

Long Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201 (Proposed Class #23)

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Item 1. Commenter Information

This Comment is submitted on behalf of Entertainment Software Association; Motion Picture Association of America, Inc.; and Recording Industry Association of America (collectively the “Joint Creators and Copyright Owners”). The Joint Creators and Copyright Owners may be contacted through their counsel, Steven J. Metalitz, J. Matthew Williams and Naomi Straus, Mitchell Silberberg & Knupp LLP, 1818 N St., NW, 8th Fl., Washington, D.C., 20036, Telephone (202) 355-7900.

The Joint Creators and Copyright Owners are trade associations representing some of the most creative and innovative companies in the United States.

The Entertainment Software Association (“ESA”) represents all of the major platform providers and nearly all of the major video game publishers in the United States. ESA is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the Internet. ESA offers a range of services to interactive entertainment software publishers, including but not limited to: a global content protection program; business and consumer research; government relations; and intellectual property protection efforts.

The Motion Picture Association of America, Inc. (“MPAA”) is the voice of one of the country’s strongest and most vibrant industries – the American motion picture, home video and television industry. MPAA works to advance the business and the art of filmmaking and to celebrate its enjoyment around the world. MPAA members include: Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; and Warner Bros. Entertainment Inc.

The Recording Industry Association of America (“RIAA”) is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. In support of its mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conduct consumer, industry and technical research; and monitor and review state and federal laws, regulations and policies.

Item 2. Proposed Class Addressed

Proposed Class 23: Abandoned Software—Videogames Requiring Server Communication.

The December 12, 2014 Notice of Proposed Rulemaking (“NPRM”) described this proposed class as permitting “circumvention of TPMs on lawfully acquired video games consisting of communication with a developer-operated server for the purpose of either authentication or to enable multiplayer matchmaking, where developer support for those server communications has ended. This exception would not apply to video games whose audiovisual content is primarily stored on the developer’s server, such as massive multiplayer online role-playing games.” 79 Fed. Reg. 73,856, 73,869 (Dec. 12, 2014). The proponent of this exemption, the Electronic Frontier Foundation (“EFF”), proposed the following class of works: “Literary works in the form of computer programs, where circumvention is undertaken for the purpose of restoring access to single-player or multiplayer video gaming on consoles, personal computers or personal handheld devices when the developer and its agents have ceased to support such gaming.” EFF Class 23 Comment at 1.

Item 3. Overview

The Joint Creators and Copyright Owners oppose this exemption and endorse the arguments presented in the separately filed comments of the Entertainment Software Association (“ESA”). This proposed class of works should be rejected because circumvention related to videogame consoles inevitably increases piracy and is detrimental to the secure and trustworthy innovative platforms that videogame publishers and consumers demand. Congress clearly intended to protect the right of consumers and developers to choose between competing styles of platforms.¹

In addition, EFF has vastly overstated the purported adverse effects at issue by suggesting that discontinuation of authentication and matchmaking servers commonly interferes with single-player game play. Given that maintenance of such servers is almost never required for a consumer to continue playing a game that is already in use on her own console, and that videogame publishers separately license – and charge separate fees for – multi-player functionality, a consumer who purchases a game is not deprived of the benefit of any bargain when an authentication or matchmaking server is discontinued. For these reasons and the reasons discussed below and in ESA’s comments, the proponents have not met their burden of persuasion. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems

¹ *See* Staff of House Committee on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, at 6 (Comm. Print 1998), *reprinted in* 46 J. COPYRIGHT SOC’Y U.S.A. 635 (1999) (“Manager’s Report”) (endorsing opportunity for access controls to enable “new ways of disseminating copyrighted materials to users”).

for Access Control Technologies; Notice of Inquiry and Request for Petitions, 79 Fed. Reg. 55,687, 55,689 (Sept. 17, 2014) (“2014 NOI”).²

Item 4. Technological Protection Measure(s) and Method(s) of Circumvention

EFF states that “[t]he technological protection measures that control access to games come in a variety of different formats.” Although EFF does not provide much detail on any of these varieties, two specific TPMs identified by EFF are “proprietary protocols [used] to communicate between server and client,” and methods of “phon[ing] home to a central server to check for the presence of an activation key.” EFF appears to have some doubts as to whether the former technological measure is actually an access control. *See* EFF Class 23 Comment at 4 (“server protocols *may be* technical measures that effectively control access to the work”) (emphasis added).

As explained in ESA’s separately filed comments, a user cannot hack the server-based authentication and “matchmaking” access controls for console-based video games without also hacking the video game console access controls. This is very likely true with respect to other devices that enable game play as well. Thus, with respect to at least video game consoles, the end result of the circumvention that EFF asks the Register and the Librarian to bless is equivalent to the proposal currently being considered as class 19 and the similar proposal from EFF that the Register rejected in 2012. In that way, proposed class 23 is a classic wolf in sheep’s clothing. Indeed, proposed class 23 is in some respects broader than the proposal EFF presented in the 2012 proceeding in that class 23 would apply to all devices on which games are played and not just to videogame consoles. The proponents have put forward no evidence indicating that any other types of gaming devices should be treated any differently.

Item 5. Asserted Noninfringing Use(s)

EFF claims that creating “a new version of [a] game that will play without a server authentication or one that connects to new matchmaking servers” does not infringe the adaptation right because “the purpose of the use is to enable lawful copies of game software to interoperate with new servers, and with copies used by other players.” EFF Class 23 Comment at 6. However, this reasoning is circular. It begs the question whether the derivative works are “lawful copies.” This is exactly what EFF must demonstrate, and by merely restating the question, it fails to do so.

Under the first fair use factor, the purpose of EFF’s derivative works is to replicate exactly the same entertainment experience that the games were initially designed to enable while multi-player functionality continues to be offered. Thus, the proposed use is not transformative. The fact that a console manufacturer/publisher decides to discontinue multi-player functionality

² The burden of coming forward with evidence in support of the proposed exemption, as well as the burden of persuasion that the exemption should be recognized on the narrow grounds authorized by the statute, must always remain with the proponent of an exemption. 2014 NOI at 55,689. This burden applies to both factual and legal issues.

does not constitute an abandonment of the publisher's copyrights. Such a conclusion is the equivalent of determining that a movie studio loses the right to prevent theatres from publicly performing a film the day that the studio withdraws the 3-D version of the film from theatres and begins preparing for future releases in different formats.

Nor does the fact that videogame software includes functional elements justify EFF's desired copying under the second fair use factor. As the Federal Circuit recently held in *Oracle Am., Inc. v. Google, Inc.*, 750 F.3d 1339, 1370 (Fed Cir. 2014), there is no "'interoperability exception' to copyrightability." Moreover, EFF mischaracterizes prior decisions from the Ninth Circuit by suggesting that "achieving interoperability" is inherently fair use. Significantly, the decisions on which EFF relies – *Sega Enterprises v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992) and *Sony Computer Entertainment, Inc. v. Connectix, Corp.*, 203 F.3d 596 (9th Cir. 2000) – found fair use only "because the defendants in those cases made intermediate copies to understand the functional aspects of the copyrighted works *and then created new products.*"³ Here, EFF is not advocating the creation of new products but rather enabling access to highly-expressive products that are (even temporarily) discontinued.

EFF's case fares no better under the third fair use factor. EFF identifies no new expression that is involved in altering games to interoperate with new authentication or matchmaking servers.

As discussed above in connection with the first factor, the purpose of the copying at issue is to recreate the exact same entertainment experience that videogame publishers license for a fee. Under the fourth factor, such competitive copying clearly undermines potential markets for works. As ESA explains in its separate comments, the reason that many servers are discontinued is that the number of players interested in continuing multiplayer gaming has dwindled. To the extent that there is sufficient demand in the marketplace for such play being re-enabled, it is the copyright owner's exclusive right to meet that demand.

Finally, as noted above, the uses at issue here result in jailbroken consoles and other devices that enable infringers to play pirated copies of videogames. The Register should not lose sight of the fact that "access controls on videogame consoles not only preserve the integrity of the consoles, but also ensure the legitimacy of the content that is played on those devices. ... [C]ircumvention of console restrictions – even when initially undertaken for salutary purposes – is inextricably linked to and tends to foster piracy." Recommendation of the Register of Copyrights, Section 1201 Rulemaking: Fifth Triennial Proceeding, at 43 (Oct. 12, 2012) ("2012 Recommendation").

Given the unique nature of videogame consoles, which are not mobile tools used for all sorts of daily activities but instead devices designed for in-home enjoyment of entertainment products, preserving the integrity of the servers that publishers rely on to protect some of the most dynamic, creative content being disseminated today, including not only games but feature films and television shows, is essential. Because consoles are used to consume a variety of content beyond games, granting the proposed exemption would threaten multiple copyright-

³ *Oracle*, 750 F.3d at 1369-70 (emphasis added).

based industries. For example, hacked consoles could enable unauthorized recording of movies and television content being delivered by subscription or on-demand streaming services. It could also disable technologies used to provide time-limited access to such content. The serious threat of piracy undermines EFF's assertion that the uses at issue are noninfringing.

Item 6. Asserted Adverse Effects

EFF attempts to portray this proposed exemption as a simple matter of restoring functionality, such as “matchmaking,” for which consumers have already paid. However, as discussed in ESA's separately filed comments, game publishers typically offer a wide array of online services beyond this simplified rendering in EFF's comments, including chat communications, sharing of user-generated content, leaderboards, points, badges, and downloadable content. Notably, these online network services are generally entirely distinct services for which the user must register, and often pay, separately, and are not included in the purchase of the video game. Consequently, contrary to EFF's assertions, multiplayer gameplay over the Internet is not a “core” functionality of the video game, and permitting circumvention to access such functionality would provide the user greater benefits than those bargained and paid for. Under these facts, consumers are not facing any likely, substantial, adverse effects on the ability to play the games they have purchased.

Item 7. Statutory Factors

17 U.S.C. § 1201(a)(1)(C)(i) instructs the Register to consider “the availability for use of copyrighted works” broadly and in historical context. In the videogame market, access controls have undoubtedly increased, rather than decreased, the availability of “highly valuable expressive works.” 2012 Recommendation at 41. Similar to the use of Advanced Access Content System (“AACS”) technology to protect the content on Blu-ray Discs, copyright owners and manufacturers of video game consoles use server-based access controls to make copyrighted content available in digital format through video game consoles and to secure this content against the risk of piracy. The server-based access controls, which include the authentication check and matchmaking access controls, enable platform providers to develop exciting and innovative means of distributing a wide variety of copyrighted video game content to users through not only consoles, but also through smartphones, tablets, and other devices.

Although EFF tries to couch the proposed exemption as one that benefits scholars, researchers and preservationists, it is clear that EFF's primary goal is to legitimize game, console, and server hacking for the purpose of enabling casual use of entertaining, copyrighted video games across a wide swath of platforms and devices.⁴ Such use does not involve criticism or commentary. Accordingly, 17 U.S.C. § 1201(a)(1)(C)(iii) weighs against granting the proposed exemption.

⁴ See Kendra Albert, *An Exemption to the DMCA Would Let Game Fans Keep Abandoned Games Running*, Deep Links Blog, EFF (Feb. 9, 2015), <https://www.eff.org/let-game-fans-keep-abandoned-games-running> (“When you buy a video game, you expect to be able to play it for as long as you want. You expect to be able to play it with your kids many years from now if you want (well, maybe not Grand Theft Auto).”).

Finally, undermining the integrity of these access controls would also undermine the market for and value of the content accessible through videogame consoles and other devices on which games are played.⁵ Not only would individuals with no ownership interest in videogames be entitled to exploit games via new servers, EFF's proffered exemption language is so broad and ambiguous that it could encourage abuse and cause confusion about the exemption's scope. Thus, a person could profit tremendously by exploiting games that others invested in, created and own. That would not only be inconsistent with the purpose of this proceeding, it would be exceptionally unfair.

Item 8. Documentary Evidence

None.

⁵ See 17 U.S.C. § 1201(a)(1)(C)(i).