises restriction, the Copyright Office imported language from section 108 rather than using SPN/LCA’s proposed language, which included teaching rather than private study. Given that teaching is an important non-infringing use, and its inclusion within the scope of the exemption has not been challenged by any opposition comment, we update the language to reflect our original intention and understood scope of the exemption.

<sup>28</sup> *Section 1201 Rulemaking Hearing Before the Copyright Office: Class 14a and 14b*, 659-663, <https://www.copyright.gov/1201/2021/hearing-transcripts/210419-Section-1201-Public-Hearings-Class-5-14a-14b.pdf> [<https://perma.cc/A4P9-ZW7D>] (discussing how copy limits can be imposed by section 108, but additional copies could be permitted under section 107).

<sup>29</sup> SECTION 108 DISCUSSION DOCUMENT at 39.

case.<sup>30</sup> The removal of the single user restriction is a limited and targeted modification of an existing approved exemption, and does not change its fundamental nature.

For all of those reasons, and as the statutory factors favor the expanded exemption, the Copyright Office should eliminate the single user restriction.

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<sup>30</sup> *Accord id.* at 39 n.188 (declining to adopt a single user/copy restriction for all digital distributions because “the Office believes that such an approach would be overly constraining on libraries, archives, and museums”).

## APPENDIX A

### PROPOSED EXEMPTION LANGUAGE

#### **Proposed Exemption:**

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.

Any electronic distribution, display, or performance made outside of the physical premises of an eligible library, archives, or museum of works preserved under this paragraph may be made only for a limited time and only where the library, archives, or museum has no notice that the copy would be used for any purpose other than teaching, scholarship, or research.

(ii) For purposes of the exemption in paragraph (b)(18)(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)(18).

#### **Redline with Changes from 2021 Exemption:**

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.



Any electronic distribution, display, or performance made outside of the physical premises of an eligible library, archives, or museum of works preserved under this paragraph may be made ~~to only one user at a time,~~ for a limited time, and only where the library, archives, or museum has no notice that the copy would be used for any purpose other than *teaching private study*, scholarship, or research.

(ii) For purposes of the exemption in paragraph (b)(18)(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)(18).