

*This is a Word document that allows users to type into the spaces below. The comment may be single-spaced but should be in at least 12-point type. The italicized instructions on this template may be deleted.*



UNITED STATES COPYRIGHT OFFICE

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

### ITEM A. COMMENTER INFORMATION

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### ITEM B. PROPOSED CLASS ADDRESSED

Proposed class 6(b) Video Games - Preservation

### ITEM C. OVERVIEW

Regarding my request for an additional exemption for video games (comment ID COLC-2023-0004-0047):

<https://www.regulations.gov/comment/COLC-2023-0004-0047>

Since I was unable to submit an initial supporting comment in time, I stand by the initial request as-is, though I will summarize the point I made. If a TPM prevents a lawful owner of a game from playing it because the TPM is no longer supported, from the consumer's perspective it doesn't matter if it's because of lack of access to an online authentication server that's no longer available or because the TPM code is prevented from executing on modern operating systems. The result for the consumer is the same – an unplayable game.

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

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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 E. ASSERTED ADVERSE EFFECTS ON NONINFRINGEMENT USES**

**Regarding ESA comment COLC-2023-0004-0073:**

<https://www.regulations.gov/comment/COLC-2023-0004-0073>

ESA had quite a lot to say about a proposed exemption that has no record and that has allegedly not met its burden of proof. Their response indicates that the request was well-understood and that they are aware of the problem the proposal intends to solve.

### **Item E, 2, B (pg 14)**

While ESA is correct that the games industry devotes substantial resources to anti-piracy measures, it's clear that the potential threats or even demonstrable consequences of market harm of infringing distribution do not outweigh the opportunity for profit when TPM implementations are omitted from a game's release. If a TPM implementation was a requirement for market success, digital storefronts like GOG would not sell completely TPM free versions of, among many others, smash hit games such as The Elder Scrolls V: Skyrim, Cyberpunk 2077, and Baldur's Gate III. Sales have apparently been good enough for rightsholders to continue adding more TPM free games over the years, despite any threat of unfettered, infringing distribution of the games sold.

[https://www.gog.com/en/game/the\\_elder\\_scroll\\_s\\_v\\_skyrim\\_special\\_edition](https://www.gog.com/en/game/the_elder_scroll_s_v_skyrim_special_edition)

[https://www.gog.com/en/game/cyberpunk\\_2077](https://www.gog.com/en/game/cyberpunk_2077)

[https://www.gog.com/en/game/baldurs\\_gate\\_iii](https://www.gog.com/en/game/baldurs_gate_iii)

ESA specifically calls out market harm to reissues and remakes of classic games due to infringing distribution. GOG started as "Good Old Games" and built their business by selling TPM free reissues of exactly the kinds of games ESA describes. Many of these games were originally distributed on physical media which is no longer in production and these versions are therefore limited in supply. Because of this, the circumvention of out of support TPMs as proposed cannot possibly result in meaningful market harm.

ESA claims that, "Permitting circumvention of the TPMs used to protect video games would run the risk of legitimizing the infringing distribution of copyrighted games." However, they've offered no evidence to support the statement. In particular, there is no evidence to suggest that such a reality has materialized for the games already protected under the current exemption for TPMs that can no longer connect to authentication servers. As such, there is no logical reason to believe there will be a different outcome for the proposed exemption.

ESA also claims that allowing the cracking of Black & White's TPM would specifically encourage further infringing downloads. This means that ESA believes there is an audience of would-be infringing users waiting with bated breath for there to finally be an exemption that doesn't even apply to them before downloading and playing the game. To be blunt, this is an argument rooted in pure fantasy.

**Item E. 3. B (pg 15-16)**

ESA references the example from my initial proposal and makes the claim that there is no evidence of a broader issue. According to the Steam hardware and software survey for February 2024, over 54% of gamers are still using Windows 10. According to statcounter's February 2024 report, 72% of desktop PCs worldwide run some version of Windows, and of those devices, 67% are still using Windows 10 specifically. How much broader does an issue need to be to warrant an exemption?

<https://store.steampowered.com/hwsurvey/Steam-Hardware-Software-Survey-Welcome-to-Steam>

<https://gs.statcounter.com/os-market-share/desktop/worldwide>

**DOCUMENTARY EVIDENCE**

This document includes links to appropriate evidence.