

UNITED STATES COPYRIGHT OFFICE



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

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ITEM A. COMMENTER INFORMATION

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These comments are submitted by the Entertainment Software Association (“ESA”), the U.S. trade association serving companies that publish computer and video games for game consoles, handheld devices, personal computers, and the Internet. ESA represents the major game platform providers and almost all of the major video game publishers in the United States.¹

ESA’s member companies are leaders in bringing creative and innovative products and services into American homes and have made major contributions to the U.S. economy.² In fact, the U.S. video game industry generated \$36 billion in revenue during 2017,³ and provided jobs to more than 220,000 people across all fifty states.⁴ This innovation and economic activity

¹ A complete list of ESA’s member companies is available at <http://www.thesa.com/about-esa/members/> (last reviewed Jan. 19, 2018).

² Aside from their significant and ongoing contributions to the traditional home video game and handheld video game markets, ESA member companies have established full-fledged online entertainment services (including mobile), developed popular and forward-looking immersive technologies (augmented, virtual, and mixed reality), and have taken the lead in the burgeoning esports industry. More innovation and creativity is promised in the future as the industry begins to embrace artificial intelligence and new ways to play and enjoy video games.

³ Press Release, Entertainment Software Association, *US Video Game Industry Revenue Reaches \$36 Billion in 2017* (Jan. 18, 2018), <http://www.thesa.com/article/us-video-game-industry-revenue-reaches-36-billion-2017/> (“ESA Press Release”).

⁴ Stephen E. Siwek, Entertainment Software Association, *Video Games in the 21st Century* 2, 36 (2017), http://www.thesa.com/wp-content/uploads/2017/02/ESA_EconomicImpactReport_Design_V3.pdf (“*Video Games in the 21st Century*”). In fact, about two thirds of U.S. households are home to at least one person who plays three or more hours of video games a week. Entertainment Software Association, *2017 Essential Facts about the Computer*

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depends on strong copyright protection for the software and other creative works that are the lifeblood of the video game industry. Accordingly, ESA member companies have a strong interest in maintaining effective copyright protection, including protection against circumvention of technologies that control access to copyrighted video game software.

There is no doubt that video games are an important and significant form of creative expression.⁵ In fact, video games of all types are now being recognized by major art museums across America.⁶ And the creative nature of the medium is evident from the treatment of video games in the mainstream press, which reviews and critiques video games alongside other copyrighted works, such as literature, movies, television, and theater.⁷ Accordingly, and as described further below, 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.

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 8: Computer Programs—Video Game Preservation

ITEM C. OVERVIEW

1. Introduction.

Because video games have substantial social, cultural, and historical value, ESA and its member companies enthusiastically support various legitimate public preservation activities

and Video Game Industry 6 (Apr. 2017), http://www.theesa.com/wp-content/uploads/2017/09/EF2017_Design_FinalDigital.pdf (“2017 ESA Essential Facts”).

⁵ In *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786 (2011), the U.S. Supreme Court recognized that video games, as expressive works, are fully protected by the First Amendment. That is because “[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages.” *Id.* at 790.

⁶ Many institutions have recognized video games' central place among the most established forms of art. For example, in 2012, the Museum of Modern Art (“MoMA”) in New York City began displaying video games in its galleries, and exhibitions devoted to video games opened at the Smithsonian American Art Museum and the Museum of the Moving Image, prompting the *New York Times* to declare that “[v]ideo games are now high culture.” See Allan Kozinn, *MoMA Adds Video Games to Its Collection*, N.Y. Times: Artsbeat (Nov. 29, 2012, 1:45 PM), <https://artsbeat.blogs.nytimes.com/2012/11/29/moma-adds-video-games-to-its-collection/>. The MoMA selects video games to acquire using the same criteria the museum uses for other collections, including “historical and cultural relevance, aesthetic expression, functional and structural soundness, innovative approaches to technology and behavior, and a successful synthesis of materials and techniques.” *Id.* Moreover, the Strong National Museum of Play in Rochester, which houses the World Video Game Hall of Fame, recognizes individual video games that have exerted influence on the industry or on popular culture and society in general. See World Video Game Hall of Fame, Strong Nat’l Museum of Play, <http://www.museumofplay.org/about/world-video-game-hall-fame> (last visited Feb. 5, 2018); see also, Nathan Reese, *An Exhibition That Proves Video Games Can Be Art*, N.Y. Times (Feb. 10, 2016), <https://www.nytimes.com/2016/02/10/t-magazine/art/jason-rohrer-video-games-exhibit-davis-museum.html> (reviewing *The Game Worlds of Jason Rohrer*, a video game art exhibit which was on view at the Davis Museum in Wellesley, Massachusetts in 2016.)

⁷ E.g., Seth Scheisel, *Way Down Deep in the Wild, Wild West*, N.Y. Times (May 16, 2010), <http://www.nytimes.com/2010/05/17/arts/television/17dead.html> (reviewing Take-Two Interactive Software’s 2010 hit *Red Dead Redemption*, commenting on the way in which video games often confront moral issues).

beyond the companies' own archival practices.⁸ The existing exemption to Section 1201 for video game preservation, which is codified in 37 C.F.R. § 201.40(b)(8)(i)(B) and (ii), also permits eligible libraries, archives, and museums to engage in independent preservation activities that facilitate legitimate scholarly work without disrupting efforts to continue serving and expanding the vibrant and dynamic market for video games.⁹ Recognizing that the Register carefully tailored the existing exemption to strike that balance, ESA did not oppose continuation of the existing exemption for video game preservation.

Proposed Class 8 in this proceeding represents a substantial expansion of the existing game-preservation exemption,¹⁰ and ESA does oppose that expansion. What the petitioner Museum of Art and Digital Entertainment ("MADE") and the other proponents of Class 8 seek is a far cry from the serious preservation and scholarly use imagined by the Register in 2015. The additional activities that the proponents contemplate include:

- Accessing content stored on an external server and not previously distributed by game companies. The proponents first ask the Register to sanction the creation of substitute game-service environments. This likely would require copying server software and individual game elements that reside on an external server, have not been distributed to the public, and organizations like MADE do not lawfully possess.
- Restoring playable versions of online multiplayer video games. Proponents next ask the Register to enable them to make online video games available for play by a public audience. Online video games, in proponents view, appear to be games that offer multiplayer gameplay through an external server. This request does not address harms allegedly caused by the technological protection measures ("TPMs") that are the subject of this proceeding, but instead addresses harms created by the termination of online game services. Additionally, making games available for online play would implicate (and in ESA's view violate) the anti-trafficking provisions of Section 1201(a)(2). For these reasons, the Register rejected an identical request in the 2015 Triennial Proceeding.¹¹ The same result should obtain here.

⁸ Because video games have significant economic value to their creators, game companies naturally tend to preserve the assets in their catalogs.

⁹ This exemption applies to local copies of video games requiring authentication to an external server, where server support has been discontinued for at least six months. Such games have occasionally been referred to by the proponents of Section 1201 exemptions as having been "abandoned," but that is not an accurate use of that term of art in copyright law, and it is particularly inappropriate given efforts of their copyright owners to preserve them and the potential for re-release. See *infra* Part E.1.ii-iii.

¹⁰ In a separate provision, the existing exemption also permits circumvention to restore local access to a video game for personal gameplay. See 37 C.F.R. § 201.40(b)(8)(i)(A). Such circumvention is only permitted in carefully limited circumstances and proponents do not seek in Class 8 to expand them. Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, 82 Fed. Reg. 49,550, 49,561 (Oct. 26, 2017), ("NPRM") ("The proposed class would expand upon the current exemption . . . permitting circumvention 'by an eligible library, archives, or museum,' of TPMs protecting video games, for which outside server support has been discontinued."). As discussed below, the primary proponent of Class 8 confirms this narrow formulation. Any belated attempts to extend the proposed expansion to personal gameplay should be rejected.

¹¹ Register's 2015 Recommendation at 351.

- Enlisting public assistance in preservation. Proponents also ask the Register to let a loosely defined group of “affiliates” engage in preservation activities. Under the proposed regulatory language, affiliates can be drawn from members of the public and may work remotely from geographically distributed locations. Institutions enlisting the assistance of affiliates would not be required to formally retain them, would not be required to impose legally enforceable restrictions on their activity, and would not be required to implement any mechanisms to protect against infringement. In effect, the request would dissolve any meaningful distinction between preservationists and recreational gamers, and invite substantial mischief.

These proposed expansions of the existing exemption for video game preservation must be rejected, because the proponents cannot demonstrate that Section 1201’s prohibition on circumvention – as modified by the existing exemption – is imposing adverse effects on noninfringing uses and that their proposed expansion is warranted under the relevant statutory factors. These deficiencies can briefly be summarized as follows:

- Adverse Effects. The proponents fail to establish that current law adversely affects efforts to preserve video games for research and study, for several reasons. First, video game publishers have strong economic incentives to preserve their own games, which are often issued and re-issued in patterns common to other forms of creative content, such as film and music.¹² Second, there are currently extensive video game preservation programs, and large collections of historical games, at public institutions, as well as cooperative efforts between the ESA and its members and public institutions like the Library of Congress.¹³ Third, the existing exemption is sufficient to facilitate preservation by eligible institutions, and to facilitate subsequent research and study.¹⁴ Finally, the purported effects upon which proponents rely are not actually caused by the TPMs at issue.¹⁵
- Infringing Uses. The proponents fail to establish that the additional uses they contemplate are noninfringing. Copying software and game elements that have not been distributed to the public would infringe the right of reproduction and the right to create derivative works.¹⁶ Restoring online gameplay would violate the same rights, and also the distribution and performance rights, if games are distributed or performed to the public.¹⁷ Finally, permitting preservation by affiliates may involve and promote a wide range of infringing activity, as by facilitating the creation or distribution of unauthorized derivative works, and by enabling members of the public to “jailbreak”¹⁸ video game

¹² See *infra* Part E.1.ii.

¹³ *Id.* Part E.1.iii.

¹⁴ *Id.* Part E.1.iv.

¹⁵ *Id.* Part E.1.i.

¹⁶ *Id.* Part E.2.i.a.

¹⁷ *Id.* Part E.2.i.b.

¹⁸ In these comments, we use the term “jailbreaking” because the Office has done so from time to time. However, we note that it is a loaded term intended by those who popularized it to downplay the importance of protecting copyrighted works. By contrast, the Register has repeatedly found that the hugely valuable copyrighted works distributed for and through game consoles are reasonably and appropriately secured with technological protection measures.

consoles and use those consoles to play unauthorized copies of video games.¹⁹ Each of these uses is outside the scope of 108,²⁰ and none of them are fair uses.²¹

- **Statutory Factors.** The proponents fail to establish that their broad proposal is warranted under the statutory factors. The proposed expansion would introduce several potential risks to effective copyright protection, which could reduce the incentives to invest in creation of new video games and make video game consoles a less attractive platform for content delivery. The proponents make no countervailing showing, under the first three statutory factors, that a broader exemption would enable more preservation, or enable development of more research and study, than is generated under the existing exemption. Moreover, the proponents' requested expansion would encourage or enable widespread infringement of video games and facilitate infringement of other entertainment content made available on video game consoles, doing substantial market harm.²²

For these and numerous other reasons described further below, the proposed expansion would substantially increase infringement and should be rejected.

2. Effective copyright protection for video games is important to securing their social, cultural, and economic effects.

ESA and its member companies are proud that video games make significant social, cultural, and economic contributions. Video games have provided a foundation for building strong online and offline communities and offering a distinct entertainment experience. They also explore social issues,²³ help children develop intellectual and social skills,²⁴ and advance social welfare, such as by contributing to improved health outcomes²⁵ and to education.²⁶

¹⁹ See *infra* Part E.2.i.c.

²⁰ *Id.* Part E.2.ii.

²¹ *Id.* Part E.2.iii.

²² *Id.* Part E.3.

²³ Christine Schmidt, *Games might be a good tool for fighting fake news*, Nieman Foundation (Aug. 3, 2017), <http://www.niemanlab.org/2017/08/games-might-be-a-good-tool-for-fighting-fake-news-heres-what-three-developers-have-learned/>; Rachel Ament, *Screen Saviors: Can Activism-Focused Games Change Our Behavior?*, NPR (July 23, 2017), <https://www.npr.org/sections/alltechconsidered/2017/07/23/538617205/screen-saviors-can-activism-focused-games-change-our-behavior>; *14 Video Games That Tackle Important Social Issues*, TeachThought, <https://www.teachthought.com/technology/14-games-tackle-important-social-issues/>.

²⁴ E.g., Viviane Kovess-Masfety et al., *Is Time Spent Playing Video Games Associated with Mental Health, Cognitive and Social Skills in Young Children?*, 51 Soc. Psychiatry & Psychiatric Epidemiology 349 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4814321/>; Isabela Granic et al., *The Benefits of Playing Video Games*, 69 Am. Psychologist 66 (Jan. 2014), <http://www.apa.org/pubs/journals/releases/amp-a0034857.pdf>; Sandro Franceschini et al., *Action Video Games Make Dyslexic Children Read Better*, 23 Current Biology 462 (2013), [http://www.cell.com/current-biology/fulltext/S0960-9822\(13\)00079-1](http://www.cell.com/current-biology/fulltext/S0960-9822(13)00079-1).

²⁵ E.g., Lalitha Iyadurai, *Preventing Intrusive Memories After Trauma Via a Brief Intervention Involving Tetris Computer Game Play in the Emergency Department*, Mol. Psychiatry (Mar. 28, 2017), <https://www.nature.com/articles/mp201723>; Brian A. Primack et al., *Role of Video Games in Improving Health-Related Outcomes*, 42 Am. J. Prev. Med. 630 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3391574/>.

²⁶ News Release, NYU, *Educational Video Games Can Boost Motivation to Learn, NYU, CUNY Study Shows* (Nov. 6, 2013), <http://www.nyu.edu/about/news-publications/news/2013/november/educational-video-games-can-boost-motivation-to-learn-nyu-cuny-study-shows.html>; Office of Educ. Tech., U.S. Dep't of Educ., *Games for Learning* (last reviewed Feb. 6, 2018), <https://tech.ed.gov/games/> (recognizing that "[v]ideo games are important learning

Video games also embody creative expression. As the Supreme Court has recognized, video games convey expression in much the same way as books, movies, and other forms of media.²⁷ Video game developers push artistic boundaries.²⁸ Indeed, the ingenuity and originality of game creators has been recognized by institutions like the Smithsonian,²⁹ the Museum of Modern Art,³⁰ and others,³¹ each of which has developed exhibits to showcase the artistic expression in the medium.

Today, the market for video games is more vibrant than ever before.³² For example, U.S. sales of computer and video games have grown from \$10.1 billion in 2009 to \$29.1 billion in 2017.³³ This success is attributable in significant part to copyright protection. It is common for developers to spend tens of millions of dollars on the development of a game. Like major motion pictures, production budgets for major games can exceed \$100 million.³⁴ That level of investment in the creation of new works is not possible without effective intellectual property protection, including protection against circumvention of technologies that control access to copyrighted video game software. Copyright protection also makes it possible for video game companies to invest in new ways to make video games accessible to consumers. Microsoft, for example, recently launched a subscription service called Gamepass, which allows users to access more than 100 video games for a monthly fee.³⁵ Video game companies also have reintroduced

tools that provide immersive, interactive, and creative spaces for students to learn” as well as “the proven power of digital games for learning”).

²⁷ *Entm’t Merchants Ass’n*, 564 U.S. at 790.

²⁸ See, e.g., Catherine Jewell, *Video Games: 21st Century Art*, WIPO Magazine (Aug. 2012), http://www.wipo.int/wipo_magazine/en/2012/04/article_0003.html (observing that video games “offer richly textured, emotional and social experiences” and that “[v]ideo games stand out as an artistic medium”).

²⁹ See *The Art of Video Games*, Smithsonian Institute, <https://www.si.edu/Exhibitions/The-Art-of-Video-Games-840> (last visited Feb. 6, 2018) (discussing six month exhibit that comprehensively examined video games as artistic medium, featured over 800 works of art from video games, and completed a 10-city national tour); *SAAM Arcade*, Smithsonian American Art Museum, <http://americanart.si.edu/calendar/saam-arcade/> (last visited Feb. 6, 2018) (describing annual weekend event that allows over one hundred and fifty independent video game designers and developers to showcase their work alongside the world’s premier art collections).

³⁰ See *Eve Online*, New York’s Museum of Modern Art, <https://www.moma.org/collection/works/162462> (last visited Feb. 6, 2018) (describing permanent exhibit that features *Eve Online* gameplay recordings and *Eve Online* server data).

³¹ See, e.g., *The Game Worlds of Jason Rohrer*, Wellesley College, <http://www.wellesley.edu/event/node/76186#l0GiXOZSwp46oArT.97> (last visited Feb. 6, 2018) (describing museum retrospective dedicated to a single video game maker’s work); Nathan Reese, *An Exhibition that Proves Video Games Can Be Art*, N.Y. Times (Feb. 10, 2016), https://www.nytimes.com/2016/02/10/t-magazine/art/jason-rohrer-video-games-exhibit-davis-museum.html?_r=1; *VGA Gallery At Open House Contemporary*, Video Game Art Gallery, <https://www.videogameartgallery.com/events/2017/5/18/vga-gallery-at-open-house-contemporary> (last visited Feb. 6, 2018) (exhibit that is a partnership between the Video Game Art Gallery and Open House Contemporary that will be open from May 2017 to September 2017. The exhibit will highlight distinctive game art from emerging game developers from across the globe.)

³² See *supra* at 1.

³³ See *Video Games in the 21st Century*, at 5; ESA Press Release.

³⁴ *Why Video Games Are So Expensive To Develop*, The Economist (Sept. 25, 2014), <https://www.economist.com/blogs/economist-explains/2014/09/economist-explains-15>.

³⁵ Phil Spencer, *Introducing Xbox Game Pass: Unlimited Access to More Than 100 Games*, Xbox Wire (Feb. 28, 2017), <https://news.xbox.com/en-us/2017/02/28/introducing-xbox-game-pass/>.

an increasing number of video games from their back catalogs, as Nintendo did when offering previously discontinued games on the NES and SNES Classic consoles.³⁶

3. Substantial efforts are directed to preservation that is consistent with effective copyright protection.

The existing exemption, together with preservation efforts by ESA and its members, is sufficient to preserve important games for serious scholarly purposes, and they do so without jeopardizing effective copyright protection for games.

To begin with, video game companies have a strong economic motivation to preserve the titles in their back catalogs.³⁷ And, under Section 106, the decision whether to discontinue or reissue particular game titles generally should lie with the copyright owner. Contrary to claims made by the proponents of the expansion, a copyright owner's decision to exercise these exclusive rights is not at odds with preservation.³⁸ The decision to discontinue providing a game service says nothing at all about whether the copyright owner is taking action to preserve the video game in its archive. In fact, video game companies do *not* routinely discard their valuable copyrighted assets.

In addition to internal preservation efforts, which allow video game companies to make business judgments about which titles in their catalogs to offer at which times, ESA and its members actively support legitimate preservation activities at various public institutions that adhere to high professional standards and have the resources and expertise to ensure secure, long-term retention of game artifacts for purposes of future scholarship. These efforts will in many cases ensure that future scholars can experience culturally significant contemporary games, because many such games allow for either single player or local multiplayer gameplay.³⁹ By contrast, allowing unilateral circumvention in the name of preservation would add little to these efforts because, as illustrated by the proponents' restoration of the video game *Habitat*,⁴⁰ what they would like to accomplish is impracticable (or at least would be extraordinarily difficult) without the cooperation of video game companies.

Because governmental, nongovernmental, and private-sector stakeholders are committed to developing coordinated and voluntary approaches to preservation that apply high professional standards and are respectful of copyright issues, the proponents' claims that America is in danger of losing its game heritage without a substantially expanded exemption for circumvention of TPMs are simply wrong. The fact is that the games most worthy of preservation – the kinds of games that feature prominently in the proponents' comments – are, under current law, being preserved for future scholarship.

³⁶ Nintendo Entertainment System Classic Edition (last visited Feb. 6, 2018), <https://www.nintendo.com/nes-classic>; Super Nintendo Entertainment System (last visited, Feb. 6, 2018), <https://www.nintendo.com/super-nes-classic>.

³⁷ See *infra* at Part.E.1.ii.

³⁸ Additionally (and significantly) a desire to re-implement online game services when publishers discontinue them is not a problem caused by TPMs that can be solved in this proceeding.

³⁹ This is true for console games, and even truer for mobile games and PC games. See, e.g., PC Gamer, *The Best Local Multiplayer Games on PC* (Dec. 24, 2017), <http://www.pcgamer.com/local-multiplayer-games/>.

⁴⁰ See Comments of Museum of Art and Digital Entertainment at 12 (“MADE Comments”) (discussing creator cooperation required to restore *Habitat*).

4. The proposed expansion would enable and facilitate infringing use.

Because the Register has already recommended continuing the current video game exemption, analysis at this stage of the proceeding must focus on the additional uses that have been proposed by the proponents of a broadened video game exemption.⁴¹ Here, the proponents of Class 8 request that the Register expand the current exemption to permit three new categories of circumvention by eliminating important limitations that the Register adopted in 2015. Each of these proposals would enable and lead to substantial infringing activity.

The proponents first seek to circumvent TPMs used to control access to game software when gameplay requires access to content stored on a computer server that has not previously been distributed to the user.⁴² Purportedly for purposes of maintaining online games “in playable form,” the proponents contemplate copying, and preparing derivative works of, server software and server-hosted game elements that are part of the overall copyrighted video game and that have not been lawfully distributed to the libraries, archives, or museums eligible for the video game preservation exemption. Contrary to the proponents’ assertions, this copying involves core expressive aspects of the game experience, including creative choices about how players interact with each other and their environment. For the same reason, the copying that proponents want to perform does not constitute reverse engineering. Even if the copying is not direct and mechanical, it is infringing, because copyright law prohibits non-literal copying of the expressive aspects of software.⁴³

The proponents next seek to circumvent TPMs used to control access to game software when a server interaction is necessary for online gameplay, rather than just local gameplay.⁴⁴ This proposal implies additional infringing activity for several reasons. First, it necessarily involves running an unauthorized copy of computer software. Second, it may require creation of derivative works of local game software needed to ensure connection and interoperability with a new game server. Third, it underscores that the proponents’ real goal is to allow a public audience – and not just serious scholars – to play online video games.⁴⁵

Finally, proponents seek to circumvent TPMs used to control access to video game software to enable preservation by “affiliates” of qualifying organizations.⁴⁶ Crowdsourcing preservation by permitting a loosely-defined group of “affiliates” – who may work remotely and from geographically distributed locations – raises significant copyright enforcement issues. As an initial matter, allowing the unauthorized exchange of games among a large and open group of affiliates drawn from the public would implicate the exclusive right of distribution under Section 106(3) of the Copyright Act. And even if eligible institutions could deputize affiliates without

⁴¹ NPRM, 82 Fed. Reg. at 49,558 (“In cases where a class proposes to expand an existing exemption, commenters should focus their comments on the legal and evidentiary bases for modifying the exemption, rather than the underlying exemption.”).

⁴² *E.g.*, MADE Comments at 7 (proposing to add to the definition of “complete games” games that require access to game content stored on a server). Proponents appear to contemplate circumvention of both local and server-based game software. *Id.*

⁴³ *See infra* Part E.2.i.a.

⁴⁴ *E.g.*, MADE Comments at 6 (proposing to add to the current exemption the words “or to conduct online gameplay”).

⁴⁵ *See infra* Part E.2.i.b.

⁴⁶ *E.g.*, MADE Comments at 7 (proposing to add references to preservation by affiliates); *see infra* Part E.2.i.c.

running afoul of the distribution right, the proponents have not explained how each of the many institutions potentially eligible for the preservation exemption could effectively supervise a legion of affiliates.

This omission is particularly glaring insofar as proponents do not propose adopting *any* of the conditions that the Section 108 Study Group suggested imposing on outside contractors who are *formally retained* to assist in legitimate archival activity. While some organizations may be capable and responsible enough to genuinely supervise a handful of carefully-selected affiliates, others will likely lack the capacity to effectively police affiliates that may wish to take advantage of their privileged position to engage in or facilitate unauthorized use of copyrighted works. Proponents fail to explain how they would cabin affiliate use of circumvention devices and copyrighted games to prevent widespread online gameplay and infringement of works accessed through circumvention.

In sum, expansion of the video game preservation exemption as contemplated by Class 8 is not a “modest” proposal.⁴⁷ Eliminating the important limitations that the Register provided when adopting the current exemption risks the possibility of wide-scale infringement and substantial market harm.

5. The statutory factors do not support expanding the existing exemption for video game preservation.

The proposed expansion would reduce the availability of copyrighted works, is not necessary to support legitimate preservation activities, and would harm the market for and value of both discontinued and current video games. The proposed expansion also contemplates violation of Section 1201(a)(2)’s anti-trafficking provisions and risks harming the goodwill that video game creators cultivate by offering a high-quality gaming experience that protects privacy, personal safety, and the integrity of gameplay. On balance, the statutory factors do not support an expanded exemption.⁴⁸

* * *

After proponents of the existing exemption secured what, during the 2015 proceeding, was framed as a narrow exemption for preservation, the proponents of Class 8 now seek to expand it in substantial and unjustified ways. The Register should recommend denying the proposed expansion.

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

1. Video game companies provide many options for enjoying gameplay.

This is a golden age for video games. Not only are major new titles released virtually every week, but game companies have introduced new gaming experiences, including virtual reality and different modes of play across an increasing variety of platforms.

⁴⁷ MADE Comments at 2.

⁴⁸ See *infra* Part E.3.i-iv.

One fast-growing segment of the game market is mobile gaming. Mobile devices have become ubiquitous, and one need only go out in public to see the proliferation of consumers enjoying game apps on their phones. Over the course of the last three years, numerous classic games have been re-released for mobile devices,⁴⁹ including games from Atari,⁵⁰ Sega,⁵¹ Capcom,⁵² Rock Star,⁵³ and Square Enix.⁵⁴

Many of the today's most popular games offer players the opportunity to play in single or multiplayer modes.⁵⁵ And, in response to consumer demand, video game publishers have significantly expanded opportunities for online multiplayer gameplay.⁵⁶ It should come as no surprise that in an increasingly connected world, where consumers are accustomed to experiencing music, television, and motion pictures through online services, consumers also enjoy playing video games through online services. All the major video game console providers offer online services that provide consumers access to online play and features such as downloadable content, leaderboards, badges, chat, and other social features. Like many other online entertainment services, users ordinarily must register – and often must pay subscription fees – to access these services. For example, Microsoft requires its users to register for an Xbox Live Gold subscription – typically priced at \$59.99 per year – before the user may access online services made available through its online network services server. On the PlayStation 4, users are required to purchase a subscription to “PlayStation Plus” – also typically priced at \$59.99 per year – before they can access online multiplayer gaming through that service. And Nintendo offers the “Nintendo Online Switch” service, which allows Nintendo Switch users to play compatible video games online by signing into their Nintendo Accounts.⁵⁷

The proposed broadening of the preservation exemption would apply to a vast array of video games (including console games, PC games, mobile apps, and browser-based games), with a wide range of features and architectures. It should be understood that when the proponents of the expansion propose making a substitute game server available to allow the public to play

⁴⁹ Of course, classic games have also been re-released on a number of other platforms, including Nintendo's NES and SNES Classic. *See infra* Part E.1.ii.

⁵⁰ Atari, Mobile, Online Arcade, <https://www.atari.com/buy-games/all/mobile> (last visited Feb. 6, 2018).

⁵¹ Sega Forever, Classic Games Collection, <http://forever.sega.com/about>, (last visited Feb. 6, 2018).

⁵² Press Release, Capcom, *Capcom Reorganizes Mobile Business; Plans to Aggressively Release Titles Utilizing Its IP* (Aug. 1, 2016), <http://www.capcom.co.jp/ir/english/news/html/e160401.html>.

⁵³ Rockstar Games, Browse by Game Platforms: Mobile, <https://www.rockstargames.com/games?platform=mobile> (last visited Feb. 10, 2018).

⁵⁴ Square Enix, Games, Mobile, <http://www.square-enix.com/na/game/mobile/> (last visited Feb. 10, 2018).

⁵⁵ These titles include, for example, 2017 best sellers like Call of Duty, Battlefield, Grand Theft Auto, Minecraft, and sports franchises such as Madden, NBA 2K and FIFA. *See 2017 ESA Essential Facts* at 12 (identifying 2017 best sellers).

⁵⁶ Games have historically offered multiplayer gameplay through several different mechanisms, including by connecting several controllers to a single console, by connecting several consoles through a Local Area Network (“LAN”), or by offering online play. *See* U.S. Copyright Office, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 345 (Oct. 2015), <https://www.copyright.gov/1201/2015/registers-recommendation.pdf> (“Register’s 2015 Recommendation”).

⁵⁷ Online play for the Nintendo Switch is free for Nintendo Account holders until the paid online service launches in September 2018.

online video games, they are talking about providing an online service that would replace a service for which video game companies frequently charge.

2. The proposed expansion implicates critical access controls, the circumvention of which risks serious harm.

The wide variety of games that would be subject to the broader exemption employ a variety of access controls. The proponents of the proposed expansion do not identify precisely which access controls they seek to circumvent, but they acknowledge that enabling online games to be played on video game consoles or other devices connected to third-party game servers would require circumventing a large number of game- and device-based TPMs.⁵⁸ Indeed, the proposed expansion would seem to permit circumvention of nearly all TPMs used to secure video games and provide a secure environment for the use and distribution of authorized video games.

In redefining “complete games” to include “video games that can be played by users through lawful access of game content stored or previously stored on an external computer server,”⁵⁹ the proponents appear minimally to seek permission to circumvent access controls on local game client software (such as by decrypting it), so that software can be modified to (1) work with a game service that substitutes for the original, authorized game service, and (2) render unauthorized server-hosted game elements.

This proposal is particularly problematic with respect to video games for recent major video game consoles. A modern game console cannot be used to run modified firmware, or to load other software that has not been authorized for use on the console, without first circumventing one or more TPMs.⁶⁰ In many cases, successful circumvention requires users to bypass the encryption on the console firmware and successfully avoid authentication processes used to check for unauthorized software loaded to the console. Once a console’s TPMs have been cracked, it can be used to play infringing copies of games, regardless of the user’s intent. In some instances, circumvention of a console renders it unable to run properly licensed content. Indeed, as the Register has repeatedly concluded, “jailbroken consoles are strongly linked to piracy of video games.”⁶¹

⁵⁸ MADE Comments at 11-12.

⁵⁹ *Id.* at 7.

⁶⁰ In the 2015 Triennial Proceeding, the Register compiled a robust record regarding the access controls that protect video game consoles. Those access controls have not meaningfully changed since the 2015 Proceeding. Information concerning the nature of TPMs on major consoles was attached to ESA’s 2015 comment on proposed Class 23. *See* Statement of Peter Waxman (Microsoft); Statement of Dylan Rhoads (Nintendo); Statement of Anthony Justman (Sony), available at <https://www.copyright.gov/1201/2015/comments-032715/>.

⁶¹ Register’s 2015 Recommendation at 339; *see also id.* at 339-40 (“[A] jailbroken console can be used to play illegitimately acquired games and not just ‘abandoned’ games. Moreover, jailbreaking of console software weakens the efficacy and value of that software as a distribution platform.”); U.S. Copyright Office, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 50 (Oct. 2012), https://www.copyright.gov/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf (“Register’s 2012 Recommendation”) (“Console access controls protect not only the integrity of the console code, but the copyrighted works that run on the consoles. In so doing, they provide important incentives to create video games and other

The harm of console jailbreaking extends beyond video games. Video game consoles are the center of an intellectual property ecosystem that allows consumers to access not only video games, but also movies, television, music, and live-sports programming that is provided by ESA's members and a wide range of content partners.⁶² Console jailbreaking threatens infringement of the copyrights in that non-game content, as well as video games.

Depending on the architecture of the particular video game involved and the process by which the circumvention above is accomplished, it may be necessary to circumvent other TPMs as well. For example, video games commonly require server authentication upon installation, and some video games may require server authentication in connection with gameplay as well. Either bypassing that authentication check by modifying the client software, or completing the authentication from an unauthorized server, would constitute circumvention of a TPM controlling access to the client software. Similarly, use of a third-party game server for online gameplay may constitute an ongoing circumvention of TPMs controlling access to the local software, if the substitute server simulates an authentication process that is necessary to enable communications between an authorized video game client and server.⁶³ In addition, the uses contemplated by the proponents may require modifying video game protocols, which can be viewed as circumvention of a TPM.⁶⁴ The authentication between legitimate clients and servers works both ways. Once that link is broken, it seems probable that infringing copies of local game software could be used with the substitute game server.

It may be that proponents also contemplate circumventing access controls on authorized video game services, in the event that server support for a particular video game is discontinued, but software or other elements of the game remain online so a hacker could access and download them without authorization. Any such intrusion into video game services would not only enable infringement of the copyrighted material accessed, but also potentially compromise the security of innocent users of the service.

In sum, the proponents seem to contemplate a wide range of circumvention with the potential to cause substantial harm.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

The Office's Notice of Proposed Rulemaking ("NPRM") describes Class 8 as being related exclusively to the *preservation* of video games.⁶⁵ As the Register has consistently

content for consoles, and thus play a critical role in the development and dissemination of highly innovative copyrighted works.")

⁶² See, e.g., Xbox Entertainment, <http://www.xbox.com/en-US/entertainment?xr=shellnav> (last visited Feb. 6, 2018); Nintendo Wii U eShop, <https://www.nintendo.com/wiiu/built-in-software#/nintendo-eshop> (last visited Feb. 6, 2018); Nintendo Switch Hulu, <https://www.nintendo.com/games/detail/hulu-switch> (last visited Feb. 7, 2018); PlayStation Network, <https://www.playstation.com/en-us/network/> (last visited Feb. 6, 2018).

⁶³ See *RealNetworks, Inc. v. Streambox, Inc.*, No. 99-cv-2070P, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. Jan. 18, 2000).

⁶⁴ See MADE Comment at 11-12.

⁶⁵ NPRM, 82 Fed. Reg. at 49,561 ("The proposed class would expand upon the current exemption . . . permitting circumvention 'by an eligibly library, archives, or museum,' of TPMs protecting video games, for which outside server support has been discontinued.") MADE, the initial proponent of the proposed expansion, emphasizes this focus in its comments. It states that the organization "do[es] not seek to expand the portions of the Current

reiterated, proponents “bear the burden of establishing that the requirements for granting the exemption have been satisfied.”⁶⁶ This means that the proponents must prove both that (1) “uses affected by the prohibition on circumvention are or are likely to be noninfringing,”⁶⁷ and (2) “as a result of a technological measure controlling access to a copyrighted work, the prohibition is causing, or in the next three years is likely to cause, an adverse impact on those uses.”⁶⁸ As set forth below, Section 1201, as modified by the current exemption, does not adversely affect the ability of libraries, museums, or archives to make noninfringing preservation uses of video games, nor are such adverse effects likely to emerge over the next three years. Indeed, proponents have not even established that their proposed expansion addresses a problem caused by TPMs, as opposed to the discontinuation of a video game service. Because proponents will not suffer adverse effects under the existing exemption, because the proposed expansion will make infringing use of copyrighted material, and because the statutory factors weigh heavily against the proposed expansion, the Register should reject the proposed expansion.

1. An expanded exemption from the prohibition on circumvention should not be granted because proponents fail to demonstrate the requisite adverse effects.

Proponents have not met their burden of demonstrating that the current prohibition against circumvention, as modified by the existing exemption, is causing (or will in the coming three-year period cause) an adverse effect. “To prove the existence of adverse effects, it is necessary to demonstrate ‘distinct, verifiable and measurable impacts’ occurring in the marketplace.”⁶⁹ The Register has repeatedly held that exemptions “should not be based upon *de minimis* impacts”⁷⁰ and that “‘mere inconveniences’ or individual cases do not satisfy the rulemaking standard.”⁷¹

The showing made by the proponents falls well short of these standards. This is so for a number of reasons, each of which provides a sufficient basis for rejecting the proposed expansion. These include: (1) proponents fail to establish the required nexus between TPMs and the alleged adverse effects; (2) proponents fail to demonstrate that video game companies do not preserve games themselves; (3) proponents acknowledge video game companies’ voluntary cooperation in preservation efforts by public institutions, and fail to show why those efforts are insufficient; and (4) proponents fail to demonstrate that current exemption is insufficient to enable preservation for scholarly purposes. ESA elaborates on each of these deficiencies below.

Exemption concerning personal gameplay beyond their current bounds.” MADE Comment at 2. It appears, however, that proponents seek to blur the line between preservation and gameplay. *See infra* Part E.1.iv; *see also infra* Part E.2.i.b; *see also* Register’s 2015 Recommendation at 340-41 & n.2313 (noting that proponents of the now existing exemption acknowledged belief that there is not a “strong line of demarcation” between preservationists and individuals who want to continue to play games (quotation marks omitted)). Any attempt to broaden the proposed expansion to personal gameplay at this stage is impermissible and should be rejected.

⁶⁶ Register’s 2015 Recommendation at 13.

⁶⁷ *Id.* at 15.

⁶⁸ *Id.*

⁶⁹ *Id.* at 15-16 (citation omitted).

⁷⁰ *Id.* at 16 (quotation marks omitted).

⁷¹ *Id.* at 16 (citation omitted).

i. The alleged adverse effects are not actually caused by TPMs.

As a threshold matter, an exemption may only be granted in this proceeding if an asserted adverse effect on noninfringing uses arises “by virtue of” the prohibition on circumvention in Section 1201.⁷² Even if proponents could establish that they are likely to suffer some adverse effect on noninfringing uses over the next three years that is not adequately addressed by the current preservation exemption (and they cannot), the Register should recommend against the proposed expansion. This is because the asserted adverse effects associated with an inability to preserve online video games in playable condition are not actually caused by TPMs or the prohibition against circumventing TPMs. Rather, they are caused by discontinuation of online video game services.

The current exemption focuses on server-based authentication to enable local gameplay. That is an example of a TPM controlling access to the video game. But in the proposed broadening of the exemption, the proponents propose expressly to reach beyond circumvention of server-based authentication to encompass “lawful access of game content stored or previously stored on an external computer server” in order “to conduct online gameplay.”⁷³ There, the server software and other video game content stored (or previously stored) on a server are not merely a TPM controlling access to the local game software, they are an online service that is an integral part of the original game experience. By the same token, taking away the server software and other video game content stored on a server is not the introduction of a TPM. Rather, it is the discontinuation of an online service that is only available by license so long as it is made available, and to which there is, accordingly, no permanent right of access. Circumventing some TPMs will not bring back the service.

To illustrate the point, consider a hypothetical online service that streams television programming to subscribers over the internet. To ensure that only subscribers can access such streams, the service presumably would maintain subscriber accounts and have mechanisms to authenticate subscribers desiring to access the streams (*e.g.*, user log-in procedures). If the service used a proprietary player – a kind of software on the user’s computer to access the streams – the authentication process between the player and the service’s servers could be viewed as a TPM controlling access to the player. However, nobody would think that shutting down the service is a TPM controlling access to the player, or view recreating streams of programming from the service’s library as an issue to be solved by circumventing some TPMs. The same is true of online video games when the proposal is not to defeat a server-based authentication mechanism, but to recreate expressive elements of the game service “to conduct online gameplay.”

This distinction is grounded firmly in the Register’s 2015 Recommendation. There the Register observed that:

The ability to engage in online multiplayer play is a functionality that extends beyond the game or TPM itself. . . . [M]atchmaking functionality involves not just the operation of a TPM, but also the

⁷² 17 U.S.C. § 1201(a)(1)(B); *see also* 17 U.S.C. § 1201(a)(1)(C) (“adversely affected by the prohibition”).

⁷³ MADE Comments at 6-7.

service of connecting one player to other players over the internet (as well as sometimes providing downloadable content, leaderboards, badges, chat, and other social features). If a matchmaking service is discontinued, the loss of online multiplayer play through that service is not caused by the TPM; circumventing the TPM cannot restore the service. What proponents in fact seek to do is circumvent for the purpose of implementing a *new* external service, which is somewhat different than accessing the game itself.⁷⁴

The proponents' request to expand the existing exemption to online video games is a request to implement a *new* external service. The Register rejected such a request in 2015, and the same result should follow in this proceeding.

ii. Video game companies routinely preserve their games themselves.

MADE claims that “despite their ever-growing cultural importance, online video games continue to turn into digital dust when their copyright owners cease to provide access to an external server necessary for the game to function.”⁷⁵ This claim, which conflates public access to online gameplay with preservation, is unsupported and inaccurate. Video game companies have strong economic motivations to preserve their video games assets themselves. Like other copyright owners of valuable entertainment content, they do *not* routinely discard works that in many cases they paid millions of dollars to create. And like other copyright owners of valuable entertainment content, video game companies increasingly reissue works from or based on their back catalogs.

To the extent that the proponents' comments concretely address preservation, rather than discontinuation, the comments demonstrate that game companies *do* preserve their assets. MADE addresses at length its efforts to preserve the game *Habitat*, but those efforts were undertaken with the cooperation of the copyright owner, which provided “working copies of both the game client software and the server.”⁷⁶ Thus, in that case, the software for which MADE seeks an exemption was preserved – apparently for decades – by the creators of the game. The software that MADE was not able to get from the rightsholder was “the network server software that sat between *Habitat* and the player” and “handled billing and sign-on.”⁷⁷ That software was proprietary to the dial-up network through which the game service was originally provided.⁷⁸ Such third party software was not integral to the video game, does not seem to have been part of the video game company's copyrighted work, and does not appear to be within the class of works addressed by Class 8 (“Video games in the form of computer programs”). Thus, MADE

⁷⁴ Register's 2015 Recommendation at 345 (emphasis in original) (footnote omitted).

⁷⁵ MADE Comments at 2 (footnote omitted).

⁷⁶ *Id.* at 12.

⁷⁷ *Id.* at A-2.

⁷⁸ *Id.*

seeks an exemption solely directed to preservation of software that it concedes *was* preserved and made available by the video game company in the case of *Habitat*.⁷⁹

Rather than a lack of preservation, discontinuation is evidence of nothing more than the normal business judgments that copyright owners make about how to commercialize the works in their catalogs. Under Section 106, decisions concerning when to discontinue and reissue copyrighted works in their catalogs generally lie with the copyright owner. Exercising this exclusive right is not at odds with preservation and is consistent with longstanding practices concerning the commercialization of other types of copyrighted works. For example, re-release cycles have long been common in the markets for motion pictures, television programming and sound recordings. In those markets, as in the market for video games, choosing to suspend commercialization of a work is a business judgment that copyright owners sometimes make. Video game companies make such judgments based on a number of factors, which may include the desire to drive demand for successor games in a franchise, or the desire to give a title a rest until nostalgia would help support renewed demand. In the case of online game services, this is no different from a situation in which a cable television service runs a particular series for a while and then stops running it (at least for a while).

Like other types of valuable creative works, video games regularly are reintroduced or reimagined. In fact, there is a vibrant and growing market for “retro” games, which game companies are motivated to serve. As just a few examples:

- Blizzard recently announced that it would reissue and re-launch server support for an early version of the game *World of Warcraft*.⁸⁰
- Microsoft has made a substantial (458) and growing number of older titles available to the public by offering backwards-compatibility, as well as digital download, through its Xbox One console.⁸¹
- Atari has released games from its back catalog through a number of platforms.⁸²
- Nintendo has released classic versions of its original NES and SNES consoles, which come loaded with 30 and 21 classic games (respectively).⁸³

⁷⁹ MADE asserts that many games are orphan works, but provides no concrete evidence to substantiate that. *See id.* at 29. Over a sufficiently long period of time, some games may become orphan works, but that period is much longer than six months after discontinuation of server support, and it seems highly unlikely that the major games that have the most cultural impact and feature prominently in the proponents’ comments will be orphaned.

⁸⁰ Allegra Frank, *World of Warcraft Classic is an Official Vanilla Server*, Polygon (Nov. 3, 2017), <https://www.polygon.com/2017/11/3/16603922/world-of-warcraft-classic-announced-trailer-wow-blizzcon-2017>; Jason Schreier, *Blizzard Announces World of Warcraft Classic*, Kotaku (Nov. 3, 2017), <https://kotaku.com/world-of-warcraft-classic-announced-1820123796>.

⁸¹ Microsoft: Xbox One: Backward Compatible Game Library, <https://www.xbox.com/en-US/xbox-one/backward-compatibility#faqSection> (last visited Feb. 6, 2018).

⁸² *See, e.g.*, Atari Vault, <http://atarivault.com/> (last visited Feb. 6, 2018); Atari Flashback Classic Game Console, <https://www.atari.com/flashback> (last visited Feb. 6, 2018).

⁸³ Nintendo Entertainment System Classic Edition, <https://www.nintendo.com/nes-classic> (last visited Feb. 6, 2018); Super Nintendo Entertainment System, <https://www.nintendo.com/super-nes-classic> (last visited Feb. 6, 2018). In fact, the SNES classic also comes loaded with a title called *Starfox 2*, never previously brought to market. That the

- Nintendo also has recently announced that consumers who subscribe to Nintendo Switch Online, to be released in September 2018, will receive access to “a compilation of classic titles with added online play.”⁸⁴
- Last year, Activision released a remastered trilogy of games from the Crash Bandicoot series, originally introduced between 1996 and 1998.⁸⁵
- Activision has also released a remastered version of the incredibly popular game Call of Duty: Modern Warfare, offering a single player campaign mode as well as a local multiplayer mode.⁸⁶
- In January 2018, BBG Entertainment and Retro Games announced the re-release of the original version of Boulder Dash from 1984, which has been available as a mobile game, and will now come pre-installed on the THEC64 Mini (a modern take on a classic home computer system from 1982, now designed to work with modern HD televisions).⁸⁷
- In February 2018, Sony released a remastered edition of Shadow of the Colossus, which was originally introduced in 2005 and “is widely regarded as one of the great games of all time.”⁸⁸

Mobile applications make it even easier for a video game company to re-release games from its back catalog. Video game publishers – including Atari,⁸⁹ Sega,⁹⁰ Capcom,⁹¹ and others – have re-released a substantial number of older titles in the form of mobile apps.⁹²

Video game companies do have the prerogative to stop making commercial use of a particular game. However, if companies elect to do so, they may help to ensure the video game remains playable, as by releasing the code necessary to allow third parties to sustain online

company continues to uncover beloved franchise games for retro consoles further illustrates that video game developers have ample motivation to preserve their back catalog.

⁸⁴ Nintendo Switch, Online Service (last visited Feb. 8, 2018), <https://www.nintendo.com/switch/online-service/>.

⁸⁵ Andrew Goldfarb, *Crash Bandicoot N. Sane Trilogy Release Date Announced*, IGN (Feb. 6, 2017), <http://www.ign.com/articles/2017/02/16/crash-bandicoot-n-sane-trilogy-release-date-announced>; see also Jonathon Dornbush, *Crash Bandicoot N. Sane Trilogy Review*, IGN (June 29, 2017), <http://www.ign.com/articles/2017/06/29/crash-bandicoot-n-sane-trilogy-review>.

⁸⁶ *Call of Duty: Modern Warfare Remastered FAQ*, Activision (last visited Feb. 9, 2018), https://support.activision.com/articles/en_US/FAQ/Call-of-Duty-Modern-Warfare-Remastered-FAQ.

⁸⁷ Philip Federico, *Two Classics from the 80s, the classic Boulder Dash video game and the retro THEC64 Mini, Join Forces* (last visited Feb. 8, 2018), <http://www.capsulecomputers.com.au/2018/02/two-classics-from-the-80s-the-classic-boulder-dash-video-game-and-the-retro-the64-mini-join-forces/>.

⁸⁸ Vaughn Highfield, *Shadow of the Colossus PS4 Review: The greatest remake you'll ever play*, Alpher (Jan. 29, 2018), http://www.alpher.com/games/1008339/shadow-of-the-colossus-ps4-review?_mout=1&utm_campaign=alpher_newsletter&utm_medium=email&utm_source=newsletter.

⁸⁹ Atari, Mobile, Online Arcade, <https://www.atari.com/buy-games/all/mobile> (last visited Feb. 6, 2018).

⁹⁰ Sega Forever, Classic Games Collection, <http://forever.sega.com/about> (last visited Feb. 6, 2018).

⁹¹ Press Release, Capcom, *Capcom Reorganizes Mobile Business; Plans to Aggressively Release Titles Utilizing Its IP* (Aug. 1, 2016), <http://www.capcom.co.jp/ir/english/news/html/e160401.html>.

⁹² See, e.g., SJ Azar, *The Best classic Games Available on Mobile*, Tech Radar (Aug. 25, 2015), <http://www.techradar.com/news/gaming/the-best-classic-games-available-on-mobile-1302609>.

gameplay. For example, in December 2017, Ubisoft released the code required to operate the multiplayer online server for the game *World in Conflict* (originally released in 2007 and preserved by Ubisoft for the decade thereafter).⁹³

The prevalence of reissues of older games belies any claim that game companies lack incentive to preserve older titles. In fact, MADE's comments and the many examples of reissues demonstrate clearly that game companies routinely preserve the games in their back catalogs.

iii. Cooperative efforts by ESA members and public institutions result in vastly more preservation than is likely to be accomplished through the additional circumvention addressed by the expanded exemption.

ESA and individual game companies are engaging in external preservation efforts that involve collaboration with a range of public institutions that adhere to high professional standards, are accustomed to working with scholars, and have the resources and expertise to ensure secure, long-term retention of video game artifacts for purposes of future scholarship. Most notably, ESA recently entered into a gift agreement with the Library of Congress, which is actively focused on preservation of software, including video games.⁹⁴ Pursuant to the agreement, ESA donated a collection of materials estimated to include approximately 2,500 video games from several of its members, which included original video game cartridges, discs, and consoles. ESA is also supporting the Smithsonian's preservation efforts, including assistance to its Lemelson Center, which in 2016 announced an initiative to preserve materials related to historically significant games and to record oral-histories with those who helped create them.⁹⁵ The project will involve collecting, preserving, and interpreting artifacts and documents, including source code, related to early video games.⁹⁶ ESA has likewise worked with the Smithsonian American Art Museum on exhibitions exploring the evolution of video games as an artistic medium and showcasing the work of independent video game creators.⁹⁷

Significant preservation efforts are also being undertaken at other large and reputable institutions with the professional staff and facilities necessary for archival storage of important materials over the long term. Organizations like the Strong National Museum of Play have compiled enormous collections of video games, consoles, and other materials, like game packaging, game-related publications, and game-related consumer products. The Strong's International Center for the History of Electronic Games alone has a collection of more than

⁹³ Andy Chalk, *Ubisoft Makes the World in Conflict Multiplayer Backend Open Source*, PC Gamer (Dec. 21, 2017), <http://www.pcgamer.com/ubisoft-makes-the-world-in-conflict-multiplayer-backend-open-source/>.

⁹⁴ Library of Congress, *2015 National Agenda for Digital Stewardship* 18 & n.40 (Sept. 2014), <http://www.digitalpreservation.gov/documents/2015NationalAgenda.pdf>.

⁹⁵ News Release, Smithsonian, *Smithsonian's Lemelson Center Announces Video Game Pioneers Archive Initiative* (June 13, 2016), <https://newsdesk.si.edu/releases/smithsonian-s-lemelson-center-announces-video-game-pioneers-archive-initiative>.

⁹⁶ *Id.*

⁹⁷ *The Art of Video Games*, Smithsonian American Art Museum (2012), <http://www.americanart.si.edu/exhibitions/archive/2012/games/>; See also, n.29, *supra* (discussing other video game-related activities at the Smithsonian American Art Museum).

60,000 items. As a further example, MADE acknowledges that copyright owners have assisted with its preservation efforts.⁹⁸

These preservation efforts belie proponents' asserted need for an expanded exemption. The fact is that the most significant game titles are being preserved for legitimate scholarly use by public institutions that target scholarly use, often in cooperation with game companies. Even without heroic efforts to replicate discontinued game services, these efforts will in many cases ensure that future scholars can experience culturally significant contemporary games, because many such games allow for either local multiplayer or single player gameplay.⁹⁹ By contrast, allowing unilateral circumvention in the name of preservation would add little or nothing to these preservation efforts because, as the proponents' effort to restore the game *Habitat* shows, what they would like to accomplish is impracticable except with the cooperation of video game companies.¹⁰⁰

iv. The existing exemption sufficiently enables preservation for scholarly purposes.

In 2015, the Register found that the existing exemption would be sufficient to facilitate preservation, which she then understood as an attempt to archive individual video games “and make them available for research and study.”¹⁰¹ In so finding, the Register rejected efforts by the then-proponents to blur the line between preservation and play:

The Register also narrows her consideration of fair use to reproductions and modifications of video game and console software made for the purpose of preserving games in playable condition to enable research and study. Although proponents also seek the ability to modify video games and consoles so they can be exhibited to the public in playable form – undoubtedly an appealing prospect for many – it is important to recognize that these additional uses also implicate the exclusive section 106 rights of public performance and display.¹⁰²

⁹⁸ MADE Comments at 12 (describing how rightsholders assisted in preserving *Habitat*).

⁹⁹ This is true for console games, and even more true for mobile games and PC games. See, e.g., <http://www.pcgamer.com/local-multiplayer-games/>.

¹⁰⁰ See MADE Comments at 12 (discussing creator cooperation required to restore *Habitat*).

¹⁰¹ Register's 2015 Recommendation at 322 (drawing on proponents' definition of preservation); see also *id.* at 322 n.2182 (quoting proponents of exemption for preservationists as “asserting that ‘the goal of preservation is to preserve every aspect of the original experience of playing a game, to provide really the maximum amount of data and experiential data for the future, *whether that is a museum exhibit for academics or whatever use coming down the road.*’” (emphasis added)); *id.* at 327 (summarizing proponents position that loss of online multiplayer gameplay adversely affects preservationists by “thwart[ing] . . . their efforts to preserve video games and make them available for study.”).

¹⁰² *Id.* at 342. Although she did not express an opinion on whether exhibition of preserved games constitutes a fair use, the Register observed that “[t]here is no express exception in the Copyright Act that would appear to address the performance aspects of the exhibition uses at issue here.” *Id.* at 343. Proponents do not propose expanding or provide any evidence in support of expanding the Register's definition of preservation to include exhibitions of preserved materials.

In this proceeding, the proponents request only that the Register expand the existing exemption as applied to preservation.¹⁰³ However, evidence suggests that the proponents may not use the term “preservation” as the Register used that term in her 2015 Recommendation (and as it is properly understood in copyright law generally). For example, there is abundant evidence that the proponents again wish to blur the line between preservation and play.¹⁰⁴ To the extent the proponents take this more expansive view of the term preservation, it should be rejected. Nothing in the current record supports a departure from the Register’s 2015 finding that preservation is properly construed as limited to maintaining games “to enable research and study.”¹⁰⁵ In evaluating whether it is necessary to expand the existing exemption to permit the additional uses that proponents contemplate, the critical question is whether legitimate preservation for scholarly purposes requires an exemption broader than what the Register found appropriate in 2015.

In 2015, the Register considered and rejected some of the same arguments proponents press here, and particularly that an exemption is necessary to restore online multiplayer gameplay. The Register explained that preservationists do not need to replicate online multiplayer gameplay “if the objective is preservation of the game in playable form for future research and study.”¹⁰⁶ This, the Register said, was right for at least two reasons:

First, as explained above, section 108 suggests that preservation activities are properly limited to on-site uses, and multiplayer play over the internet would violate that principle. Moreover, the objective of permitting researchers to experience multiplayer play would appear satisfied by the alternatives to circumvention put forward by opponents, namely, by connecting multiple controllers to a single device or using local networking capabilities.¹⁰⁷

On these grounds, and others described below, proponents’ request to broaden the existing exemption to cover online multiplayer play should again be rejected.

The Register’s conclusion that, under Section 108, preservation is properly limited to on-site uses, and should not be extended to online multiplayer gameplay, requires rejection of the proponents’ request to extend the current exemption to online multiplayer games.¹⁰⁸ While it is theoretically possible to construct an online multiplayer ecosystem accessible only by scholars

¹⁰³ NPRM, 82 Fed. Reg. at 49,561. The initial and primary proponent of the proposed expansion states that it does not seek any modifications of the existing exemption as applied to personal play apart from a museum setting. MADE Comments at 1.

¹⁰⁴ See *infra* at Part E.1.iv; see also *infra* Part E.2.i.b.

¹⁰⁵ Register’s 2015 Recommendation at 342.

¹⁰⁶ *Id.* at 346.

¹⁰⁷ *Id.* at 346-47.

¹⁰⁸ Importantly, this conclusion also forecloses two additional elements of the proposed expansion that proponents press: (1) that the Register permit eligible preservationists to distribute video games to affiliates *outside of the physical premises* of the relevant institution; and (2) that the Register permit eligible preservationists to enlist affiliates, who may work *off-site* under the proposed definition. MADE Comments at 6-7 (modifying Section 201.40(b)(8)(i)(B)).

within the confines of an eligible institution, like the Library of Congress, proponents have shown no inclination to so limit their activities.¹⁰⁹

Likewise, the Register's conclusion that the existing exemption is sufficient to enable preservation remains valid for the coming triennial period. When a game company discontinues server support for an online game, marketplace alternatives enable proponents to preserve the game for scholarly pursuits without circumventing access controls. Across the full range of games in the marketplace, in many instances, games for which there is no external server support can still be played through single-player modes. Moreover, many games can also be played in multiplayer mode through local area networks¹¹⁰ or by plugging multiple controllers into a single console.¹¹¹ This is particularly true with respect to the older, discontinued games that are the focus of preservation activities. The proponents fail to explain why alternatives to online multiplayer gameplay are insufficient to preserve games for "research and study."¹¹² Given the availability of adequate alternatives to multiplayer gameplay, proponents have not met their burden of demonstrating that the proposed expansion is required.¹¹³

Even in the case of games where multiplayer gameplay is not available from preserved copies of distributed games, claims that serious video game scholarship often requires playing discontinued online games in a simulation of their original environment should be viewed with considerable skepticism. Video game research is flourishing, with various whole journals devoted to the topic, and research occurring across many academic disciplines. The proponents' claims that future such research as to online games depends on preservation that is being materially impeded depends on at least two propositions: (1) that the kinds of serious scholarly research that might contribute to fundamental knowledge concerning video games focuses (and is likely to focus) to a material extent on historical games rather than relatively current ones, and

¹⁰⁹ See Exhibit A (illustrating that MADE's primary emphasis is on facilitating recreational play within the confines of its facility).

¹¹⁰ As the Register has observed, a local area network connects different devices "in a localized area, such as a home, office, or school, whereas a wide area network, such as the internet, connects computers running at distant locations." Register's 2015 Recommendation at 333.

¹¹¹ *Id.* at 345. Proponents claim that "nearly 'every multiplayer game on the market requires a constant connection to the home servers' for multiplayer features." MADE Comments at 10 (citation and alteration omitted). Proponents offer no meaningful evidence in support of this claim, which flatly contradicts a finding the Register made just three years ago. Instead, proponents rely on a single unsubstantiated assertion. This is insufficient and, in any event, fails to account for the body of games most relevant to the proposed exemption: games that are *no longer* available on the market.

¹¹² Although massive multiplayer online games and multiplayer online battle arena games may not be available in single-player or local multiplayer mode, proponents make no showing that this precludes serious research and study, an evidentiary deficiency further discussed below.

¹¹³ See, e.g., Register's 2015 Recommendation at 351 (rejecting proposed exemption for online multiplayer gameplay for several reasons including, among others, that local multiplayer gameplay provided suitable alternative to online multiplayer gameplay); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260, 65,274 (Oct. 26, 2012) ("2012 Final Rule") (rejecting proposed exemption for jailbreaking video game consoles for several reasons including, among others, that "alternative devices" could be used for proponents' stated purpose); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,834 (July 27, 2010) (rejecting exemption for DRM-protected streaming video based on finding of sufficient alternatives, including DVD player); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472, 68,478 (Nov. 27, 2006) (rejecting proposed exemption for circumventing TPMs on certain DVDs based on availability of alternatives).

(2) such research would be materially advanced by scholars' being able to have a personal gameplay experience in their own time (albeit in a simulated environment), rather than merely studying video games and related materials as historical artifacts. These propositions are far from obvious, and in any event have not been proven by the proponents.

Even if a particular research project focused on historical use of video games, a scholar's personal gameplay experience in a simulated environment may not be "that useful to the researcher; it may not be the most useful way to understand historical software in execution," given the many ways that a community of gamers might interact with other players or the game environment.¹¹⁴ Perhaps that is why the proponents seem more focused on play by individual gamers, rather than scholars. For purposes of genuine scholarship, public institutions are currently preserving large numbers of important games, together with related artifacts that may be as important as the games themselves for purposes of understanding games in context at a time decades in the future. Such scholarship does not clearly require more.

That is probably a good thing, because as MADE acknowledges, recreating an online game experience requires a significant effort that makes doing it on a large scale unrealistic. MADE states that it can only "work towards preserving and resurrecting about one to two games at a time, with average return completion around 4 years."¹¹⁵ Even then, the record demonstrates that cooperation from copyright owners may be a necessity, and may very well be obtainable. For example, in working to restore *Habitat*, MADE sought and obtained assistance from both the copyright owner and the game's original developers.¹¹⁶ Thus, cooperation is an important and viable alternative to circumvention for purposes of recreating online games, and a broadened exemption would do little to mitigate the difficulty of restoring discontinued game services.

As the Register concluded in 2015, the existence of alternatives to restoration of online gameplay render the existing exemption sufficient to support preservation for scholarly purposes.

* * *

The above factors, taken together, render *de minimis* any adverse effect on preservation caused by Section 1201 as modified by the current exemption, if there is any such effect at all. In light of the significant preservation activities already happening and the opportunities for preservation that are permitted by the current exemption, there is no reason to believe that maintaining the status quo will have a meaningful adverse effect. For these reasons, and those

¹¹⁴ See Henry Lowood, *The Lures of Software Preservation*, in *Toward a National Strategy for Software Preservation* 4, 9 (Library of Congress Oct. 2013), http://www.digitalpreservation.gov/multimedia/documents/PreservingEXE_report_final101813.pdf; *id.* at 7-8 ("With interactive software, significance appears to be variable and contextual, as one would expect from a medium in which content is expressed through a mixture of design and play, procedurality and emergence.").

¹¹⁵ MADE Comments at A-4 (emphasis added).

¹¹⁶ See, e.g., *id.* at A-1 (describing assistance received from original authors of relevant game, as well as help from other game developers). Notably, when seeking the initial exemption in 2015, proponents conceded that they would require developer assistance in order to preserve games predicated on persistent worlds. Register's 2015 Recommendation at 323 (citing supplemental comments conceding that "[p]ersistent worlds require 'robust servers designed to host hundreds, if not thousands of simultaneous players,' and cannot generally be re-created after a shutdown without the cooperation of the game's developer." (quotation marks omitted) (quoting EFF/Albert)).

laid out in the Register's 2015 Recommendation, the proposed expansion of the existing exemption should be rejected.

2. The proponents propose broadening the preservation exemption in ways that would enable and promote infringement.

The Register should not recommend expanding the video game preservation exemption as proposed in Class 8 because the case for it is based on uses that are (at least in significant respects) infringing and granting it will promote further infringement. It is the proponents' burden to show "that uses affected by the prohibition on circumvention are or are likely to be noninfringing."¹¹⁷ Demonstrating that the use "might plausibly be considered noninfringing" is insufficient.¹¹⁸ Indeed, the Register has consistently emphasized that "there is no 'rule of doubt' favoring an exemption when it is unclear that a particular use is a fair or otherwise noninfringing use."¹¹⁹ The proponents have failed to meet their burden that the proposed expansion is focused on noninfringing use.

Given the decision the Register has already made to recommend continuation of the current video game exemption,¹²⁰ analysis at this stage of the proceeding must focus on the additional uses that have been proposed by the proponents of a broadened video game exemption. The Office made that principle plain in the NPRM.¹²¹ And the reason for that pronouncement is equally plain: a perceived need for circumvention to enable noninfringing use that is adequately addressed by an existing exemption could not possibly justify a broader exemption. While giving lip service to this point,¹²² the proponents assert that their proposed broadening of the exemption is noninfringing based significantly on arguments concerning preservation in general, not the specific additional actions that the broadened exemption would enable.¹²³

A proper analysis of whether additional activities proposed to be included in an exemption are noninfringing must logically begin by identifying what the further activities are. Here, there are three categories of activities that the proponents propose to add to the video game preservation exemption: (1) circumvention of TPMs used to control access to video game software (apparently both local and server-based game software) when gameplay requires access to content stored on a computer server that has not previously been distributed to the user;¹²⁴ (2) circumvention of TPMs used to control access to video game software when a server interaction is necessary for online gameplay, rather than just local gameplay;¹²⁵ and

¹¹⁷ Register's 2015 Recommendation at 14-15; *see also* NPRM, 82 Fed. Reg. at 49,551-52.

¹¹⁸ Register's 2015 Recommendation at 15.

¹¹⁹ *Id.* at 15.

¹²⁰ NPRM, 82 Fed. Reg. at 49,555-56.

¹²¹ *Id.* at 49,558 ("In cases where a class proposes to expand an existing exemption, commenters should focus their comments on the legal and evidentiary bases for modifying the exemption, rather than the underlying exemption.").

¹²² *E.g.*, MADE Comments at 6.

¹²³ *E.g.*, *id.* at 13-24.

¹²⁴ *E.g.*, *id.* at 7 (proposing to add to the definition of "complete games" games that require access to game content stored on a server).

¹²⁵ *E.g.*, *id.* at 6 (proposing to add to the current exemption the words "or to conduct online gameplay").

(3) circumvention of TPMs used to control access to video game software to allow preservation of video game software by “affiliates” of qualifying organizations.¹²⁶

The proponents characterize these as “slight modifications” to the existing exemption.¹²⁷ However they are nothing of the sort. The proponents request permission to engage in forms of circumvention that will enable the complete recreation of a hosted video game-service environment and make the video game available for play by a public audience. Worse yet, proponents seek permission to deputize a legion of “affiliates” to assist in their activities. If a cable TV network decided to discontinue the service of providing a particular channel, nobody would think that it was noninfringing for libraries and fans across the country to band together to reproduce copies of the shows, motion pictures, and interstitial matter formerly aired on the channel and recreate for a public audience the experience of watching the channel as such; yet that’s effectively what is being proposed here.

Proponents argue that these additional activities are consonant with Section 108 and qualify as fair uses. However, that is not correct – certainly as to the full scope of activities that each such expansion would add to the exemption. And these activities would enable other infringement that is not necessarily the object of the proposed expansion, but would certainly result from the expansion if granted. Accordingly, the proponents have not satisfied their burden and the proposal should be rejected.

i. The additional uses will involve or enable infringement.

The proponents argue at length that what they propose to do with the broadened exemption is noninfringing because it is consistent with the spirit of Section 108 and is a fair use. However, the proponents’ analysis is incomplete, because they never identify and address the specific acts to which they would like those defenses to apply. One cannot apply Section 108 or the fair use doctrine without knowing the specific kinds of infringing acts to which one is supposed to be applying them. ESA’s infringement analysis begins with that foundational step.

a. Copying software and video game elements that have not been lawfully distributed to the organization is infringing.

A critical feature of the current exemption is that the circumventing organization must have lawfully acquired a copy of a complete video game in a physical or download format.¹²⁸ The proponents propose rewriting the definition of “complete games” to include therein what would more accurately be thought of as *incomplete* games – games where play requires access to content stored on a computer server that has not previously been distributed to the user. Thus, while the organization may lawfully possess what MADE characterizes as “much of the game’s copyrightable material,”¹²⁹ the organization does not lawfully possess all of it. Specifically, the organization does not possess a lawful copy of the server software or of any individual game elements that reside on the server and have not been distributed to the organization. Such

¹²⁶ *E.g., id.* at 7 (proposing to add references to preservation by affiliates).

¹²⁷ *Id.* at 2-3, 35.

¹²⁸ 37 C.F.R. § 201.40(b)(8)(i).

¹²⁹ MADE Comments at 9.

elements may include items such as downloadable content (sometimes separately priced for in-game purchase), leaderboards, badges, and other graphic elements.¹³⁰

The proponents' professed goals of restoring "online games to full functionality"¹³¹ and maintaining them "in playable form"¹³² admittedly require that the organization "copy or modify" what the proponents minimize as "functional elements" of the video game software, as well as "expressive elements that are intertwined with a game's functionality – e.g., modifying graphics that were once stored on the original game server."¹³³ Achieving the proponents' goals of ensuring playability in the long term would require that these new, unauthorized copies be permanent copies.

Thus, analysis of whether the proponents propose to engage in noninfringing activities must begin by recognizing that they admittedly hope to reproduce and prepare derivative works of software and game elements that are part of the overall copyrighted video game and that have not been lawfully distributed to the eligible organization that wishes to recreate the online video game. That is *prima facie* a violation of Section 106(1) and (2). This may be why, in the 2015 proceeding, the Register found "exclud[ing] uses that require access to or copying of copyrightable content stored or previously stored on developer game servers" to be an "important limitation."¹³⁴

Infringement concerns associated with replicating game elements stored on external services are broader than the proponents suggest. Game server software for an online video game is not merely an authentication mechanism, as was the case with respect to local gameplay by the current exemption. Game server software is used to provide a service that is the essence of the overall expressive online game experience. As the proponents admit, it is the server software that determines how players interact with each other and their environment in different circumstances.¹³⁵ Such software is not purely "functional," and is instead (or as well) the embodiment of the core expressive aspects of the game experience. Video game developers make creative choices in determining how players interact with each other and their environment, and those are embodied in the server software. Tweaking the server software controlling those interactions (something that video game developers sometimes do) can materially affect the game experience and gameplay. Copying that software – either directly or by writing new software to approximate the interactions embodied in the original software – to replicate the game service previously provided by the copyright owner is copying expressive elements of the video game.¹³⁶

The proponents try to minimize the significance of this activity by describing what they would like to do as "reverse engineering."¹³⁷ However, as the Register noted in 2015, the

¹³⁰ See Register's 2015 Recommendation at 345.

¹³¹ MADE Comments at 30.

¹³² *E.g., id.* at 2, 5, 10, 12, 18, 19, 20, 27.

¹³³ *Id.* at 20.

¹³⁴ Register's 2015 Recommendation at 350.

¹³⁵ MADE Comments at 10.

¹³⁶ See, e.g., *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F. 3d 928, 954 (9th Cir. 2010) (online servers for World of Warcraft game "provide access to WoW's dynamic non-literal elements").

¹³⁷ *E.g.,* MADE Comments at 11, A-4, A-9.

reverse engineering that courts have permitted is temporary one-time copying of copyrighted software to learn the unprotected ideas expressed therein, as an intermediate step in creating new *noninfringing* software.¹³⁸ Here, the proposal is to copy the software controlling expressive aspects of the game experience, such as how players interact with each other and their environment, and then to run that copied software in the long term to provide a substitute game service. Even if that copying is not direct and mechanical, copyright nonetheless protects against non-literal copying of the expressive aspects of software.¹³⁹ That is not excused by Section 102(b) as the proponents suggest.¹⁴⁰ What is proposed here is infringing unless covered by Section 108 or fair use (which it is not, for the reasons discussed below).

b. Enabling online gameplay implies additional infringing activity.

The proponents' proposal to allow circumvention of TPMs used to control access to game software when a server interaction is necessary for online gameplay, rather than just local gameplay, will extend the reach of the exemption to a broader set of video games. The proposal also implies a broader range of infringing activity as to the online video games involved.

First, as described above, the proponents propose to copy – either directly or by reverse engineering and approximation – expressive elements of game server software that were not licensed or delivered to the organization involved. And because online gameplay requires server interactions, they then propose to run an unauthorized copy of the server software in the long term. It is well established that running an unauthorized copy of computer software implicates the exclusive rights of the copyright owner.¹⁴¹

Second, enabling online gameplay often would require modifying local game software to interact with the (infringing) game server software on a substitute server. Proponents fail to explain how the expanded exemption can be implemented without creating derivative works of local game software to connect and interoperate with a new game server, and creation of such derivative works implicates the rights of copyright owners.

Finally, and most importantly, the proposal to enable online gameplay highlights that the proponents' real goal is to allow a public audience – and not just serious scholars – to play online video games. In 2015, the Register focused her analysis on “reproductions and modifications of video game and console software made for the purpose of preserving games in playable condition to enable research and study.”¹⁴² The Register specifically noted that “exhibit[ion] to the public in playable form . . . implicate[s] the exclusive section 106 rights of public performance and display.”¹⁴³ She thus found “[t]he performance and display of a video game for visitors in a public space [to be] a markedly different activity than efforts to preserve or study the

¹³⁸ Register's 2015 Recommendation at 338; *see also Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 602-05 (9th Cir. 2000); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522-23 (9th Cir. 1992).

¹³⁹ *E.g., Softel, Inc. v. Dragon Med. & Sci. Commc'ns, Inc.*, 118 F.3d 955, 963 (2d Cir. 1997) (“It is well-established in this circuit that non-literal similarity of computer programs can constitute copyright infringement.”).

¹⁴⁰ MADE Comments at 15.

¹⁴¹ *E.g., MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993).

¹⁴² Register's 2015 Recommendation at 342.

¹⁴³ *Id.* at 342.

game in a dedicated archival or research setting.”¹⁴⁴ For that reason, she specifically *excluded* from the current exemption “exhibition activities involving public performance or display.”¹⁴⁵

There is abundant evidence that when the proponents desire to enable play of online video games, their vision is not to allow a university faculty member and her graduate student to play an online game from a reading room populated by scholars. They appear interested in allowing the public to play video games. This is obvious from MADE’s description of the effort involved in restoring the video game *Habitat*, which MADE describes as “a four-year project which took thousands of person-hours.”¹⁴⁶ MADE did not go through that process solely because of the abstract possibility that someday, some scholar might wish to study *Habitat*. MADE undertook this process because “the gaming community and game development community wanted to see *Habitat* returned.”¹⁴⁷ Indeed, “[a]s of now, neohabitat.org is live,¹⁴⁸ and hosting a free *Habitat* server for players around the globe.”¹⁴⁹

MADE’s goal of enabling public gameplay, rather than preservation for serious scholarly purposes, is further clear from MADE’s website, selected pages from which are reproduced in Exhibit A. MADE is an “all-playable video game museum” that is “open to the public.” Visitors are invited to pay \$10 “to play games all day.”¹⁵⁰ As can be seen from the photographs in Exhibit A, its “museum” is like a clubhouse where people gather to play games. Indeed, MADE’s founder has long acknowledged that the organization aspires to allow members of the public to play games in its facility,¹⁵¹ and a commenter who volunteers at MADE admits that it “provide[s] a place for people to play games as a community, creating a positive recreation space for all kinds of people.”¹⁵² While MADE may offer educational exhibits and other programs that have merit, and perhaps it has even produced some serious scholarship (although there is no evidence of that in MADE’s initial comments), it must be recognized that MADE is primarily a venue for the public to play video games.¹⁵³ MADE clearly engages in acts that implicate the rights of copyright owners by performing or displaying games “at a place open to the public or at [a] place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”¹⁵⁴

¹⁴⁴ *Id.* at 342.

¹⁴⁵ *Id.* at 342.

¹⁴⁶ MADE Comments at A-1.

¹⁴⁷ *Id.* at A-3.

¹⁴⁸ As discussed above, MADE’s effort to restore *Habitat* was undertaken and completed with authorization from rightsholders. *See id.* at 12 (“[W]hen the MADE preserved the world’s first MMO, *Habitat*, they had working copies of both the game client software and the server. (They received this code from the game’s copyright owners, who authorized the project.)”); *see also id.* at 28 (“MADE’s restoration of the game *Habitat* was done with permission from Fijitsu and America Online, the owners of the game’s copyrights.”); *id.* at 36 (statement of MADE) (“We worked with Fijitsu and America Online to secure the rights needed to bring *Habitat* back online.”).

¹⁴⁹ *Id.* at A-1.

¹⁵⁰ Museum of Art and Digital Entertainment, <https://www.themade.org/> (last visited Feb. 6, 2018).

¹⁵¹ Cassie McFadden, *The Making of the MADE*, East Bay Express (Dec. 21, 2011), <https://www.eastbayexpress.com/oakland/the-making-of-the-made/Content?oid=3076391>.

¹⁵² Taylor Nodell Comments at 2.

¹⁵³ Notably, MADE is not accredited by the American Alliance of Museums. *See* American Alliance of Museums, <http://www.aam-us.org/resources/assessment-programs/accreditation> (last visited Feb. 6, 2018).

¹⁵⁴ 17 U.S.C. § 101 (definition of “publicly”).

The intentions of other proponents are equally clear:

- Consumers Union wants “to enable consumers to access the software changes in order to continue playing the games.”¹⁵⁵
- Imran Akhtar explains that “there [is] a big community out there who really wants [a certain game] to be brought back from ashes.”
- Michael Dobbs “would love to one day take my children on a digital tour of the games of my childhood.”
- John Dolph would like a particular game to “be playable for fans.”
- Brendan Giddens “believe[s] that the gaming community should not be blocked in recreating the servers for private or non-profit use.” He even acknowledges the possibility of charging a fee for such use.
- Elijah Smith explains that “getting the opportunity to replay games from my youth, and share them with my child – are a source of joy for me.”

It bears emphasis that in this proceeding, public performance and display of online games is not just a possibility that can be ignored while plausibly creating an exemption directed toward serious scholarship. Circumvention of access controls to permit play of purely local video games is not a herculean task; it potentially could be undertaken in anticipation of future scholarship without the lure of public performance and display (even if that is not really what is happening at MADE). Restoration of discontinued online video games is a very different thing. Public performance and display of restored online games cannot be ignored because it is the primary reason anyone would consider the massive investment required to restore an online video game. The proposal to enable online gameplay must be understood as fundamentally being a proposal to render public performances and displays of online video games.

If such access were made widely available, it may encourage further infringement of local game software as well. Authorized game servers are designed to work only with legitimate client software. In effect, the legitimate client software and client-server protocol function as a TPM controlling access to the legitimate server. However, the proposed exemption does not require that someone recreating a game server build into it the access controls that were in the original. Thus, if access to the server were not limited to the eligible organization’s reading room, it seems probable that infringing copies of local game software could be used with the substitute server. In this way, creation of substitute servers could drive infringement of the client software for discontinued games.

c. Permitting preservation by affiliates will involve and lead to additional infringing activity.

The proponents propose expanding the video game preservation exemption to allow not only circumvention for purposes of preservation by an eligible library, archive or museum, but

¹⁵⁵ Consumers Union Comments at 3.

also preservation by an “affiliate” of such an organization. MADE’s proposed regulatory language states that the affiliate should be “engaged in the lawful preservation of video games under the supervision of an eligible library, archives, or museum.”¹⁵⁶ However, while the concept of affiliates might sound benign, it is amorphous. MADE clearly expects that affiliates will be working off-site at geographically distributed locations. Toward that end, MADE suggests that eligible organizations be permitted to distribute video games outside of their physical premises, if not “to the public.”¹⁵⁷ However, a sufficiently large and open group of affiliates would constitute the public, meaning that the proposal to distribute video games to affiliates implicates Section 106(3).

The proponents have not described how an eligible organization could possibly provide effective supervision of individuals in remote locations with whom it may have contact only online. It is not hard to imagine an organization opening up “affiliation” to anyone who volunteers through completion of an online form, without any meaningful verification of the affiliates’ identities or intentions. As a practical matter, it should be assumed that any individual who wants to claim the benefit of the exemption could affiliate with some eligible organization and operate without any meaningful supervision.

And while MADE may have the best of intentions for using affiliates, the American Library Association estimates that there are approximately 120,000 libraries in the U.S.,¹⁵⁸ and the Institute of Museum and Library Services maintains a list of over 30,000 museums in the U.S.¹⁵⁹ One would not expect all of them to engage in video game preservation, but they would all potentially be eligible for the proposed exemption. That means that if the proposed exemption were adopted, potentially thousands of organizations could deputize vast numbers of “affiliates” to circumvent TPMs and distribute copies of video games to them without authorization.

It is reasonable to expect that, if this proposal were adopted, affiliates would be gamers who want to play video games. This concern is particularly acute because in 2015, the proponents of what is now the existing exemption acknowledged that there is not a “strong line of demarcation” between preservationists and individuals who want to continue playing video games.¹⁶⁰ The point is reinforced by the individual comments in this proceeding, which support the broadening of the exemption based on the potential for gameplay.¹⁶¹ While some organizations may be capable and responsible enough to genuinely supervise a handful of carefully-selected affiliates, others will likely lack the capacity to effectively police affiliates that may wish to take advantage of their privileged position to engage in or facilitate infringing activity. Proponents fail to explain how they would cabin affiliate use of circumvention devices

¹⁵⁶ MADE Comments at 8.

¹⁵⁷ See *id.* at 7 (qualifying current exemption to prohibit eligible libraries, archives, or eligible affiliates from distributing video games “to the public” outside of their physical premises).

¹⁵⁸ Am. Library Ass’n, *Number of Libraries in the United States: ALA Library Fact Sheet 1* (last updated Sept. 2015), <http://www.ala.org/tools/libfactsheets/alalibraryfactsheet01>.

¹⁵⁹ https://data.imls.gov/Museum-Universe-Data-File/Museum-Universe-Data-File-FY-2015-Q3/ku5e-zr2b?_ga=2.148307828.295899495.1516983589-1740802668.1516983589.

¹⁶⁰ Register’s 2015 Recommendation at 340-41 & n.2313 (quotation marks omitted).

¹⁶¹ See *supra* Part E.2.i.b.

and copyrighted works accessed through circumvention to prevent widespread online gameplay and infringement of works accessed through circumvention.

Indeed, the proposal would allow organizations to create online repositories that house tools for facilitating circumvention, as well as a substantial number of video games undergoing “restoration.” It would also allow organizations to provide tools for circumvention and video games under restoration to a large and poorly supervised group of “affiliates.” This is just the kind of risk that the Register sought to avoid in 2015, when she recommended that “any digital copies or adaptations of the video games or console software created by the institution as a result of preservation efforts must not be distributed or otherwise made accessible beyond the *physical premises* of the institution”¹⁶²

Proponents read the Section 108 Study Group Report to support their proposal regarding affiliate archivists.¹⁶³ However, the proponents are mistaken. The Section 108 Study Group report does not in any way suggest that libraries or archives should be permitted to rely on a broad and dispersed assemblage of poorly-supervised volunteers to assist with preservation activities. Rather, it recommended permitting these institutions to authorize *outside contractors* to perform “at least some” activities permitted under Section 108 on its behalf.¹⁶⁴

The Section 108 Study Group report did not stop there. It recommended that institutions be obligated to impose certain conditions on outside contractors through a formal contract, including that outside contractors be prohibited from receiving benefits other than direct compensation for services, that outside contractors be prohibited in all but a narrow range of circumstances from retaining copies of material for their own purposes, and that outside contractors be prohibited from using materials for any purpose other than the Section 108-excepted activity.¹⁶⁵ Additionally the Section 108 Study Group suggested “that a written agreement between the library or archives and the contractor preserve a meaningful ability on the part of the rights holder to obtain redress from the contractor for infringement by the contractor.”¹⁶⁶

Nothing in the proposed exemption comes remotely close to providing protections commensurate with those discussed in the Section 108 Study Group report. Whether the Study Group’s suggested protections ultimately would be sufficient to protect copyright owners from the risks posed by outsourcing preservation activities is uncertain. But the proponents’ failure to

¹⁶² Register’s 2015 Recommendation at 352 (emphasis added).

¹⁶³ MADE Comments at 5, 24.

¹⁶⁴ Section 108 Study Group, *The Section 108 Study Group Report* 40-41 (2008), <https://web.archive.org/web/20171207124042/http://www.section108.gov/docs/Sec108StudyGroupReport.pdf> (“Section 108 Study Group Report”).

¹⁶⁵ *Id.* at 41.

¹⁶⁶ *Id.* at 41. Although the members did not agree on how to accomplish this, proposals included making the library or archive “jointly and severally liable for any infringing activities by the contractor or through its negligence[,]” requiring that the contractor “agree to nationwide personal jurisdiction” in order to allow a rights holder “to sue in its home jurisdiction” and avoid having to chase a contractor, and requiring that the contractor “agree to injunctive relief without bonding and other legal requirements[,]” as well as a “provision that rights holders are third party beneficiaries.” *Id.* at 41-42.

even approximate comparable protections underscores the very considerable threat posed by their proposal, as well as the indisputable basis for rejecting it as likely to promote infringement.

ii. Proponents acknowledge that the additional uses are outside the scope of Section 108.

The idea of Section 108 figured prominently in the Register’s 2015 decision to grant the existing game-preservation exemption, but she was clear that Section 108 “does not address the full range of preservation-related activities advocated by proponents.”¹⁶⁷ The proponents of broadening the exemption in this proceeding likewise exalt the spirit of Section 108 over its actual provisions. Ultimately they concede, as they must, that Section 108 is “inadequate to address institutional needs in relation to digital works.”¹⁶⁸

Given that concession, it is unnecessary to belabor the point, but to be clear, Section 108 does not exempt the additional unauthorized copying that a broadened exemption would allow or promote. For example, Section 108 does not cover the acquisition by an organization of an unauthorized copy of game server software or server-hosted game elements that have not been distributed to the organization, because those works are not “currently in the collections of the library or archives.”¹⁶⁹ Performance and display of online video games is not permitted under Section 108, because Section 108 “addresses only the rights of reproduction and distribution in the context of preservation-related activities, and does not authorize or except the public performance or display of copyrighted works,” except certain works not relevant here.¹⁷⁰ Similarly, Section 108 does not permit distribution of copies to, or gameplay by, remote affiliates.¹⁷¹ Broadening the exemption would enable significant activities that implicate the rights of copyright owners and are not made noninfringing by Section 108.

iii. The additional uses are not fair use.

The fair use doctrine provides the proponents’ only theory for believing that the additional uses that would result from broadening of the exemption are not infringing. In 2015, the Register relied on Section 108 principles to find that a narrow set of preservation activities likely qualifies as fair use.¹⁷² However, the proposed exemption would remove from the current exemption important limitations that enabled that conclusion. Without those limitations, significant additional activities that would be permitted under the broadened exemption cannot be justified as a fair use.

¹⁶⁷ Register’s 2015 Recommendation at 341.

¹⁶⁸ MADE Comments at 13 (quotation marks omitted).

¹⁶⁹ 17 U.S.C. § 108(b)(1).

¹⁷⁰ Register’s 2015 Recommendation at 341-42.

¹⁷¹ *Id.* at 346-47 (“[S]ection 108 suggests that preservation activities are properly limited to on-site uses, and multiplayer play over the internet would violate that principle.”).

¹⁷² *Id.* at 341-44.

a. The purpose and character of the proponents' proposed use weighs against fair use.

The first fair use factor requires consideration of “the purpose and character of the use.”¹⁷³ The inquiry under this factor entails two considerations: whether the use is commercial and whether (and to what extent) the use is transformative.¹⁷⁴ As explained above, the focus at this stage of the proceeding must be on the full range of additional uses that the proposed expansion will enable, and preserving online video games for serious scholarship is just a small part of the activity involved. Proponents seek to broaden the current exemption to cover acquisition of unauthorized copies of game server software and server-hosted game elements and public performance and display of online video games. It also is likely that a broadened exemption would result in distribution of video games to or by “affiliates” that are drawn from the public and not supervised to an extent that would make them agents of the relevant organization.¹⁷⁵

Commercial Use

Even if a library, archive or museum were the entity taking the additional actions that would be enabled by a broadened exemption, a significant part of those activities are commercial uses within the meaning of Section 107.

“[N]on-profit organizations enjoy no special immunity from determinations of copyright violation.”¹⁷⁶ Moreover, “[d]irect economic benefit is not required to demonstrate commercial use.”¹⁷⁷ Ultimately, “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”¹⁷⁸ Where nonprofit organizations engage in “repeated and exploitative copying of copyrighted works,” that use may be commercial “even if the copies are not offered for sale.”¹⁷⁹

These precedents establish that, so far as commercial use under Section 107 is concerned, what matters is the nature of the use involved, not the nature of the entity making the use, its tax status, or whether money changes hands. Here, even if the organization’s purpose were primarily preservation for purposes of serious scholarship (and that is clearly not the case with respect to MADE), that does not mean that the organization is entitled to acquire unauthorized copies of game server software and server-hosted game elements. Looking to Section 108 by analogy, that provision does not permit acquisition of works that are not already “in the

¹⁷³ 17 U.S.C. § 107(1).

¹⁷⁴ *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 144 (2d Cir. 1998).

¹⁷⁵ *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

¹⁷⁶ *Lish v. Harper’s Magazine Found.*, 807 F. Supp. 1090, 1101 (S.D.N.Y. 1992) (holding that non-profit organization’s sale of magazine was a commercial use).

¹⁷⁷ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

¹⁷⁸ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); *see also Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (holding that “profit/non-profit distinction is context specific, not dollar dominated”); *Reyes v. Wyeth Pharm., Inc.*, 603 F. Supp. 2d 289, 297 (D.P.R. 2009) (use of copyright materials in public service announcement not considered nonprofit or educational use where company derived goodwill).

¹⁷⁹ *Wall Data Inc. v. Los Angeles Cty. Sheriff’s Dep’t*, 447 F.3d 769, 779 (9th Cir. 2006); *accord Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110, 1118 (9th Cir. 2000).

collections of the library or archives.”¹⁸⁰ And the Register limited the current exemption to cases where genuinely complete games were “lawfully acquired,”¹⁸¹ presumably because acquiring infringing copies of server software and game elements is a different matter entirely. It is a commercial use within the meaning of Section 107.

Public performance and display of online games within a museum likewise is a commercial use within the meaning of Section 107. MADE charges an admission fee – “\$10 to play games all day.”¹⁸² Under the authority summarized above, public performance and display of copyrighted works to generate entrance fee revenue is a commercial use, even if undertaken by a nonprofit museum. Similarly, distribution, performance, and display of video games to remote affiliates for purposes of recreational gameplay, or unauthorized redistribution of copyrighted material by affiliates, should be viewed as a commercial activity even if no money changes hands.

Transformative Use

The first factor also encompasses consideration of whether a use “merely supersede[s]” the original work or is instead transformative, adding “something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹⁸³ “A use is considered transformative only where a defendant changes a plaintiff’s copyrighted work or uses the plaintiff’s copyrighted work in a different context such that the plaintiff’s work is transformed into a new creation.”¹⁸⁴

In 2015, the Register found “preservation of a video game in playable form for research and study” to be “favored purposes,” if not necessarily transformative ones.¹⁸⁵ And ESA agrees that preservation, research, and study sometimes may qualify as fair uses. However, preservation of copies lawfully acquired by a library, archive or museum – in the sense that the Register understood preservation in 2015¹⁸⁶ – is already addressed by the existing exemption. A significant part of the additional uses that the proposed expansion would enable are neither transformative nor favored.

Acquiring unauthorized copies of game server software and server-hosted game elements is not transformative. Even if these are copied through a laborious process of reverse engineering and approximation, the goal is to emerge with a copy that faithfully reproduces expressive elements of the original game experience. That introduces no new expression, meaning or message. It simply reproduces a work to enable the use for which it was originally created.

While the proponents might assert that the unauthorized copies are acquired for the purpose of preservation, the proponents do not contemplate acquiring those unauthorized copies

¹⁸⁰ 17 U.S.C. § 108(b)(1).

¹⁸¹ 37 C.F.R. § 201.40(b)(8)(i).

¹⁸² Museum of Art and Digital Entertainment, <https://www.themade.org/> (last visited Feb. 6, 2018).

¹⁸³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (quotation marks omitted).

¹⁸⁴ *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (quoting *Wall Data*, 447 F.3d at 778).

¹⁸⁵ Register’s 2015 Recommendation at 343.

¹⁸⁶ *Id.* at 341-42.

solely, or even primarily, for the purpose of preservation as that concept is expressed in Section 108 or was understood by the Register in 2015.¹⁸⁷ Although the Register found it important to distinguish preservation from recreational play,¹⁸⁸ the proponents want to make online video games playable for recreational purposes by a public audience that is far larger than the community of scholars studying video games. Indeed, MADE cites no specific example of serious scholarly work following from its preservation activities. To the contrary, it is clear from MADE's website that at its museum, public recreational play predominates over serious scholarship.¹⁸⁹ As the Register found in 2015, public performance and display of video games for purposes of recreational play is not transformative.¹⁹⁰ That is as true for online video games as for the locally-hosted video games addressed by the Register in 2015. Similarly, distribution, performance, and display of video games to remote affiliates for purposes of recreational gameplay, or unauthorized redistribution of copyrighted material by affiliates, is by no means a transformative use.

b. The nature of video games disfavors fair use.

The second fair use factor requires consideration of “the nature of the copyrighted work.”¹⁹¹ Here, the focus is on the extent of expressive content contained within the work. Video games are creative works that are entitled to a relatively high degree of protection against unauthorized use.¹⁹² Indeed, the Register has stated that “video games are highly expressive and thus at the core of copyright’s protective purposes.”¹⁹³ This finding might not counsel against fair use *if* proponents proposed copying only functional elements of video game software.¹⁹⁴ However, the proposed broadening of the exemption is not nearly so limited. The proponents propose to copy game server software that controls expressive aspects of video games, as well as server-based game elements, and then publicly perform and display online video games, both within their facilities and to a remote group of affiliates. Accordingly, this factor weighs against fair use.

c. The amount and substantiality of the proponents’ contemplated use disfavors a finding of fair use.

The third fair use factor examines the “amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹⁹⁵ This inquiry is concerned primarily with “the amount and substantiality of the original work used by the secondary user” and “whether the

¹⁸⁷ *Id.* at 342.

¹⁸⁸ *Id.*

¹⁸⁹ See Exhibit A (compiling evidence of MADE’s emphasis on personal use).

¹⁹⁰ Register’s 2015 Recommendation at 337.

¹⁹¹ 17 U.S.C. § 107(2).

¹⁹² See, e.g., *Sony Computer Entm’t Am., Inc. v. Bleem, Inc.*, 214 F.3d 1022, 1028 (9th Cir. 2000); *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 934 (N.D. Cal. 1996) (“[V]ideo games are for entertainment uses and involve fiction and fantasy, which are more creative than information.”).

¹⁹³ Register’s 2015 Recommendation at 338.

¹⁹⁴ *Id.*

¹⁹⁵ 17 U.S.C. § 107(3).

quantity of the material used was reasonable in relation to the purpose of the copying.”¹⁹⁶ “[T]he more of a copyrighted work that is taken, the less likely the use is to be fair.”¹⁹⁷

Here, the additional uses under the proposed broadening of the exemption involve durable copying and persistent public performance and display of large and important parts of video games. This is significantly different from what the Register envisioned in her 2015 Recommendation, where she found that circumventing the TPMs on a lawfully-acquired and locally-hosted complete game would require only modification of a small amount of game software for functional reasons, and possibly the reproduction of a complete, but temporary, copy of the game software to allow such modification. Even then, the Register found that the third factor disfavored fair use, although only slightly.¹⁹⁸

The broadened exemption at issue in this proceeding would involve a similar use, in this case modifying the local game software to communicate with a new server. But it would also involve much more significant and durable uses of copyrighted expression. The proponents propose to acquire unauthorized copies of game server software, including its expressive elements, along with server-hosted game elements. These copies would be permanent, because that is what is needed to enable online gameplay in perpetuity. And MADE acknowledges that “the portion copied may contain the ‘heart’ of the game.”¹⁹⁹ That concession is accurate, because online video games are unplayable without the server software that embodies the interactions among players and their environment. The proponents also contemplate persistent public performance and display of whole video games, over and over.

MADE recognizes that the copying it proposes to undertake is “substantial.”²⁰⁰ However, it urges the Register to find that such substantial copying is a fair use because the copying is necessary to preservation. The problem is that the proponents do not propose to limit their use of the works involved to preservation as the Register has described it. It is unlikely that anyone, including proponents, would invest thousands of hours of labor over a period of years merely because a scholar someday may wish to study the game. To the contrary, it is likely that the institutions and volunteers involved want to enable recreational gameplay. That has to be viewed as the primary purpose of the copying. And that purpose cannot justify substantial copying, including the heart of a creative work.²⁰¹ Under these circumstances, the amount and substantiality factor plainly weighs against fair use.²⁰²

d. The proponents’ contemplated use would harm the market for video games and therefore weighs against fair use.

The final fair use factor concerns “the effect of the use upon the potential market for or value of the copyrighted work.”²⁰³ In 2015, the Register found the very limited copying

¹⁹⁶ *Castle Rock*, 150 F.3d at 144 (quotation marks omitted).

¹⁹⁷ *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998).

¹⁹⁸ Register’s 2015 Recommendation at 338, 343-44.

¹⁹⁹ MADE Comments at 21.

²⁰⁰ *Id.*

²⁰¹ See *Harper & Row*, 471 U.S. at 564-66.

²⁰² See, e.g., *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (“Neither our court nor any of our sister circuits has ever ruled that the copying of an entire work *favours* fair use.”).

²⁰³ 17 U.S.C. § 107(4).

necessary to allow circumvention by eligible organizations for purposes of preservation and research to present little risk to the market.²⁰⁴ However, analysis of this factor is very different for the broader scope of use proposed in this proceeding.

As an initial matter, game server software is an unpublished work. While it is used by the game provider to provide a game service, copies of that software are not distributed to the public. Acquisition of a copy of unpublished game server software that the copyright owner never desired to place into the hands of others is uniquely harmful to copyright owners and weighs strongly against a finding that such copying is a fair use.²⁰⁵

More generally, the proponents seek to enable recreational play of online video games by members of the public and not just scholars. That poses a very significant risk of harm to the substantial and growing market for both derivative works and reissues of video games. As they did in 2015, the proponents refer to the video games eligible for both the current and proposed exemptions as “abandoned.” However, they do not use that word as the term of art it is in copyright law. In copyright, a work is considered abandoned only when there is an “intent by the copyright proprietor to surrender rights in his work.”²⁰⁶ The reality is that game companies do not regularly *abandon* works of authorship that may have cost them many millions of dollars to bring to market. Rather, like other copyright owners, they preserve the works in their catalogs and make business judgments about which of them to offer at which times. Many popular video games are part of franchises with many games in a series. While video game services are from time to time discontinued, at least for a time, that is an ordinary feature of the commercialization of copyrighted works. For example, if a copyright owner chooses to discontinue an older game to help drive demand for a successor to that game, that kind of market decision is one copyright law usually leaves to copyright owners. And discontinued video games have increasingly been brought back to the market as part of a surge in “retro gaming” since the 2015 proceeding.²⁰⁷

Courts have recognized that copyrighted works regularly pass through release and re-release cycles. Far from giving individuals or entities free reign to appropriate to themselves the market for out-of-print works, courts have recognized the potential for harm when the copyright owner might re-issue a work, issue a derivative work, or generate income through licensing.²⁰⁸ Making older online video games available for recreational play without the copyright owner’s authorization places the copyright owner in the position of having its current releases and re-releases compete with unauthorized access to its older games, and also may diminish consumer

²⁰⁴ Register’s 2015 Recommendation at 344.

²⁰⁵ *Harper & Row*, 471 U.S. at 549-55.

²⁰⁶ *Napster*, 239 F.3d at 1026 (quotation marks omitted). Recognizing this point, in 2015 the Register felt compelled to clarify that the issue under discussion is not abandonment, but discontinuation of server support. Register’s 2015 Recommendation at 321 n.2177.

²⁰⁷ See *supra* Part E.1.ii.

²⁰⁸ See, e.g., *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1314 (11th Cir. 2008) (out-of-print status did not favor fair use because copyright owner reserved decision on whether or not to reissue); *Robinson v. Random House, Inc.*, 877 F. Supp. 830, 843 (S.D.N.Y. 1995) (“[T]he fact that the Daley Book currently is out of print is not dispositive—the statute focuses on the potential market for the original work.”); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1533 (S.D.N.Y. 1991) (“[D]amage to out-of-print works may in fact be greater since permissions fees may be the only income for authors and copyright owners.”).

demand for subscriptions to legitimate video game networks. That is quintessential market harm of the kind recognized by the fourth fair use factor.

The expansive affiliate concept proposed here presents a further risk of market harm, in two respects. First, access to video games in the collection of the eligible organization will no longer be limited to the premises of the organization. Thus, in addition to seeking to provide an on-premises arcade where a public audience will be able to play online video games, the proposed exemption would allow eligible organizations to provide an online arcade for affiliates, greatly extending the geographic reach of the harm described above.

Second, the proposed expansion would allow affiliates to engage in console jailbreaking in the privacy of their homes. The proposal would facilitate this activity without requiring the institutions to engage in any meaningful supervision, without requiring the institution to impose legally enforceable restrictions on affiliate behavior, and without requiring any formal protections against subsequent infringement. This is a substantial departure from the current exemption, which was predicated on a finding that eligible organizations constitute a more-confined class than gamers at large, and would limit their use to on-site activities in a controlled environment.²⁰⁹ This matters because “jailbroken consoles are strongly linked to piracy of video games.”²¹⁰ “[A] jailbroken console can be used to play illegitimately acquired games and not just ‘abandoned’ games.”²¹¹ “Moreover, jailbreaking of console software weakens the efficacy and value of that software as a distribution platform.”²¹² On the basis of these facts, the Register in 2015 concluded that “any exemption that would extend to modification of console computer code by individual consumers is likely to cause market harm to the console platform software as well as the non-discontinued games distributed for that platform, and is therefore unlikely to be a fair use.”²¹³ There have been no changes in console architecture or the video game piracy environment that would lead to a different conclusion today.

Finally, the provision of unauthorized third-party game servers presents a risk to video game fans that could lead to market harm for copyright owners. Video game publishers work hard to create a high-quality game play experience that protects against cheating and abusive conduct and maintains the privacy of users. Unauthorized third-party game servers run significantly by volunteers seem unlikely to offer such protections. And whether or not unauthorized third-party game servers exploit publishers’ trademarks to attract gamers, they could cause consumers to believe that the game company’s games, rather than the unauthorized third-party service, are unreliable, unfair, deceptive, or unsafe. If consumers lose trust in video game companies’ ability to provide a quality game experience that protects the safety and privacy of online gamers, they may be less likely to purchase new video games or use video game companies’ authorized online game services. In this manner, circumvention of video game access controls and the infringement that follows from such circumvention can harm the

²⁰⁹ Register’s 2015 Recommendation at 340.

²¹⁰ *Id.* at 339. The Register also declined to adopt a console jailbreaking exemption in 2012. Register’s 2012 Recommendation at 26, 50-51.

²¹¹ Register’s 2015 Recommendation at 339-40.

²¹² *Id.* at 340.

²¹³ *Id.*

consumer experience and potentially diminish the market for video game publishers' copyrighted works.

Taking all the fair use factors into account, it is clear that the proposed broadening of the exemption will significantly enable and promote activity that is not a fair use.

iv. Additional uses are not permitted by Section 117.

The proponents do not assert that their proposed uses are permissible under Section 117. That makes sense. The additional uses they propose fail to comport with Section 117 for several reasons. First, Section 117 does not apply to copyrighted works that are not computer programs, such as graphic elements. Second, nobody other than the game provider is an “owner of a copy” of the game server software the proponents wish to copy. That software is held closely by the game provider and used to provide a service. Copies of it are not distributed, much less owned by anyone else. Third, users of video games, including organizations eligible for the current preservation exemption, are not typically owners of copies of the software they do possess, because that software is typically distributed only pursuant to licenses that contain notable use restrictions and do not convey ownership of copies.²¹⁴ Finally, Section 117 does not extend to public performance and display of video games. For each of these reasons, and because proponents do not press any such claim,²¹⁵ Section 117 has no bearing on the additional uses at issue in this proceeding.

* * *

While MADE asserts that its proposal entails only “slight modifications” to the existing exemption,²¹⁶ that characterization is not accurate. The proponents want a substantially expanded exemption that will allow them to completely recreate a hosted game service environment, including by reproducing unpublished software and game elements that were never lawfully distributed to them, and make a substitute service available for play by a public audience. And they want to extend these activities beyond the controlled confines of eligible organizations by deputizing a legion of “affiliates” to assist in their activities. This proposal clearly involves significant infringing activity.

3. The statutory factors weigh against granting the proposed expansion.

In evaluating the proposed expansion of the game preservation exemption, the Register must consider five statutory factors, each discussed below.²¹⁷ In doing so, she must evaluate how the proposed methods of circumvention will affect all copyrighted works protected by the access controls at issue. Proponents seek to circumvent access controls that protect video games and video game consoles, and to deputize an army of affiliates to do so. However, these access controls are also designed to protect other forms of media that are accessible on video game

²¹⁴ See, e.g., *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010).

²¹⁵ Register’s 2015 Recommendation at 336-37 (declining to analyze applicability of Section 117 because proponents did not claim that proposed uses were permissible on that basis).

²¹⁶ MADE Comments at 2-3, 35.

²¹⁷ Under 17 U.S.C. § 1201(a)(1)(C).

consoles, and circumventing them will open game consoles to infringement. The benefits associated with such protection must be evaluated in weighing the statutory factors.

i. The proposed expansion will not materially increase, and may decrease, the availability of copyrighted works.

Although the Register has concluded that a “relatively narrow exemption” could enhance the availability of copyrighted works,²¹⁸ the expansion sought here is unlikely to meaningfully increase the availability of works. The Register’s previous conclusion was based primarily on a finding that eligible organizations’ could maintain access to video games “that might otherwise be lost.”²¹⁹ However, the proponents’ conclusory assertions here do not establish that the current exemption, coupled with the efforts of video game companies alone and in cooperation with public institutions, are insufficient to prevent games from being genuinely “lost.”

The Register also speculated that “preservation efforts may also stimulate new copyrighted works offering commentary and analysis of video games.”²²⁰ However, a significant amount of video game scholarship is happening under current law. It is not apparent that much or any of it depends on scholars’ playing historical video games. The proponents make no showing that such scholarship is the fruit of the current exemption, or that the proposed expansion – which seems directed primarily to recreational play by individual gamers – is likely to move the needle on the volume of video game scholarship. Because the re-implementation of online game servers that the proponents contemplate likely requires cooperation from the game’s copyright owner,²²¹ it seems particularly unlikely that the proposed expansion alone would produce an outpouring of new scholarship.

Conversely, the proposed broadening of the exemption presents risks to effective copyright protection that could reduce the incentives to invest in the creation of new games and make game consoles a less attractive platform for content delivery, if the more damaging forms of infringement that the exemption would enable were to become widespread. Section 1201 envisioned the use of access controls “to prevent piracy and other economically harmful unauthorized uses of copyrighted materials[,]” as well as “to support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses of those materials by individuals.”²²² The proponents’ request to broaden the exemption would undermine these aims.

First, while the proponents promote their proposal as directed toward scholarship, it appears their principal goal may be to enable recreational gameplay by individual gamers.²²³ If re-implementation of online video games and public gameplay using substitute servers were to

²¹⁸ Register’s 2015 Recommendation at 348.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *See, e.g.,* MADE Comments at 12.

²²² Staff of H. Comm. 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), <http://digital-law-online.info/misc/HCommPrnt6.pdf>.

²²³ *See supra* Part E.2.i.b.

become widespread, that could diminish consumer demand for current releases of online games.²²⁴

Second, the proponents ask the Register to sanction distributed hacking of video game consoles, by expanding the existing exemption for console-based hacking from its current scope – which is limited to preservationists working within the confines of an eligible institution – to a legion of “affiliates,” who may work off-site at geographically distributed locations.²²⁵ This is especially troublesome because evidence linking hacked consoles to infringement of video games, and other copyrighted material available on video game consoles, is overwhelming.²²⁶ If the proposal were adopted, and large numbers of individual gamers were authorized to jailbreak their consoles under color of a preservation exemption, it could discourage copyright owners from distributing their creative works through video game consoles. Such a result could also promote infringement to an extent that would materially reduce incentives to invest in the creation of new games.

ii. The proposed expansion would not increase the availability of works for nonprofit archival, preservation, and educational purposes, or the availability of works of criticism, comment, news reporting, teaching, scholarship, or research.

Proponents suggest that these two statutory factors weigh heavily in their favor, but that is not so. The Register, in her 2015 Recommendation, concluded that the existing exemption was sufficient to enable preservation and subsequent criticism, comment, teaching, scholarship, or research.²²⁷ The Register’s conclusion remains true: online multiplayer gameplay is not necessary for preservation or for subsequent scholarly purposes.²²⁸

iii. The proposed expansion would have a substantial adverse impact on the market for or value of copyrighted works.

Although the Register has in the past concluded that a “properly crafted exemption for preservationists can satisfy their needs without impacting the market for video games,”²²⁹ the proposed expansion is far from properly crafted. To the contrary, the proposed expansion would significantly increase the number of individuals eligible to jailbreak consoles and depart from the constraint that such conduct occur in a controlled setting.²³⁰ In this regard, the proposed expansion would facilitate (and invite) a significant increase in infringement, substantially diminishing the market for and value of infringed works.²³¹ The proposed expansion would also substantially diminish the market for and value of copyrighted works in other ways, already

²²⁴ Permitting proponents to set up unauthorized servers for the purpose of facilitating play would also diminish demand for legitimate subscriptions to online services, which operate pursuant to licenses that afford no permanent right of access, and which the Register has recognized as distinct from access to actual games. *See* Register’s 2015 Recommendation at 345.

²²⁵ MADE Comments at 7-8; *see also supra* Part E.2.i.c.

²²⁶ Register’s 2015 Recommendation at 339-40.

²²⁷ *See supra* Part E.1.iv.

²²⁸ *See supra* Part E.1.iv.

²²⁹ Register’s 2015 Recommendation at 348.

²³⁰ *Cf. id.*

²³¹ *See supra* Part E.2.iii.d.

discussed in detail above.²³² As a result, the fourth statutory factor weighs heavily against granting the proposed expansion.

iv. Other appropriate factors counsel against the proposed expansion.

As the proponents acknowledge, re-establishing online gameplay will require launching substitute game servers and modifying client-server protocols.²³³ The proponents appear to contemplate distributing software embodying these modified client-server protocols to “affiliates.” As the Register recognized in her 2015 Recommendation,²³⁴ this conduct implicates the anti-trafficking provision set forth in Section 1201(a)(2)(A).²³⁵ In fact, many (if not all) game client-server protocols probably qualify as TPMs, because they supply information or effectuate some other process needed to access copyrighted works. Distributing modified protocols that bypass the normal operation of the game TPMs thus seems likely to violate the anti-trafficking provision set forth in Section 1201(a)(2)(A).²³⁶ The proposed expansion should be rejected on this basis.

Although the proponents purport to seek the broadened exemption for the purpose of preservation, proponents appear to view recreational gameplay as within the ambit of “preservation.”²³⁷ If such uses became widespread as a result of the proposed expansion of the exemption, it could harm the brands and goodwill developed by video game companies. As described above,²³⁸ unauthorized third-party game services run significantly by volunteers are unlikely to offer a game experience fully commensurate with the high-quality experiences provided by game companies. That risks tarnishing their brands and creating consumer confusion, which may reduce demand for new video games or video game companies’ authorized online game services.

For all of the reasons stated above, the proposed expansion should be rejected.

DOCUMENTARY EVIDENCE

Attached, please see Exhibit A (compiling screen shots of MADE website).

²³² See *supra* Part E.2.iii.d.

²³³ MADE Comments at 11.

²³⁴ Register’s 2015 Recommendation at 346.

²³⁵ See 17 U.S.C. 1201(a)(2)(A) (“No person shall . . . otherwise traffic in any technology, product, service, device, component, or part thereof, that . . . is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title.”).

²³⁶ See, e.g., *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 944, 954 (9th Cir. 2010) (holding that technological protection measure is anything that “effectively controls access to a protected work” and that measure controls access to a work when it “require[s] the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work”); see also Register’s 2015 Recommendation at 346 (concern that circumvention for online multiplayer gameplay violates anti-trafficking provision of Section 1201(a)(2) counsels against exemption designed to reinstate such gameplay).

²³⁷ See *supra* Part E.2.i.b and Exhibit A (illustrating that MADE’s primary emphasis is on facilitating recreational play within the confines of its facility).

²³⁸ See *supra* Part E.2.iii.d.

Exhibit A

The MADE

Museum of Art and Digital Entertainment

[Home](#)

[Events](#)

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Visiting The MADE

Itching to replay an old classic? Revel in video game history? Talk shop with fellow video game nerds?

From the Atari to the Playstation 3, the MADE houses over 5,300 playable video games. When you arrive at the MADE, you can expect to meet people, find an old classic, find a **new** classic, and learn something about the games you love. In addition to our normal suite of playable consoles, we have specially curated exhibits, including our **Big Steel Battalion Box**, ROM hacks, Dance Dance Revolution, and a rotating display piece.

Friendly museum volunteers will help you pick a game, just pick up a controller and play!



FIND US:

3400 Broadway, Oakland CA
94611

info@themade.org
510-457-0211

ABOUT THE MUSEUM

The MADE is a 501(c)(3) organization and museum dedicated to activities that engage participants with all forms of digital art and entertainment.



info@themade.org

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The MADE

Museum of Art and Digital Entertainment

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FAQ

Frequently Asked Questions

What are you? We're a museum dedicated to interactive art, specifically the art of video games.

Where are you? We are located at [3400 Broadway, Oakland, CA](#).

How can I help? You can volunteer, donate money, or just spread the word by telling people about us. We also need shelving very badly.

How can I volunteer? We are arranging all manner of teams right now: curatorial, IT, retail, financial, development, community building, and facilities management. If you feel you can help us out in one of these categories, [contact us!](#)

I have cool stuff, how can I get it to you? Drop us an email and find a time to bring it by.

I am not in the San Francisco Bay Area, can I still volunteer? Yes! We need people to help with the [Wiki](#) and to administer servers. We use Google Apps, so we can collaborate anywhere. We would love to have your input, so please feel free to join our mailing list!

What are your long-term goals? The MADE aims to become a major institution, and thus has a 15-year plan to construct a world-class facility in downtown San Francisco. This will be a long and arduous journey. It's almost as if we are a teenaged rascalion armed with a wooden sword, sent out to save the kidnapped princess from some world-endangering, unspeakable evil. Along the way, we're sure to meet some memorable characters, and find glorious treasures. We're in this thing to the final end boss, and we are planning on saving that princess no matter what. That princess being a massive museum near the SF MOMA, with a large trust or endowment to sustain itself.

What if you fail? What will happen to my cool stuff? Of course, we're going with the mindset that failure is not an option. But if that awful day does come, 100% of donated materials and Museum assets will be given to Stanford University, which already houses the largest curated collection of videogames in the world. The only variance in this plan would be the diversion of materials to the [Strong Museum of Play](#), or to the [Smithsonian](#).

What is your EIN #? EIN# 26-4570976

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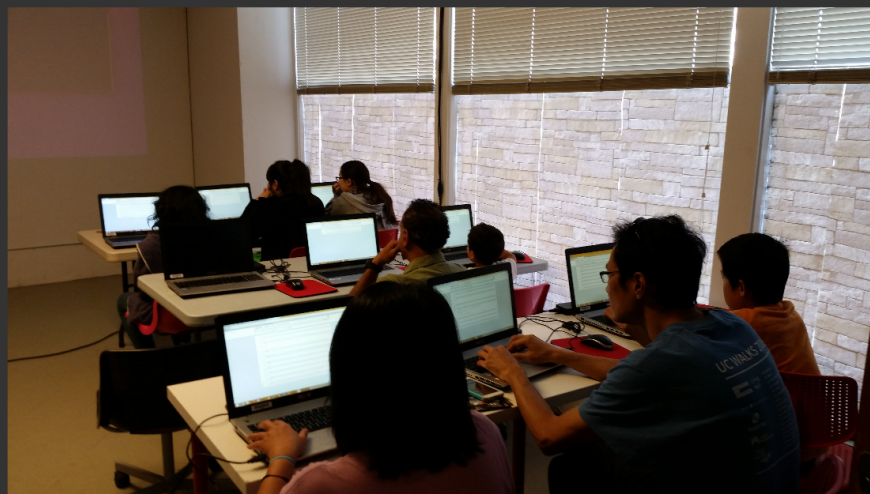
Gallery

A Day At The MADE



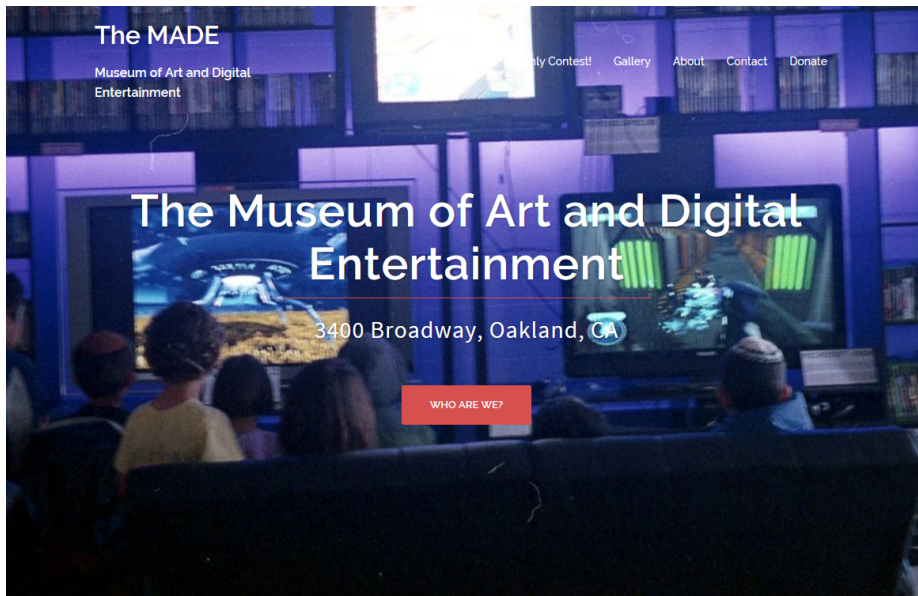
A row of Classic Consoles

Events & Speakers



Python Class

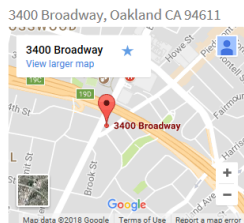
Additional Images can be found on our [Flickr](#)



Home

The MADE is the only all-playable video game museum in the world. We were the first dedicated open to the public video game museum in the United States. Our collection houses over 5,300 playable games. The MADE is a 501(c)3 nonprofit dedicated to the preservation of video game history, and to educating the public on how video games are created. Our goal is to inspire the next generation of game developers.

Location



Open Hours:

The MADE is currently closed.

Friday : 3:00 PM to 9:00 PM

Saturday/Sunday: 12:00 PM to 6:00 PM

[Calendar](#)

Admission and Memberships:

\$10 to play games all day

\$50 yearly membership

\$100 yearly family membership

Final Fantasy at 30

Final Fantasy will be entering it's 30th year in 2018. Come play the classics in a collaborative save system, where you pick up and play with the party the previous player has created to continue the story!



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