Before the
United States Copyright Office
Library of Congress

In the Matter of: Exemptions To Permit Circumvention of Access Controls on Copyrighted Works	Docket No. 2020-11

POST-HEARING RESPONSE OF THE
JOINT CREATORS AND COPYRIGHT OWNERS
CONCERNING CLASS 14b (VIDEO GAMES – PRESERVATION)

Pursuant to Mr. Kevin R. Amer's letter of April 29, 2021, the Entertainment Software Association ("ESA"), Motion Picture Association, Inc. and the Alliance for Recorded Music (collectively, the "Joint Creators and Copyright Owners") provide this response to the Class 14b post-hearing submission by Mx. Kendra Albert on behalf of the Software Preservation Network ("SPN") and Library Copyright Alliance ("LCA") dated May 13, 2021.

This rulemaking is a legal proceeding in which the proponents of an exemption "bear the burden of establishing that the requirements for granting the exemption have been satisfied."[1] However, throughout this proceeding, it has been impossible to discern what activities with respect to video games the Class 14b proponents actually hope to enable. The only specific use case addressed in the written comments of SPN/LCA was game emulation.[2] Yet all of their shifting proposals of regulatory language would permit a much broader scope of activity than just emulation,[3] and their hearing testimony was not at all focused on emulation. At this point, it appears that they just want to press for an exemption for the full scope of activity covered by their broad regulatory language. But they did not provide information about realistic and noninfringing use cases that would support an exemption of that scope, let alone evidence of how users are being adversely affected by their inability to engage in activities the proponents cannot even describe. Because the proponents' broad proposals are not supported by a corresponding evidentiary record, and the proponents have resisted the Office's efforts to focus on a narrower exemption that might be supportable, the proponents have failed to meet their burden of proof.

---

[1] Register's 2018 Recommendation, at 12.

[2] Round 1 Comments of SPN/LCA at 7-13, 19, 24-25, 28 (Dec. 14, 2020) ["Initial Comments"].

[3] *See* Initial Comments at 2 (proposing deletion of the physical premises limitation currently set forth in the exemption for games that do not require access to an external computer server for gameplay (37 C.F.R. 201.40(b)(12)(ii))); Round 3 Comments of SPN/LCA at 2 (Mar. 10, 2021) ["Reply Comments"] (identifying "Preferred Proposed 14(b) Exemption" as deleting the physical premises limitation currently set forth in the exemption for games for which the copyright owner has ceased to provide access to an external authentication server (37 C.F.R. 201.40(b)(12)(i)(B)), but indicating that they would be "open to considering" some restrictions not limited to emulation or other specific means of access); Letter from Kendra Albert to Kevin Amer and John Riley (May 13, 2021) ("willing to accept" restrictions less confining than suggested in Reply Comments).

The proponents' Reply Comments suggested a restriction to permit distribution and making available of video games preserved after circumvention outside the physical premises of the preserving organization "*only* . . . where the library, archives, or museum has had no notice that access to the work would be used for any purpose other than private study, scholarship, or research."[4] While that proposal's notice concept provided little comfort that preserved games would be protected from inappropriate use, the proposal in Mx. Albert's most recent submission would permit an even broader scope of use. Specifically, it adds a new permitted purpose – teaching – and because it omits the crucial word "only," it would seem to permit distribution and making available for recreational gameplay if teaching, research, or scholarship is also permitted. That is not a meaningful limitation.

Even if the proponents' most recent regulatory language limited usage *only* to teaching, research, and scholarship, the proponents' written comments, hearing testimony and letter provide essentially no information about how games preserved after circumvention could be distributed or made available outside the physical premises of a preserving organization in a secure manner that would ensure those limitations are enforced.[5] It appears from their hearing testimony and Mx. Albert's submission that the proponents would like to enable eligible organizations to reproduce unauthorized copies of copyrighted games from which access controls have been removed and distribute those copies to the public for purposes of teaching, research, and scholarship. Yet it is not apparent how an eligible organization could possibly control use of unauthorized game copies once they leave the organization's premises. In addition to the obvious potential harm from widespread dissemination of unauthorized game copies, use of those copies by the recipients would require circumventing access controls on game consoles, an activity that the Register has repeatedly found to be "strongly linked to piracy of video games."[6]

Even emulation and other access methods involving performance or display of game content raise serious concerns that are not ameliorated by the SPN/LCA proposals and that SPN/LCA have not meaningfully addressed. All the existing exemptions in Section 201.40(b) specify circumstances in which compliance with the applicable regulatory conditions is known to and within the control of the circumventing entity. Here, the proponents would break new ground by conditioning circumvention by preservation organizations on the motivations and actions of downstream users. Yet SPN/LCA have simply refused to engage concerning questions such as how those downstream users could be authenticated and their motivations known, how access could be supervised, and how limitations on access could be enforced. As a

---

[4] Reply Comments at 2 (emphasis added).

[5] It makes sense to include in the game preservation exemption in Section 201.40(b)(12) the definition of eligibility currently found in the preservation exemption for other types of software in Section 201.40(b)(13)(ii), to avoid suggesting that a broader set of organizations is eligible for the game preservation exemption. However, the reference to security in Section 201.40(b)(13)(ii)(E) is insufficient to make up for the paucity of evidence illuminating actual or proposed security practices and providing comfort that the full range of otherwise-eligible organizations could and would provide appropriate security for games that have had their access controls removed.

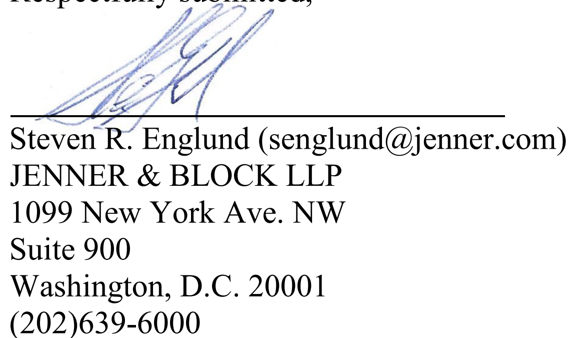
[6] Register's 2015 Recommendation, at 339-40; *see also* Register's 2018 Recommendation, at 273; Register's 2012 Recommendation, at 50.

result, an infringement analysis cannot assume that the use enabled by the proposal would actually be limited to legitimate teaching, research, and scholarship.

For example, ESA's written comments noted existing online game emulation offerings that the Internet Archive provides to the public without restriction.[7] Counsel for ESA identified the same in hearing testimony as an example of the kind of online offerings a library or archive might wish to provide if the proponents' proposal were adopted. The Internet Archive might qualify as an eligible preservation organization. And if the Internet Archive were to assert that it is providing its offerings to the public for purposes of teaching, research, and scholarship, and that it meets the security requirement in Section 201.40(b)(13)(ii)(E) because it is not possible for a user to download a playable game copy, a court might view these offerings as meeting the loose requirements of the proposed exemption. However, for purposes of the analysis the Office must undertake in this proceeding, providing a publicly-accessible online arcade is clearly not a fair use.

The Register was right to impose the physical premises limitation in past proceedings.[8] The proponents have failed to meet their burden of proving that a change is warranted.

Respectfully submitted,



______________________________	/s/ J. Matthew Williams ______________________________
Steven R. Englund (senglund@jenner.com) JENNER & BLOCK LLP 1099 New York Ave. NW Suite 900 Washington, D.C. 20001 (202)639-6000	J. Matthew Williams (mxw@msk.com) Sofia Castillo (szc@msk.com) MITCHELL SILBERBERG &KNUPP LLP 1818 N Street NW 7th Floor Washington, D.C. 20036 (202)355-7904
Counsel for ESA	*Counsel for the Joint Creators and Copyright Owners*

May 24, 2021

[7] Round 2 Comments of ESA at 11 & nn.62-63 (Feb. 9, 2021).

[8] *See* Register's 2018 Recommendation, at 274, 279; Register's 2015 Recommendation, at 352.