



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

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

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

### ITEM A. COMMENTER INFORMATION

Cyberlaw Clinic at Harvard Law School

Kendra Albert, *Clinical Instructor*, [kalbert@law.harvard.edu](mailto:kalbert@law.harvard.edu)<sup>1</sup>

Wendy Chu, *Clinical Instructor*, [wchu@law.harvard.edu](mailto:wchu@law.harvard.edu)

Farha Hanif, *Cyberlaw Clinic Student Attorney*, [fhanif.jd25@hlsclinics.org](mailto:fhanif.jd25@hlsclinics.org)

Isabelle Pride, *Cyberlaw Clinic Student Attorney*, [ipride.jd25@hlsclinics.org](mailto:ipride.jd25@hlsclinics.org)

*On behalf of*

The Software Preservation Network (SPN)

Brandon Butler, *Attorney*, [brandon@usefairuse.com](mailto:brandon@usefairuse.com)

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)

Jonathan Band, *Attorney*, [jband@policybandwidth.com](mailto:jband@policybandwidth.com)

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.

---

<sup>1</sup> Primary contact.

**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(b) – Video Games – Preservation

*A proposed modification of the video game preservation exemption (37 C.F.R. § 201.40(b)(17)) to eliminate the requirement that the program not be distributed or made available outside of the physical premises of an eligible institution.*

SPN/LCA’s proposed exemption language is included in Appendix A.

## ITEM C. REPLY TO OPPOSITION COMMENTS

There are two major points of contention in front of the Copyright Office in this subclass.

The first disagreement is over whether the restrictions proposed by the Software Preservation Network and Library Copyright Alliance<sup>2</sup> are sufficient to ensure that uses of preserved video games are non-infringing. They are.

The second disagreement is over whether, and if so, to what degree, the market for re-released video games is harmed by access to historical games. The Entertainment Software Association as well as the other organizations that oppose this exemption (“Opponents”) contend that remote access to historical video games, enabled by the proposed exemption, will threaten the ability of companies to re-release and market their works.<sup>3</sup>

To prove this contention, Opponents would need to show that this “vibrant and growing market,”<sup>4</sup> which already competes with the many potentially infringing “online arcades” that Opponents mention,<sup>5</sup> will be undone by a modest expansion to anti-circumvention exceptions only open to a narrow group of institutional actors. Or, in the alternative, that nefarious infringers await the Federal Register publication of the triennial rulemaking

---

<sup>2</sup> Referred to as “SPN/LCA” or “we” or “us”.

<sup>3</sup> See generally Entertainment Software Association, *Class 6b Opposition Comment*, (Feb. 20, 2024), [https://www.copyright.gov/1201/2024/comments/opposition/Class%206\(b\)%20-%20Opp'n%20-%20Entertainment%20Software%20Association.pdf](https://www.copyright.gov/1201/2024/comments/opposition/Class%206(b)%20-%20Opp'n%20-%20Entertainment%20Software%20Association.pdf) [hereinafter *ESA Comment*]; The Entertainment Software Association, The Motion Picture Association, Inc., & The Recording Industry Association of America, Inc, *Class 6a & 6b Opposition Comment*, (Feb. 20, 2024), [https://www.copyright.gov/1201/2024/comments/opposition/Class%206\(a\)%20and%206\(b\)%20-%20Opp'n%20-%20Joint%20Creators.pdf](https://www.copyright.gov/1201/2024/comments/opposition/Class%206(a)%20and%206(b)%20-%20Opp'n%20-%20Joint%20Creators.pdf) [hereinafter *Joint Creators Comment*]; DVD Copy Control Association & Advanced Access Content System License Administrator, *Class 6a & 6b Opposition Comment*, (Feb. 20, 2024), [https://www.copyright.gov/1201/2024/comments/opposition/Class%206\(a\)%20and%206\(b\)%20-%20Opp'n%20-%20DVD%20CCA%20and%20AACCS%20LA.pdf](https://www.copyright.gov/1201/2024/comments/opposition/Class%206(a)%20and%206(b)%20-%20Opp'n%20-%20DVD%20CCA%20and%20AACCS%20LA.pdf) [hereinafter *DVD-CCA Comment*].

<sup>4</sup> *ESA Comment* at 6.

<sup>5</sup> *Id.* at 5.

outcome, and determine their activities based on whether eligible institutions can make video games available on- or off-premises.<sup>6</sup>

Leading commercial retro game publishers, including those cited by Opponents, support a simpler and more likely possibility: the re-release market will not be harmed by the kinds of access that preservation institutions are likely to provide, and this exemption is unlikely to make much difference to anyone other than bona fide researchers, who will benefit substantially. It's this fact that has led Antstream and Limited Run Games, two major re-release publishers, to support this exemption.<sup>7</sup>

Those are the two major arguments, and in this reply, we explain further why SPN/LCA has the better of both of them. We begin by summarizing our changes to the proposed exemption to address textual concerns raised by Opponents. Then we address Opponents' remaining objections by demonstrating the lack of market harm, documenting the harm of the premises limitations, and rebutting their arguments with regards to fair use.

### ***I. The Proposed Exemption Includes Sufficient Restrictions to Ensure Uses are Non-Infringing.***

Opponents raise a number of objections to SPN/LCA's proposed language. As with previous cycles, we are more than willing to make changes to the exemption to provide additional reassurance to rightsholders when the restrictions do not conflict with the needs of preservation institutions.<sup>8</sup>

Opponents' primary concern seems to be that institutions may read the exemption to allow for broad, unmediated access to games via websites open to the public.<sup>9</sup> To the

---

<sup>6</sup> *Id.* at 11 n.77 (expressing concern that “vast numbers of unauthorized game sites whose operators could choose to style themselves as preservationists to clothe themselves with a patina of legitimacy...”).

<sup>7</sup> *Statement from Antstream Arcade in Support of Exemption*, Appendix B [hereinafter *Antstream Statement*] (“I am writing in support of the proposed DMCA exemption expanding library access to out of print video games. . . Antstream supports any service that helps preserve content and expose it to people that love it before it fades from memory forever.”); *Statement from Limited Run Games in Support of Exemption*, Appendix C [hereinafter *Limited Run Statement*] (“I support the copyright exemption proposed by the Software Preservation Network and Library Copyright Alliance.”).

<sup>8</sup> These changes are reflected in the revised exemption text in Appendix A.

<sup>9</sup> Here, as previously, Opponents invoke the Internet Archive. *ESA Comment* at 3 n.17, 11. If the Opponents have concerns about the Internet Archive's circumvention of technological protection measures, or with whether its provision of access to works is covered under fair use, they can engage with the Internet Archive directly, as they have previously with apparent success, *id.* at 8 n.52. The Copyright Office can judge for itself whether the contemporaneous availability of the Archive's video game collection has undermined what the Opponents describe as a healthy and growing market for reissues, but at least one commercial game publisher doesn't think so. See *Antstream Statement* (online resources like Internet Archive “don't in any way detract from our business”); see also *Limited Run Statement* (“Consumers have had access to

contrary, we envision an online process that would resemble the processes used in physical libraries and archives to vet users of special collections. To address Opponents' concerns that this analogy was not fully reflected in the text, the proposed exemption language now includes the requirement of individualized human review of requests for access. It is worth noting that this method is similar to the process that Corellium uses to vet user access to its research platform, a usage that the Eleventh Circuit found was fair.<sup>10</sup>

Opponents raise concerns with the use of the word "primarily" to describe the usage of games for scholarship, explaining that it could allow for "49% recreational play."<sup>11</sup> Although we are willing to remove the word "primarily" if that would make Opponents more comfortable, requiring that use be "solely" for scholarly purposes is a limitation unsupported by case law.<sup>12</sup>

Opponents also take issue with the language "private study" in the proposed exemption, arguing that the term is not "explained or justified."<sup>13</sup> It comes from Section 108, as Opponents themselves point out, and the Copyright Office in the past has focused on the language of Section 108 as a helpful guide.<sup>14</sup> But, as it is not vital to the exemption, we have removed "private study" from our updated exemption text in Appendix A.

Opponents point out that SPN/LCA's proposed language does not delete the off-premises limitation for 37 C.F.R. § 201(b)(17)(i), the exemption that covers preservation of games where external computer servers have been shut down.<sup>15</sup> We appreciate Opponents' attention to detail and provide updated language that aligns both video game

---

emulators and ROMs throughout the entire history of our industry and yet, despite the ease at which consumers can access these - consumers have still opted for legal ownership and more convenient access when they have the ability.").

<sup>10</sup> *Apple Inc. v. Corellium, LLC*, 510 F. Supp. 3d 1269, 1279 (S.D. Fla. 2020) (describing how Corellium vetted customers, including the submission of relevant background information and an individualized assessment), *aff'd in relevant part*, No. 21-12835, 2023 WL 3295671 (11th Cir. May 8, 2023).

<sup>11</sup> *ESA Comment* at 5. We may be biased, but in our experience, scholarship can be fun, perhaps even 49% fun. At times in their comments, it seems the Opponents would like us to monitor video game scholars to ensure they do not enjoy their work.

<sup>12</sup> *Apple Inc. v. Corellium, Inc.*, No. 21-12835, 2023 WL 3295671 (11th Cir. May 8, 2023) at \*8 (explaining that fair use doesn't "ask whether the new product's *only* purpose is transformative" to dismiss Apple's argument that because there were multiple uses for the software, the use was not transformative).

<sup>13</sup> *ESA Comment* at 5.

<sup>14</sup> *Id.* at 12; *see also id.* at 12 n.78; *Joint Creators Comment* at 6 n.17 (encouraging the Copyright Office to focus on Section 108).

<sup>15</sup> *ESA Comment* at 3 n.12.

exemptions.<sup>16</sup> As the ESA has argued in the past, it would be “needlessly confusing” for video game preservation to be governed by two different set of rules.<sup>17</sup>

These changes, along with existing restrictions on usage of the exemption, provide additional reassurance that uses will be non-infringing.

## ***II. The Proposed Exemption Will Not Harm the Market for Re-Released Games.***

Opponents express concern that remote access to preserved copies of games will be used for recreational purposes and will interfere with the re-release or “retro” games market.<sup>18</sup> As the Copyright Office has previously recognized, individual scholarship or preservation uses will not harm the market for re-releases,<sup>19</sup> and the exemption’s restrictions will limit the possibility of recreational use. Nonetheless, Opponents claim that granting this exemption could harm the “vibrant and growing market for authorized versions of classic games.”<sup>20</sup>

The Copyright Office should be careful about taking these claims at face value. Experts within the re-release industry disagree with the ESA’s assertion that the commercial market they serve overlaps in any way with the uses enabled by this proposed exemption.<sup>21</sup> According to these experts, the most significant barriers to a wider re-release market are not alternative options, or even market demand, but are the mundane challenges around licensing and the technical difficulty of effectively migrating a game from one platform to another. In cases where publishers overcome these challenges and reissue games, the exemption will not harm the market for these re-releases, given the differences in games that attract research attention and those appealing to recreational players.

- a) *Major re-release companies do not agree with the ESA that the exemption will cause market harm.*

Those most involved in producing re-releases are willing to go on the record to say that access of the type proposed by SPN/LCA will not negatively affect their businesses.

---

<sup>16</sup> Such language does not require a separate case because the adverse effects caused by the lack of off-premises access to preserved games where authentication servers have been deactivated are fundamentally the same as those for “complete games.”

<sup>17</sup> Entertainment Software Association, *Class 9 Opposition Comment*, (Feb. 12, 2018), [https://cdn.loc.gov/copyright/1201/2018/comments-021218/class9/Class\\_09\\_Opp'n\\_ESA.pdf](https://cdn.loc.gov/copyright/1201/2018/comments-021218/class9/Class_09_Opp'n_ESA.pdf), at 6.

<sup>18</sup> *ESA Comment* at 5.

<sup>19</sup> REGISTER’S RECOMMENDATION, SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING 268 (2018) [hereinafter 2018 RECOMMENDATION].

<sup>20</sup> *ESA Comment* at 6.

<sup>21</sup> *Antstream Statement, Limited Run Statement*.

Antstream Arcade, the only third-party provider of licensed classic games that Opponents provide as an example, supports the expanded exemption and broader efforts to provide access to out-of-print games.<sup>22</sup> Antstream sees “out of print gaming access” for researchers as the first step in “immeasurably” improving their business.<sup>23</sup>

Darren Melbourne, Antstream’s Chief Licensing Officer, further says, “[t]he more individuals researching content the easier it will be to licence it and feature it on the platform. Antstream would support any such effort.”<sup>24</sup> Hence, instead of harming the re-release market, experts believe that the exemption might make it easier to understand who holds the rights to particular games and to potentially re-commercialize them.

Antstream is not alone. Limited Run Games, another major player in this industry, also supports libraries’ and researchers’ ability to access these games remotely.<sup>25</sup> In fact, in direct conflict with Opponents’ claim of harm to various video game publishers in the classic game market,<sup>26</sup> the CEO of Limited Run Games has stated this exemption will not impact the commercial viability of its business.<sup>27</sup> Indeed, he observes that unlicensed options, whether infringing or not, have existed for the entire history of the re-release market. As he explains, “consumers have had access to emulators and ROMs throughout the entire history of our industry and yet, despite the ease at which consumers can access these – consumers have still opted for legal ownership and more convenient access when they have the ability.”<sup>28</sup>

*b) Commercial and logistical hurdles, and not competition from scholarly access, are the primary barriers to re-release market expansion.*

The reasons that these organizations believe that the exemption is unlikely to harm them are very practical—the most significant limitation to the re-release market is not infringement, but logistics.

It is difficult to re-release most games. Contrary to the ESA’s contentions, experts do not describe re-release decisions usually as a matter of rational economic choices over “nostalgia” or “suspending commercialization.”<sup>29</sup> For many works, the company that originally produced a game may no longer exist, with its intellectual property left in limbo, or bought by a larger company at firesale prices.<sup>30</sup> Or sometimes records are lost in

---

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Limited Run Statement.*

<sup>26</sup> *ESA Comment* at 6.

<sup>27</sup> *Limited Run Statement.*

<sup>28</sup> *Id.*

<sup>29</sup> *ESA Comment* at 7.

<sup>30</sup> *Antstream Statement* at 1 (Melbourne of Antstream describing the ownership difficulties encountered while trying to re-release games from Sirius Software, a video game developer which no longer exists today)

an actual fire.<sup>31</sup> In these cases, it is difficult to figure out who owns the rights to these games and who would be able to sign off on re-issuing them.<sup>32</sup> Due to the difficulty of locating the correct rightsowners, the games stay out of circulation and become inaccessible orphan works.<sup>33</sup> Game reissues also could be impossible due to time periods on the original licenses associated with a game.<sup>34</sup>

The Chief Licensing Officer of Antstream, Darren Melbourne, sums up the consequences of this logistical reality: “[b]ankruptcy, corporate acquisitions and other restructuring have also ensured that tens of thousands of games have been lost. Without an immediate and concerted effort, many of these games, which represent a huge amount of content, will be forever lost.”<sup>35</sup>

Additionally, for some games, an exact reissue is not possible at all. To play these games now, they must be modified or redesigned, altering their presentation and content.<sup>36</sup> Reissuing one game on a new platform can cost hundreds of thousands of dollars in technical development.<sup>37</sup>

Even if a game is re-issued once, that is no guarantee it will remain available, nor is it a sign that preservation access of the original is unwarranted. The 13% of games that are reissued are oftentimes trapped within the bounds of older technology and are unable to be transferred over to new platforms, making them extremely difficult to access or play.<sup>38</sup>

---

<sup>31</sup> Tracey Taylor, *Will Wright: Inspired to Make The Sims after Losing a Home*, BERKELEYSIDE (Oct. 17, 2011), <http://www.berkeleyside.org/2011/10/17/will-wright-inspired-to-make-the-sims-after-losing-a-home> [<https://perma.cc/69KA-DJ7C>] (last visited Mar 16, 2024) (explaining that Sim City creator Will Wright almost had the Sim Ant source code consumed by a fire).

<sup>32</sup> Phil Salvador, *Survey of the Video Game Reissue Market in the United States*, VIDEO GAME HISTORY FOUNDATION 9 (July 2023), available at <https://doi.org/10.5281/zenodo.8161056> [hereinafter *Game Availability Study*] (describing the example of *The Operative: No One Lives Forever (2000)* which “cannot be reissued due to an agreement that divided ownership of the game between three different companies, none of whom can prove who actually controls the rights”); see *Limited Run Statement* (citing ownership issues as a primary challenge in reissuing classic games); *Antstream Statement* at 1 (discussing difficulty finding clear line of ownership for games released before this past decade).

<sup>33</sup> *Game Availability Study* at 10 (Henry Lowood, curator of the Stephen M. Cabrinety Collection at Stanford University Libraries estimates that up to half of the collection could be considered orphaned works).

<sup>34</sup> *Id.* at 9 (discussing the role-playing *Alpha Protocol*, which was removed from digital storefronts in 2019 due to the expiration of the game’s music licenses); see also Piko Interactive, TWITTER (July 12, 2023), <https://twitter.com/Pikointeractive/status/1679185404056969216> (“1/2 In Regards of this article. It is worse than that. I (Eli) have personally reviewed every single game released since the NES all the way to GBA. And we have acquired or help acquire the majority of games that could be acquired. The rest are owned by.. 2/2 Very large companies that don’t see any benefit of releasing old games. some are stuck in third party licensing limbo (cartoons, etc), or even are no longer relevant (yearly sports games). I’ve reviewed the copyright status of over 9000 games. We have rescued a bit over 200.”).

<sup>35</sup> *Antstream Statement* at 2.

<sup>36</sup> *Game Availability Study* at 7.

<sup>37</sup> *Game Availability Study* at 7 (explaining that porting a single historical game to modern platforms can cost \$350,000).

<sup>38</sup> *Id.*

Sometimes these technical hurdles are so difficult to overcome, the games become functionally inaccessible.<sup>39</sup> In these cases, it would be exceedingly difficult and expensive to make these games functional using current technological means.<sup>40</sup>

All of this adds up to a straight-forward commercial reality: most games would never be commercially viable to re-release, and so a re-release is a labor of love,<sup>41</sup> attempted out of sheer contrariness,<sup>42</sup> or most often, will never happen. The re-release market is constrained not by the possibility of competing with copies of games provided by preservation institutions or even by free online arcades, but by the difficulties involved in re-releasing games.

c) *Recreational interest does not align with academic demand for games.*

Finally, the types of games that preservation institutions seek to preserve and provide access to are fundamentally different than those that are likely to be re-released or sought after for recreational play.<sup>43</sup>

Take, as an example, *Spec Ops: The Line*. Released in 2012, it was the last of a long-running series of first-person shooters. Diverging markedly from its predecessors, it took inspiration from Joseph Conrad's *Heart of Darkness* and the movie *Apocalypse Now*, making a strong artistic statement. To quote scholar Justin Court, "*Spec Ops: The Line* received most of its critical attention for the way it attempts to rebuke that violent vision of [first person shooter] games through the very genre itself."<sup>44</sup> The game required players use white phosphorus, a devastating chemical weapon, to advance, and featured a main

---

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 11 (describing how re-releasing *System Shock 2* required a dedicated fan to use his own resources to start a company for the purpose of re-releasing the game).

<sup>42</sup> *Limited Run Statement* at 1 (discussing difficulty to re-release the *Home Improvement: Power Tool Pursuit!* due to the licensing concerns).

<sup>43</sup> Experts have also made this point in previous rulemakings. Dr. Henry Lowood, *Testimony at the U.S. Library of Congress, Copyright Office Section 1201 Hearings* (Apr. 12, 2018) at 238 ("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. Contemporary players . . . much prefer to play the more recent versions of games . . . [t]heir interest is . . . low in the older historical versions."). See also Software Preservation Network & Library Copyright Alliance, *Class 6(b) Comment*, (Dec. 22, 2023), [https://www.copyright.gov/1201/2024/comments/Class%206\(b\)%20-%20Initial%20Comments%20-%20Software%20Preservation%20Network%20and%20Library%20Copyright%20Alliance.pdf](https://www.copyright.gov/1201/2024/comments/Class%206(b)%20-%20Initial%20Comments%20-%20Software%20Preservation%20Network%20and%20Library%20Copyright%20Alliance.pdf) at 14 [hereinafter *2023 SPN/LCA Comment*] (quoting Dr. Henry Lowood explaining how commercial projects will not be impacted by research access); Software Preservation Network & Library Copyright Alliance, *Class 14(b) Reply Comment*, [https://www.copyright.gov/1201/2021/comments/reply/Class%2014b\\_Reply\\_Software%20Preservation%20Network%20and%20Library%20Copyright%20Alliance.pdf](https://www.copyright.gov/1201/2021/comments/reply/Class%2014b_Reply_Software%20Preservation%20Network%20and%20Library%20Copyright%20Alliance.pdf) (Mar. 10, 2021) at 12 [hereinafter *2021 SPN/LCA Reply*] (explaining how the games owned, preserved, and potentially re-released by major game companies differ from those of historical interest to scholars).

<sup>44</sup> Justin Court, *Transnational Politics in Video Games: The Case of German Military Intervention in "Spec Ops: The Line"*, 39 GERMAN POLITICS AND SOCIETY 112 (2021).



character that hallucinates and eventually forces the player to confront the question of whether they are responsible for their violent actions in games.

Unsurprisingly, given its inspiration and themes, *Spec Ops: The Line* attracted a great deal of critical attention.<sup>45</sup> But ultimately, by the head writer's account, it "didn't sell,"<sup>46</sup> perhaps because it isn't particularly fun to be yelled at for committing war crimes.<sup>47</sup> In January 2024, the game was removed from sale on Steam and other major platforms—because the commercial benefits of maintaining the listing were outweighed by the costs.<sup>48</sup>

*Spec Ops: The Line*'s critical and academic appeal, as well as its significant place in the video game canon, means that there will be continued demand for access to it from scholars. But given its lack of commercial success, it seems unlikely that it would be financially viable for a company in the future to reissue it. It is exactly the kind of game for which preservation institutions are well positioned to provide access, and where there will be no harm to the reissue market from them doing so. And it shows that there are many games where there is no meaningful overlap between the interests of scholars and the commercial demand needed for a reissue.

### ***III. Opponents' Remaining Objections Are Unfounded.***

Opponents raise a number of other objections to the proposal, similar to those raised in previous cycles. Most notably, they claim that SPN/LCA have offered insufficient evidence of the harms caused by access controls and the off-premises restriction. Beyond that, they offer objections that the Copyright Office has previously considered and rejected.

---

<sup>45</sup> See, e.g., Steven Burns, *10 Years on, Spec Ops: The Line Is a Potent Indictment of Western Warmongering*, TECHRADAR (2022), <https://www.techradar.com/features/10-years-on-spec-ops-the-line-is-a-potent-indictment-of-western-warmongering> [<https://perma.cc/8RTD-WNH2>]; Colin Moriarty, *Colin Moriarty's Top 25 Games of All Time*, IGN (2014), <https://www.ign.com/articles/2014/02/07/colin-moriartys-top-25-games-of-all-time> [<https://perma.cc/MZK2-XHN7>]; see also Matthew Thomas Payne, *War Bytes: The Critique of Militainment in Spec Ops: The Line*, 31 CRITICAL STUDIES IN MEDIA COMMUNICATION 265 (2014); Tobi Smethurst, "We Put Our Hands on the Trigger with Him": *Guilt and Perpetration in Spec OPS: The Line*, 59 CRITICISM 201 (2017).

<sup>46</sup> Joe Donnelly, *Spec Ops: The Line* writer 'would eat broken glass' before considering sequel, PC GAMER (Oct. 5, 2017), <https://www.pcgamer.com/spec-ops-the-line-writer-would-eat-broken-glass-before-considering-sequel> [<https://perma.cc/EPV6-ZFXG>].

<sup>47</sup> See Tobi Smethurst, "We Put Our Hands on the Trigger with Him": *Guilt and Perpetration in Spec OPS: The Line*, 59 CRITICISM 201, 203-04 (2017) ("... the results of the choices they make are then thrown back in the player's face time and again, they are forced to witness the grisly results of the deeds committed by the character under their control.").

<sup>48</sup> Ash Parrish, *Spec Ops: The Line* permanently removed from Steam and other digital stores, THE VERGE (Jan. 30, 2024), <https://www.theverge.com/2024/1/30/24055807/spec-ops-the-line-delisting-licensing-2k> [<https://perma.cc/F3X7-EVNR>].

- a) *The harms to scholarship, teaching, and research are significant and more than justify an exemption for limited and vetted off-premises access.*

Opponents argue that the harms to scholarship, teaching, and research are “hypothetical”<sup>49</sup> or not tethered to access controls, and are thus outweighed by the potential for market harm.<sup>50</sup> At this point, we have spent years providing detailed evidence<sup>51</sup> about the challenges involved in video game preservation and the way which Section 1201’s restrictions harm the scholarly record, and provide, in this comment, as in previous ones, specific examples of harms caused by not allowing off-premises access.<sup>52</sup> But to recap, games are held at a small number of institutions,<sup>53</sup> most scholars cannot pay to travel and stay for extensive periods of time to access these games,<sup>54</sup> scholars who

---

<sup>49</sup> See *ESA Comment* at 15 (arguing that the Duck Hunt example is “exaggerated” or “speculative”). It is true that we do not reference a specific scholar who wishes to engage with Duck Hunt. The example is valuable regardless, as it speaks to the dilemma that preservation institutions find themselves in. In its opposition comment, the ESA suggests that a librarian might just make the game available on Wii U. *ESA Comment* at 15. The game may be playable on Wii U, but as SPN/LCA mentioned in our initial comment, the Wii U console is not commercially available, and it is impossible for a scholar or library to purchase the game on Wii U, or if they had purchased it, to download it. *Wii U & Nintendo 3DS eShop Discontinuation Q&A*, NINTENDO SUPPORT, [https://en-americas-support.nintendo.com/app/answers/detail/a\\_id/57847/~/wii-u-%26-nintendo-3ds-eshop-discontinuation-q%26a](https://en-americas-support.nintendo.com/app/answers/detail/a_id/57847/~/wii-u-%26-nintendo-3ds-eshop-discontinuation-q%26a) [<https://perma.cc/38WP-TD6T>]. Furthermore, the copy of Duck Hunt owned by University of Michigan is not the Wii U version, so in order to play the game on Wii U, someone would presumably have to “jailbreak” the console, which the ESA has grave concerns about. *ESA Comment* at 9. Although Opponents accuse SPN/LCA of engaging in speculation, they are the ones who have now constructed an elaborate hypothetical around access to a game that is of eminent scholarly interest. See Clara Fernández-Vara and Nick Montfort, *Videogame Editions for Play and Study*, THE TROPE TANK (2013), available at <https://dspace.mit.edu/bitstream/handle/1721.1/87668/TROPE-13-02.pdf>.

<sup>50</sup> *ESA Comment* at 8.

<sup>51</sup> 2023 *SPN/LCA Comment* at 17; 2021 *SPN/LCA Reply* at 17 (statement from Dr. Bo Ruberg about harms to video game and scholarship and teaching); *id.* at 15-16 (interview with Dr. Adrienne Shaw explaining how video game scholars lack access to important historical works); Software Preservation Network & Library Copyright Alliance *Class 14(b) Comment*, (Dec. 14, 2021), <https://www.copyright.gov/1201/2021/comments/Class%2014a%20and%2014b%20InitialComments%20Software%20Preservation%20Network%20and%20Library%20Copyright%20Alliance.pdf> at 11 [hereinafter 2021 *SPN/LCA Comment*] (statement from Phil Salvador about the lack of availability of niche historical games and resultant scholarly harm); *id.* (statement from Catherine Addington saying that researchers switch topics if they find access to software difficult); Software Preservation Network & Library Copyright Alliance *Class 9 Comment*, (Dec. 18, 2017), <https://cdn.loc.gov/copyright/1201/2018/comments-121817/class9/class-09-initialcomments-spn-lca.pdf> at 26 [hereinafter 2017 *SPN/LCA Comment*] (statement from Heath Reinhard about how anti-circumvention rules prevent making copies of fragile games); *id.* at 29 (statement from Dr. Henry Lowood explaining how digital game preservation requires circumvention and is required to support “the work of researchers, students, and others who wish to learn about the history of digital games”).

<sup>52</sup> See 2023 *SPN/LCA Comment* at 7 (describing an example of how a delicate original game could not be provided via digital access because of the on-premises restriction); *id.* at 5 (quoting Andrew Borman explaining that one-of-a-kind items in the Strong’s collection could change scholarship if access could be provided); 2021 *SPN/LCA Reply* at 18 (“remote access is the only thing that would make it possible for those who do not focus on mainstream, current games to do their work”); 2021 *SPN/LCA Comment* at 11 (given the time involved in game studies, it is impractical to travel to a video game museum to play a specific game).

<sup>53</sup> 2023 *SPN/LCA Comment* at 2-3, 16, 17; 2021 *SPN/LCA Reply* at 14.

<sup>54</sup> 2023 *SPN/LCA Comment* at 17; 2021 *SPN/LCA Reply* at 17.

study games that are less popular or were historically niche are particularly disadvantaged,<sup>55</sup> and basic remote access akin to the type available in other disciplines is seen as a mindblowing development that would revolutionize the field.<sup>56</sup>

The off-premises limitation harms and will continue to directly harm individuals interested in further scholarship in the next three years. Lack of research access to 87% of video games harms video game research. Opponents' Google searches show that video game scholarship persists despite these barriers, not that it is "flourishing."<sup>57</sup> SPN/LCA have repeatedly provided expert testimony from video game scholars that scholarship and teaching are harmed by limited access to preserved video games.<sup>58</sup>

Research on the few historical games that are available does not prove the lack of difficulty in researching games, especially in light of evidence from SPN/LCA that scholars change topics when they meet access roadblocks.<sup>59</sup> These choices can have profound consequences for the scholarship itself. Alyssa Sepinwal, a history scholar, shared that access barriers meant that she almost gave up on her research into two niche games that depict slave rebellions in Haiti—even though they were the only ones produced by descendants of enslaved people in the French Caribbean.<sup>60</sup> Adrienne Shaw, an associate professor at Temple University, explains that she "largely just change[s] [her] research plans if [she can't] access a game easily," and that she "often start[s] with games [she does] have access to."<sup>61</sup>

To provide an additional example, Lillian McIntyre, a PhD student from the University of Hawaii, recounted how difficult the on-premises limitation made her research. When she was completing her masters degree, she tried to access *Xenogears*, but was thwarted due to the technical inaccessibility of the game with currently available consoles.<sup>62</sup> Apart from

---

<sup>55</sup> 2021 SPN/LCA Reply at 17.

<sup>56</sup> 2023 SPN/LCA Comment at 17; 2021 SPN/LCA Reply at 17, 20-21.

<sup>57</sup> ESA Comment at 15. It is worth noting that the ESA does not provide information about the search terms or queries. In order for the Copyright Office to consider such evidence, ESA would need to provide additional documentation, since as it stands "neither [the Register] nor the opponents [are] able to review the context or accuracy of these ... references." See REGISTER'S RECOMMENDATION, SECTION 1201 RULEMAKING: EIGHTH TRIENNIAL PROCEEDING 263 n.1456 (2021) [hereinafter 2021 RECOMMENDATION].

<sup>58</sup> See 2021 SPN/LCA Reply Comment at 21 (analyzing video game researchers' interest in conducting so many more studies that they cannot do currently because of the lack of access to historical games).

<sup>59</sup> 2023 SPN/LCA Comment at 8.

<sup>60</sup> Email from Alyssa Sepinwall to Kendra Albert (Mar. 15, 2024) ("In this particular case, both *Freedom: Rebels in the Darkness* and *Méwilo* were pioneering games in approaching the history of slavery and of French colonialism – and they had not received analysis from scholars of French colonialism (the only mentions I found of them were from vintage game bloggers like Phil [Salvador]). Patrick Chamoiseau, who wrote the texts for these games alongside Muriel Tramis (who was the first Black woman game designer, according to Elijah Lee) is a legendary French Caribbean novelist, who has won many prizes and written in many media – but none of the books on his scholarship that I found seemed aware of this aspect of his work, co-creating these two games on slavery in the late 1980s.")

<sup>61</sup> Email from Adrienne Shaw to Kendra Albert (Mar. 7, 2024).

<sup>62</sup> Email from Lillian McIntyre to Phil Salvador (Mar. 1, 2024).

the fact that the preservation of the game in a library would have been extremely useful to her, the off-premises limitation made her research even more difficult, given her residence in Hawaii.<sup>63</sup> The game takes 65 hours to complete, which means that McIntyre would need to have prepared for days or even weeks of travel, lodging, childcare, and other accommodations to play through the game—let alone critically analyze the game through screenshots and notes.<sup>64</sup>

Furthermore, in order to follow best practices in her field, a researcher like McIntyre would need to return to the library to access a game like this more than once. Research is an iterative process and researchers engage and return to sources many times while investigating a topic. The on-premises restriction limits scholars ability to engage in best practices even if they do manage to travel to access a game.

Jaroslav Švelch, a games scholar based in the Czech Republic, shared with SPN/LCA that his scholarship has been harmed by limits on off-premises access. In the past, he focused on an early computer role-playing game called “Wizardry: Proving Grounds of a Mad Overlord.”<sup>65</sup> Although the Strong Museum of Play had a copy in its collection, no European libraries did. As Švelch could not visit the Strong in-person at the time, he relied on a copy of dubious provenance produced for a different platform. As he explained, “having access to the emulated version online legally would be much more useful for my research.”<sup>66</sup> Multiple game researchers provided similar stories to Švelch, explaining that libraries’ inability to provide remote access to games for research led them to choose different research topics or explore websites and platforms with unclear legal status as a way to obtain access for their lawful uses.<sup>67</sup> This is evidence that the off-premises limitation is directly harming research, scholarship, and teaching about video games. As the Copyright Office has already found, these harms are caused by the

---

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* Funding for students doing this research is limited and for those fellowships that do provide a substantial weekly stipend, most of those funds would have to be used for a plane ticket to the collecting institution. *See 2023 SPN/LCA Comment* at 17.

<sup>65</sup> In September 2023, Digital Eclipse released a remake of *Wizardry: Proving Grounds of a Mad Overlord*. This remake was not available during the period in which Švelch was engaged in his research, and as proponents have previously explained, remakes do not fulfill the needs of scholars who engage with historical games. *See 2023 SPN/LCA Comment* at 20; *2021 SPN/LCA Reply* at 19-20.

<sup>66</sup> Email from Jaroslav Švelch to Kendra Albert (March 11, 2024).

<sup>67</sup> Email from Laine Nooney to Kendra Albert (March 4, 2024); Email from Adrienne Shaw to Kendra Albert (March 7, 2024); Email from Matt Shoemaker to Kendra Albert (March 7, 2024). A theme across many stories of the harm of the premises restriction was that scholars are forced to find and use video game copies that Opponents would likely consider to be infringing or are held by the type of institutions that they decry. This both has practical harms, as Švelch explains, but also suggests that granting the exemption would divert scholarly users away from these platforms, reducing rather than increasing their footprint. *See also 2023 SPN/LCA Comment* at 20 (pointing out that the status quo provides no legal way for most scholars to access games).

restrictions that preservation institutions must enforce on access to works because of Section 1201.<sup>68</sup>

b) *The Copyright Office has already addressed, and should not revisit, some of Opponents' objections to the exemption.*

This triennial proceeding was Congress's way of addressing concerns raised by libraries, archives, and others that Section 1201 would enable copyright holders to restrict via technological protection measures (TPMs) the lawful uses they cannot control by copyright law.<sup>69</sup> By creating this proceeding specifically to safeguard lawful uses burdened by TPMs, Congress has already foreclosed the argument at the core of Opponents' objections. Their market prerogatives do not trump the public interest, especially when the market effects they posit are purely hypothetical. Opponents attempt to relitigate the question of whether research access to games is a fair use, which has been settled for two cycles of this rulemaking and has only been strengthened by intervening case law.

More specifically, Opponents attempt to relitigate the question of what kinds of institutions should be eligible for the exemption. They argue that the physical premises restriction for access was actually a limit on the kinds of institutions could claim the exemption,<sup>70</sup> and they warn that the exemption continues to include for-profit entities as potential beneficiaries, even though said entities cannot take advantage of the exemption unless they stand to gain no direct or indirect commercial advantage.<sup>71</sup> Opponents offer no case law to suggest that these requirements are inherent in the fair use analysis, and

---

<sup>68</sup> The Joint Creators Comment argues that the harm that comes from not allowing off-premises access is not because of access controls and therefore should not be a harm that this proceeding should concern. *Joint Creators Comment* at 9. The Copyright Office has dismissed this claim in the past, as it should here. 2021 RECOMMENDATION at 276. If an institution is legally prohibited from providing access to a researcher remotely because a TPM was circumvented, the inability to provide remote access is a harm caused by the TPM.

<sup>69</sup> See H.R. REP. NO. 105-551, pt. 2, at 35-36 (1998).

<sup>70</sup> *ESA Comment* at 9. The ESA also likewise expresses concern that allowing for distribution outside of a physical premises will increase the risk of harm from console circumvention. *Id.* The ability to circumvent access controls for consoles is specifically restricted under the exemption, to the extent necessary to engage in preservation activities already authorized by the other exemptions, and allowing eligible institutions to proceed without a physical premise does not change that.

<sup>71</sup> Opponents tout their support for game preservation. See *ESA Comment* at 2 ("ESA and its member companies are committed to, and actively support, serious professional efforts to preserve video games and recognize the industry's creative contributions under circumstances that do not jeopardize game companies' rights under copyright law."). Given the rights issues raised by Antstream and Limited Run (e.g., many historic games are caught in a tangled web of license agreements that leave publishers without clear rights to re-release) and the messy reality of preservation, it is possible that some internal preservation efforts by game publishers are lawful due to the current exemption's recognition that for-profit entities may also engage in circumvention for preservation without commercial advantage.

the Copyright Office rejected those arguments in its Section 108 Discussion Document, from which the eligibility requirements in this exemption are derived.<sup>72</sup>

#### **IV. Opponents Mischaracterize and Misapply Section 107.**

The proposed exemption is designed to support scholarship, teaching, and research—uses listed as exemplary in Section 107.<sup>73</sup> While the Opponents have agreed that these uses are “often fair uses” which are “favored”,<sup>74</sup> they believe that a fair use analysis should be premised on the possibility that the exemption is invoked for recreational purposes.<sup>75</sup> Our proposed revisions to the exemption language in Appendix A further clarify the purpose of our modification<sup>76</sup> and ensure that uses will enable scholarship, teaching, and research—establishing the presumption that the exemption’s uses are non-infringing.

Beyond these revisions, Opponents’ objections demand a specificity that is anathema to a good faith application of fair use. The Supreme Court explained in *Google v. Oracle* that fair use’s “basic purpose” is to “provid[e] a context-based check that can help to keep a copyright monopoly within its lawful bounds.”<sup>77</sup> Fair use accommodates the context that scholars might need hours to days with their source material, and would therefore not mandate the requirement that the exemption provide a specific time limit applicable to all users. Fair use accommodates the context that eligible institutions independently decide the sort of “reasonable digital security measures [that are] appropriate for the activities in question,”<sup>78</sup> instead of mandating specific details about digital monitoring.<sup>79</sup>

---

<sup>72</sup> UNITED STATES COPYRIGHT OFFICE, SECTION 108 OF TITLE 17: A DISCUSSION DOCUMENT OF THE REGISTER OF COPYRIGHTS 19, 22 (Sept. 2017), <https://www.copyright.gov/policy/section108/discussion-document.pdf>; *id.* 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.”).

<sup>73</sup> *DVD-CCA Comment* at 4 (states that the proposed expansion does not fall within Section 108(g)). But our proposed exemption relies on Section 107 and not Section 108. See *2023 SPN/LCA Comment* at 11.

<sup>74</sup> 17 U.S.C. § 107 (“fair use... for purposes such as...teaching...scholarship, or research, is not an infringement of copyright”); see *ESA Comment* at 10, 12.

<sup>75</sup> *ESA Comment* at 10 (“The Register has found that preservation, research and teaching are often fair uses. However, that isn’t the relevant question for analysis of SPN/LCA’s proposal in this proceeding. Instead, the analysis must take into account the full range of activity in which users are likely to engage if the proposal was adopted, and that includes the significant risk of use of preserved video games for recreational purposes.”).

<sup>76</sup> See Appendix A for clarification that eligible institutions would need to conduct an “individualized human review” to confirm that the uses will be “for the purposes of scholarship, teaching, or research.”

<sup>77</sup> *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1198 (2021).

<sup>78</sup> 37 C.F.R. §201(b)(17)(iv)(e)(5).

<sup>79</sup> In *Corellium*, the court found that the uses in question were fair and there was no need to monitor users to make sure they engaged in transformative purposes. *Apple Inc. v. Corellium, LLC*, 510 F. Supp. 3d 1269,

We address Opponents' remaining fair use-specific concerns in turn.

a) *Purpose and Character of the Use*

The 2021 Register's Recommendation stated that uses of video game materials for scholarship, preservation, research, and teaching weighs in favor of the first factor of the fair use test and that "proponents' proposed expanded uses are noncommercial in nature."<sup>80</sup> Our proposed revisions to the exemption language address the Copyright Office's concerns that the exemption might be used "primarily for entertainment purposes."<sup>81</sup>

Opponents nevertheless try to argue that factor one analysis has changed since 2021, including claiming that the district court opinion in *Hachette* upends the settled law on what constitutes commercial vs. noncommercial use.<sup>82</sup> The Copyright Office should decline to reconsider its prior conclusions in this rulemaking based on a single district court decision, especially given the number of courts with contrary holdings (including the Court of Appeals for the Second Circuit).<sup>83</sup>

---

1280 (S.D. Fla. 2020) ("Corellium does not have the same control over the on-premises version of the Corellium Product; there is no way to even know where the product is after it has been shipped from Corellium, and customers are not required to keep the product in a particular location upon sale. Instead, Corellium asserts that it relies on the legal enforcement of licensing or end user agreements to ensure that its customers comply with any legal requirements."). In fact, core library patron privacy principles suggest that it would be inappropriate even if the usage would be in-person. See *Privacy: An Interpretation of the Library Bill of Rights*, AMERICAN LIBRARY ASSOCIATION (July 7, 2006) <http://www.ala.org/advocacy/intfreedom/librarybill/interpretations/privacy> [<https://perma.cc/77VN-QH5N>].

<sup>80</sup> 2021 RECOMMENDATION at 270.

<sup>81</sup> *Id.* at 273.

<sup>82</sup> See *Joint Creators Comment* at 7; *ESA Comment* at 12. The *Hachette* District Court's conception of commercial use contradicts the Second Circuit's nuanced understanding of commercialism, which requires that courts "differentiat[e] between a direct commercial use and [a] more indirect relation to commercial activity." *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 921 (2d Cir. 1994).

<sup>83</sup> *Id.*; *Authors Guild v. Google, Inc.*, 804 F.3d 202, 218–19 (2d Cir. 2015) ("Our court has since repeatedly rejected the contention that commercial motivation should outweigh a convincing transformative purpose and absence of significant substitutive competition with the original."); *Rogers v. Koons*, 960 F. 2d 301, 309 (2d Cir. 1992) (explaining that the "profit motive is not controlling"). See also *Diversey v. Schmidly*, 738 F.3d 1196, 1203 (10th Cir. 2013) (finding that distributing a dissertation within a university library was a "non-commercial, educational purpose at the heart of the protection for fair use"); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (U.S. Ct. Cl. 1973) (holding that medical libraries "devoted...to the advancement and dissemination" of information could photocopy articles for that purpose under fair use), *aff'd*, 420 U.S. 376 (1975); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994) (holding that even a finding of commerciality does not hold "presumptive significance" in fair use factor one analysis); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 n.33 (1984) (dismissing argument that home taping was commercial use because a home viewer might otherwise buy tapes from a copyright holder).



Opponents did not address our contention<sup>84</sup> that verbatim reproductions are transformative if they serve a new purpose and add value or functionality that serves copyright law’s objectives.<sup>85</sup> *Warhol*, which the Joint Creators cite in favor of their argument of non-transformativeness, made it clear that the specific factual context of that case mattered to its finding on the first factor.<sup>86</sup> *Warhol* pertained to visual artworks competing in the same commercial market, did not directly engage with the technical and functional aspects of software, and did not grapple with the level of copying permitted under fair use for preservation or research purposes.<sup>87</sup> *Google v. Oracle* and *Corellium* are better guideposts for any transformativeness analysis of our exemption, given the similarity of factual context. As with *Corellium*, our proposed off-premises access of video games is not “geared towards the same consumer-oriented function” as recreational play, but rather “giv[es] researchers the ability to examine and understand” the underlying work<sup>88</sup> and “serve a research function.”<sup>89</sup> These are different uses, with different purposes.<sup>90</sup>

---

<sup>84</sup> See 2023 SPN/LCA Comment at 10.

<sup>85</sup> See, e.g., *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014) (“[A] secondary work ‘can be transformative in function or purpose without altering or actually adding to the original work.’” (quoting *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009))); *Am. Soc’y for Testing & Materials, et al. v. Public.Resource.Org, Inc.*, 896 F.3d 437, 450 (D.C. Cir. 2018) (admonishing lower court for inadequately considering whether “distributing copies of the law for purposes of facilitating public access could constitute transformative use”); *Authors Guild v. Google*, 804 F.3d 202, 216–17 (2d Cir. 2015) (holding that digitizing entire books to enable full text search constituted a “highly transformative purpose”); *Apple Inc. v. Corellium, Inc.*, No. 21-12835, 2023 WL 3295671 at \*6 (11th Cir. May 8, 2023) (“Even verbatim copying may be transformative so long as the copy serves a different function than the original work.” (citing *Cambridge University Press v. Patton*, 769 F.3d 1232, 1262 (11th Cir. 2014))) (internal quotations and citations omitted).

<sup>86</sup> *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 527–550 (2023).

<sup>87</sup> *Id.* at 514–522.

<sup>88</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>89</sup> *Id.* at \*8.

<sup>90</sup> Recreational play is distinguishable from scholarly study. Recreational gamers focus on having fun, beating other game players, or completing the game. The academic analysis of games as cultural artifacts demands a level of perspective beyond simply playing for entertainment value. Video game scholars take care to “capture screenshots and footage, transcribe portions of dialogue when needed, and generally take notes” to navigate the game through various theoretical frameworks. Email from Lillian McIntyre to Phil Salvador (Mar. 1, 2024). While critics noted that the video game *Spec Ops: The Line* was a “commercial failure,” Joe Donnelly, *Spec Ops: The Line* writer ‘would eat broken glass’ before considering sequel, PC GAMER (Oct. 5, 2017), <https://www.pcgamer.com/spec-ops-the-line-writer-would-eat-broken-glass-before-considering-sequel> [<https://perma.cc/3SD2-PDFU>]—possibly because of “uneven” minute-to-minute gameplay” and “loose but adequate” third-person shooter mechanics, Matt Bertz, *Spec Ops: The Line* Review, GAME INFORMER (Jun. 26, 2012), [https://www.gameinformer.com/games/spec\\_ops\\_the\\_line/b/ps3/archive/2012/06/26/review.aspx](https://www.gameinformer.com/games/spec_ops_the_line/b/ps3/archive/2012/06/26/review.aspx) [<https://perma.cc/2RTR-ZNXZ>], which would be of concern to recreational users—critic and academic Brendan Keogh used his walkthrough of the game to address existential questions about the nature of



Like the relevant emulation technology in *Corellium*, remote emulation access to preserved video games also “does not supersede” the original technology<sup>91</sup>—in part because emulation technology will not provide the same recreational experience that original game technology does, and in part because it provides special affordances that support research, not recreation.<sup>92</sup>

The first factor favors a finding of fair use.

#### *b) Nature of the Copyrighted Work*

While the Opponents protest that we “go beyond” the holding of *Authors Guild v. Google*,<sup>93</sup> it is not just that court that found that the second factor favors fair use “where... the user’s purpose is different, non-superseding, and transformative.”<sup>94</sup> But even independent of this, the second factor is not dispositive and of limited importance generally.<sup>95</sup> Even if it weighs against fair use, the uses are still fair.

#### *c) Amount and Substantiality of Portion Used*

The Register’s 2021 Recommendation acknowledges that, in the case of copying an entire work, “this factor does not necessarily weigh against fair use, as it may be necessary to copy an entire work to provide researchers with access to the work for education or research purposes.”<sup>96</sup> The Opponents appear to be concerned about the use of entire

---

violence in a 50,000 word book that analyzes the game’s opening menu, loading screens, narrative design, and player decisions. Brendan Keogh, *Killing is Harmless*, ITCH.IO, <https://brkeogh.itch.io/killing-is-harmless> [<https://perma.cc/SM2M-FNWX>].

<sup>91</sup> *Apple Inc. v. Corellium, Inc.*, No. 21-12835, 2023 WL 3295671 at \*7 (11th Cir. May 8, 2023).

<sup>92</sup> See 2023 *SPN/LCA Comment* at 10, 14 (emulation loses many features that recreational users would prefer to have while playing).

<sup>93</sup> *ESA Comment* at 13. From the footnote itself, it is unclear whether Opponents are arguing that we extend too far beyond the overall holding of *Authors Guild* (a holding which is nevertheless favorable to our argument) or that we extend too far beyond *Authors Guild*’s treatment of factor two. *Id.* at n.91.

<sup>94</sup> See *Authors Guild*, at 220 (2d Cir. 2015); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98 (2d Cir. 2014).

<sup>95</sup> See *Campbell*, 510 U.S. at 586; *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015) (“The second factor has rarely played a significant role in the determination of a fair use dispute... courts have hardly ever found that the second factor in isolation played a large role in explaining a fair use decision.”); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98 (2d Cir. 2014) (“The second fair-use factor—the nature of the copyrighted work—is not dispositive.”); *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013) (“this factor may be of limited usefulness where, as here, the creative work of art is being used for a transformative purpose.”) (internal citations omitted); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006) (holding that “...the second factor may be of limited usefulness where the creative work of art is being used a transformative purpose.”).

<sup>96</sup> 2021 RECOMMENDATION at 274. See also *Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194, 202 (4th Cir. 1998) (finding copying of entire work to aid scholar’s commentary and criticism of it to be transformative); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (copying and use of entire work for scholarly purposes was fair); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 642 (4th Cir. 2009)

games “for recreational purposes”<sup>97</sup> in a manner considered “substitutional”<sup>98</sup> of the commercial market. Our proposed language would not permit such uses, and thus Opponents’ only third factor argument fails.

As in *Corellium*, use of the entirety of the video game is “tethered” to the transformative purpose that necessitates access to any of it.<sup>99</sup> Thus, the “amount and substantiality of the portion used in relation to the copyrighted work as a whole” is “reasonable in relation to the purpose of the copying.” The third factor favors SPN/LCA.

*d) Effect of Use on Potential Market*

Opponents argue that the proposed exemption does not require any practices that would mitigate the risk of recreational play of historical games.<sup>100</sup> In reality, the originally proposed exemption included multiple safeguards to discourage non-research uses, and our revised proposal requires individualized human vetting—a traditional library practice and safeguard—in connection with any user’s proposed remote access to video games. Individual review of requests to access games are, at the very least, a “security measure [that] could address some of Opponents’ concern regarding potential market harms.”<sup>101</sup>

The remainder of Opponents’ arguments on this factor focus on the impact of bad faith invocations of the exemption, attempting to hold us accountable for the actions of users who exceed the bounds of our proposal. An analysis of factor four as applied to technological uses does not look at potential users who *abuse* an exemption, but at whether the *use* itself would cause substantial economic harm.<sup>102</sup> In *Corellium*, the Eleventh Circuit rejected arguments from Apple that the hypothetical existence of nefarious actors who might otherwise use lawful technology to harm the public should

---

(copying and use of entire work for plagiarism detection fair); *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 90 (2d Cir. 2014) (copying and use of entire recording for disseminating important financial information was fair); *Am. Inst. Of Physics v. Schwegman, Lundberg & Woessner, P.A.*, No. CIV. 12-528 RHK/JJK, 2013 WL 4666330 at \*16 (D. Minn. Aug. 30, 2013) (copying and use of entire work when used for internal purposes at law firm was fair); *White v. West Pub. Corp.*, 29 F. Supp. 3d 396, 399 (S.D.N.Y. 2014) (copying and use of entire work for providing research access and search was fair).

<sup>97</sup> *ESA Comment* at 13.

<sup>98</sup> *Joint Creators Comment* at 7.

<sup>99</sup> *Corellium*, 2023 WL 3295671 at \*10.

<sup>100</sup> *See ESA Comment* at 14.

<sup>101</sup> 2021 RECOMMENDATION at 275-6.

<sup>102</sup> *Corellium*, 2023 WL 3295671 at \*11 (“Rather, it is whether [the defendant’s] use—taking into account the damage that might occur if everybody did it—would cause substantial economic harm such that allowing it would frustrate the purposes of copyright by materially impairing [the plaintiff’s] incentive to [create] the work.”); *see also Authors Guild*, 804 F.3d at 224 (noting that a fair use might cause some loss of sales but that does not necessarily rise to a meaningful or significant effect upon the market).

weigh against fair use.<sup>103</sup> Doing so would bar any form of fair use, since any technology is theoretically subject to abuse and therefore loss of revenue for copyright holders.

As a reminder, the games covered by this exemption are not available on the commercial market. There can be no harm to a market for games that are not commercially available.

With regard to the market for derivative works, Opponents do not argue with the Video Game History Foundation Game Availability Study's findings that the vast majority of games are never re-released, and that reissues are generally limited to a handful of well-known, popular games. Of course, it is unclear whether even non-academic access to preserved video games would harm the re-release market.<sup>104</sup> But scholarly use will not. There is no evidence that limited academic access negatively impacts those games that do get re-released.<sup>105</sup> As SPN/LCA have discussed extensively in previous filings, library-based emulation does not deliver a comparable experience to a platform specific re-release.<sup>106</sup> To quote the Chief Licensing Officer of Antstream Arcade, "[a]t the end of the day the consumer wants the ability to play classic games that they love in the easiest way possible. The last thing that they want to have to do is fiddle around with browser based emulation."<sup>107</sup>

The fourth factor favors fair use, and with it, SPN/LCA have met our burden of showing that the proposed off-premises uses are likely to be fair with respect to video games.

## ***V. The Proposed Exemption Should Be Granted.***

"The goal of copyright is to stimulate the creation of new works, not to furnish copyright holders with control over all markets."<sup>108</sup> Opponents cannot control through section 1201 what they do not have the right to control through the Copyright Act. Opponents argue that a conjectural impediment to a hypothetical future profit trumps the right of scholars to study, teachers to teach, and everyone to learn from the past. The Copyright Office should reject this argument, as it has in previous rulemaking cycles, and vindicate the rights of video game preservationists and scholars.

---

<sup>103</sup> *Corellium*, 2023 WL 3295671 at \*13 ("Apple hypothesizes that nefarious actors may do bad things with Corellium's software. But, even if this were a relevant consideration under the fair use test, Apple has offered no non-speculative evidence that CORSEC has ever harmed the public.").

<sup>104</sup> See Section II, *infra*.

<sup>105</sup> See 2018 RECOMMENDATION at 278 ("[t]here is no evidence that the current exemption has harmed the market for video games, including reissued games or sequels").

<sup>106</sup> 2023 *SPN/LCA Comment* at 10 ("Emulated use avoids the sticky buttons and drifting joysticks that recreational retro gamers love in favor of historical and technological details that are only pertinent to serious scholars."); *id.* at 10; 2021 *SPN/LCA Reply* at 10 (the quality and features of emulated games are only available in reduced formats, thus they wouldn't supplant a market for recreational gaming).

<sup>107</sup> *Antstream Statement* at 3.

<sup>108</sup> *Cambridge University Press v. Patton*, 769 F.3d 1232, 1276 (11th Cir. 2014).

## APPENDIX A

### PROPOSED EXEMPTION LANGUAGE

#### **Proposed Exemption:**

(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.

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 after the eligible institution acts to ensure that users seeking off-premises access to works are doing so for the purposes of scholarship, teaching, or research by: 1) specifically determining that the user's interest is scholarship, teaching, or research through individualized human review of each applicant and their stated purposes, 2) instituting access restrictions appropriate to the nature of the use and the material, and 3) notifying users that they are receiving access to copyrighted material subject to adherence with applicable laws.

(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.

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 after the eligible institution acts to ensure that users seeking off-premises access to works are doing so for the purposes of scholarship, teaching, or research by: 1) specifically determining that the user's interest is

scholarship, teaching, or research through individualized human review of each applicant and their stated purposes, 2) instituting access restrictions appropriate to the nature of the use and the material, and 3) notifying users that they are receiving access to copyrighted material subject to adherence with applicable laws.

(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)(17)(i)(B) or (b)(17)(ii) of this section.

### **Redline with Changes from Previous Exemptions:**

(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.~~

*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 after the eligible institution acts to ensure that users seeking off-premises access to works are doing so for the purposes of scholarship, teaching, or research by: 1) specifically determining that the user's interest is scholarship, teaching, or research through individualized human review of each applicant and their stated purposes, 2) instituting access restrictions appropriate to the nature of the use and the material, and 3) notifying users that they are receiving access to copyrighted material subject to adherence with applicable laws.*

(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.~~

*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 after the eligible institution acts to ensure that users seeking off-premises access to works are doing so for the purposes of scholarship, teaching, or research by: 1) specifically determining that the user's interest is scholarship, teaching, or research through individualized human review of each applicant and their stated purposes, 2) instituting access restrictions appropriate to the nature of the use and the material, and 3) notifying users that they are receiving access to copyrighted material subject to adherence with applicable laws.*

(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)(17)(i)(B) or (b)(17)(ii) of this section.

**Statement of Darren Melbourne**  
**Chief Licensing Officer at Antstream Arcade**  
**March 12, 2024**

---



I am writing in support of the proposed DMCA exemption expanding library access to out of print video games. Antstream Arcade is a streaming platform for retro games with over 1300 games available to play across a variety of devices. Because we were mentioned in a recent filing as an example of the growing market for retro games, I wanted to share some of our experiences on the realities of the retro market and how the proposal for a copyright exemption would if anything *positively* impact our business.

One of the biggest challenges that Antstream faces as a company is establishing the legal provenance of a game. If we estimate that since 1972 there have been well over half a million games created across multiple formats including home computers, consoles and arcade games and more laterally the mobile games market.

Content that has been created in the past decade usually has a clear line of ownership with copyrights and trademarks also relatively easy to establish. However in the preceding decades most of the records have been lost to time and as such working with these titles is either problematic or impossible. It's perhaps easier to give real world examples here that will illustrate the issues we have and the commercial reality of working with retro content:

In the early 1980s there was an explosion within the burgeoning video games industry. One of the companies that sprung up during this time was called Sirius Software, spearheaded by an extravert entrepreneur called Jerry Jewell. Sirius Software released over 160 games on a variety of home computers in a four year period, before closing its doors in 1984. Some of these titles were renowned for their quality and genre creating originality. However, since 1984 these titles have been lost to the world. I set out to locate Jerry Jewell in 2018 and to try and work through the provenance of the games.

We finally managed to get Jerry to speak with us after four years of knocking on digital doors. Unfortunately the issues started there. Obviously Jerry has no paperwork pertaining to a bankruptcy that took place in a different life. He has no digital records, no archiving of the game content and no paper parts for artwork or manuals. He doesn't have any of the records proving that the music copyrights were assigned to the company and he doesn't have the agreements with the original company. Therefore, of the 160 published Sirius titles, he couldn't actually let us work with any of them.

Our team continued to work with Jerry over the next couple of years, establishing copyrights whenever we were able to, contacting original authors on his behalf and working to try and fill in the gaps. So far, after a cumulative six years of shared effort we have the rights to work with eight of the 160 titles. For us to continue clearing the rights to the remaining 152 titles will likely take another decade and a huge amount of financial commitment, which largely makes the research financially unviable. The end result to this of course is that the remaining games will forever remain unused and lost to future generations.

This is one example from the hundreds that I could give!

Another example is a company like Electronic Arts. EA produced hundreds of games across the 1980's, most of which are languishing, unused. The issue that we have here is again, even a company like EA doesn't have records from the 1980's, meaning that they can't say for certainty if they own a piece of content or not. Any

large publishing organisation never wants to open themselves up to a potential lawsuit and as such EA won't therefore allow anyone to legally use their content.

With larger organisations there is a potential remedy, we can of course pay for them to investigate the provenance of the titles themselves. This seems to be an ideal answer to the problem until you realise that each of these investigations carries a cost of between \$50,000 - \$100,000 per title. Even then there are no guarantees that the respective legal departments will manage to clear the copyright to a degree that it can be used. Either way we would have to pay for their efforts, meaning a potential bill of millions of dollars with no guarantee of success. The bottom line is, the publishers aren't prepared to make the investment themselves and third parties can't afford to underwrite the legal costs involved. Therefore the tens of thousands of games that are controlled by the bigger publishers are lost to time, with piracy being the only solution for people wanting to play the games. The publishers themselves won't ever invest the necessary resources into investigating the content themselves as the ROI just isn't there.

Bankruptcy, corporate acquisitions and other restructuring have also ensured that tens of thousands of games have been lost. Without an immediate and concerted effort, many of these games, which represent a huge amount of content, will be forever lost. It's largely like the burning of the Library at Alexandria, thousands of classic literary and philosophical works were lost forever.

These are all practical and commercial issues surrounding the games and the ownership of the games.

We then have an issue of emulation.

Media such as books, music, film and television have always been kept 'alive' because new technology has always been developed with an eye on the past. The advent of CD's merely opened up the vinyl market on a new platform. Tapes and records migrated to CD, Blu-ray and then digital. Film and television followed a similar transition, ending in streaming services. Books and magazines have their own digital repositories, meaning that none of this content is ever lost. Shakespeare is still relevant 400 years after he died. The Beatles complete collection can be listened to by simply opening Spotify and a huge wealth of visual content is available from a dozen sources.

Technological solutions do not exist en masse to allow consumers to play older video games. Since the Commodore 64 ceased production and largely fell into obsolescence it's been impossible to play classic C64 games. Until Retro Games Ltd created THEC64 Mini in 2016 and Antstream launched in 2017 C64 content had been lost for almost forty years. Even with these 'plug and play' solutions they still only make 450 games accessible, out of an addressable total library of 30,000 published games.

The industry requires a solution to the issue of technology, before it becomes impossible to run these games.

Even though retro games are not culturally niche, the retro market is *commercially* niche and that's a massively important distinction. Competing services in other industries such as Spotify and Netflix have attracted hundreds of millions of paying subscribers, ensuring their survival and growth. Neither organisation would have been able to do this if they couldn't have licenced hundreds of thousands if not millions of pieces of content. If Antstream had access to hundreds of thousands of games it would instantly be an offering that would transcend niche. Until we can offer a service with tens of thousands of pieces of IP we are forever to be a niche offering.



Antstream's business would be improved immeasurably if there was access to out of print gaming content. The more individuals researching content the easier it will be to licence it and feature it on the platform. **Antstream would support any such effort.**

Regarding other avenues for accessing out of print gaming content such as the Internet Archive and abandonware: Repositories of content, including box art, manuals, reviews etc are an incredible aid to Antstream and don't in any way detract from our business. At the end of the day the consumer wants the ability to play classic games that they love in the easiest way possible. The last thing that they want to have to do is fiddle around with browser based emulation. Again, Antstream supports any service that helps preserve content and expose it to people that love it before it fades from memory forever.



I'm the founder and CEO of Limited Run Games, a company that licenses and acquires the rights to numerous classic games for re-release. I support the copyright exemption proposed by the Software Preservation Network and Library Copyright Alliance, and I'd like to offer my perspective on the state of the commercial re-release business.

At Limited Run Games we've encountered a number of things that can impede the commercial re-release of classic games:

- IP rights for licensed titles (like a video game based on a movie or comic book) can often be far too expensive to ever reasonably re-license. Some of the IP that we've considered re-releasing has required a one-million dollar minimum guarantee and that doesn't include the software rights, which are often held by separate parties.
- Once the IP rights are licensed and paid for, the software rights can be difficult to track down - sometimes it's impossible, as paperwork and contracts from the 80s and 90s were often not archived or saved. There is no way to commercially re-release a game when ownership of the software can not be determined.
- Software rights can also be split between rights to the compiled game and rights to the source code. This is a legal headache that can result in lawsuits without proper paperwork (which most developers and publishers from the 80s and 90s no longer have).
- Beyond source code rights, compiled game rights, and IP rights, there are also music rights that have to be considered. Again, publishers and developers poorly documented their ownership of the music in their games, meaning composers could claim ownership and sue a publisher that is attempting to re-release their games.
- There are also rights to included middleware (game engines and development tools) and software libraries within the games that make re-releasing them difficult.

Beyond all of this, though, most classic games are owned by large companies whose primary focus is on modern releases, not old titles. I have found time and time again that re-releasing classic games is just not worth these bigger companies' time. Many have told me it's not even worth the time to pay the lawyers to look at a contract. So much of our history as an industry is tied up in these companies that don't care to re-release their classic catalog again.

As an example, we attempted to re-release the video game *Home Improvement: Power Tool Pursuit!*, based on the 1991 television series by ABC. Frank Cifaldi, the director of the Video Game History Foundation, mentioned this game in a talk at the Game Developers Conference in 2019 as an example of a game that would never be re-released because of licensing concerns. As hard as I've tried to re-release *Home Improvement* just to prove it's possible, the challenges are insurmountable. A major copyright holder like Disney will never have the bandwidth for a product

like this. This will become an even bigger issue in the future now that we're seeing corporate and IP consolidation across the game industry.

It is essential for researchers to have easier access to these games, because they make up the basis of the history of an important art-form and need to be studied. Re-releasing many of these games is a tremendous effort that simply will *never* be worth the time of the copyright holders.

From a commercial standpoint, as someone who has a vested interest in commercially re-releasing older games - and has spent millions developing technology to make it easier - I can safely say that **allowing libraries and researchers remote access to these games will not impact the commercial viability of my business.** Consumers have had access to emulators and ROMs throughout the entire history of our industry and yet, despite the ease at which consumers can access these - consumers have still opted for legal ownership and more convenient access when they have the ability. This will not have a financial impact on myself or anyone else in my business.