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

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

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

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

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

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

⁶ at 11 n.77 (expressing concern that "vast numbers of unauthorized game sites whose operators could choose to style themselves as preservationists to clothe themselves with a patina of legitimacy...").

⁷ , Appendix B [hereinafter]

("I am writing in support of the proposed DMCA exemption expanding library access to out of print video games. . . Antstream supports any service that helps preserve content and expose it to people that love it before it fades from memory forever.");

Appendix C [hereinafter] ("I support the copyright exemption proposed by the Software Preservation Network and Library Copyright Alliance.").

⁸ These changes are reflected in the revised exemption text in Appendix A.

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

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

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

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

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

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

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

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

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

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

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

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

an actual fire.³¹ In these cases, it is difficult to figure out who owns the rights to these games and who would be able to sign off on re-issuing them.³² Due to the difficulty of

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

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

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

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

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⁴¹ at 11 (describing how re-releasing required a dedicated fan to use his own resources to start a company for the purpose of re-releasing the game).

⁴² at 1 (discussing difficulty to re-release the due to the licensing concerns).

⁴³ Experts have also made this point in previous rulemakings. Dr. Henry Lowood, (Apr. 12, 2018) at 238 ("Stanford has] provided access to games in our media center . . . for at least 15 years . . . [a]nd the use has been entirely either research use or instructional use . . . for courses. Contemporary players . . . much prefer to play the more recent versions of games . . . [t]heir interest is . . . low in the older historical versions."). Software Preservation Network & Library Copyright Alliance, (Dec. 22, 2023), [https://www.copyright.gov/1201/2024/comments/Class%206\(b\)%20-%20Initial%20Comments%20-%20Software%20Preservation%20Network%20and%20Library%20Copyright%20Alliance.pdf](https://www.copyright.gov/1201/2024/comments/Class%206(b)%20-%20Initial%20Comments%20-%20Software%20Preservation%20Network%20and%20Library%20Copyright%20Alliance.pdf) at 14 [hereinafter] (quoting Dr. Henry Lowood explaining how commercial projects will not be impacted by research access); Software Preservation Network & Library Copyright Alliance,

https://www.copyright.gov/1201/2021/comments/reply/Class%2014b_Reply_Software%20Preservation%20Network%20and%20Library%20Copyright%20Alliance.pdf (Mar. 10, 2021) at 12 [hereinafter

] (explaining how the games owned, preserved, and potentially re-released by major game companies differ from those of historical interest to scholars).

Justin Court,

, 39 GERMAN POLITICS AND SOCIETY 112 (2021).

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

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

Opponents argue that the harms to scholarship, teaching, and research are “hypothetical”⁴⁹ or not tethered to access controls, and are thus outweighed by the potential for market harm.⁵⁰ At this point, we have spent years providing detailed evidence⁵¹ about the challenges involved in video game preservation and the way which Section 1201’s restrictions harm the scholarly record, and provide, in this comment, as in previous ones, specific examples of harms caused by not allowing off-premises access.⁵² But to recap, games are held at a small number of institutions,⁵³ most scholars cannot pay to travel and stay for extensive periods of time to access these games,⁵⁴ scholars who

the fact that the preservation of the game in a library would have been extremely useful to her, the off-premises limitation made her research even more difficult, given her residence in Hawaii.⁶³ The game takes 65 hours to complete, which means that McIntyre

restrictions that preservation institutions must enforce on access to works because of Section 1201.⁶⁸

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

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

⁶⁸ The Joint

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

IV. Opponents Mischaracterize and Misapply Section 107.

The proposed exemption is designed to support scholarship, teaching, and research—uses listed as exemplary in Section 107.⁷³ While the Opponents have agreed that these uses are “often fair uses” which are “favored”,⁷⁴ they believe that a fair use analysis should be premised on the possibility that the exemption is invoked for recreational purposes.⁷⁵ Our proposed revisions to the exemption language in Appendix A further clarify the purpose of our modification⁷⁶ and ensure that uses will enable scholarship, teaching, and research—establishing the presumption that the exemption’s uses are non-infringing.

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Opponents did not address our contention⁸⁴ that verbatim reproductions are transformative if they serve a new purpose and add value or functionality that serves copyright law's objectives.⁸⁵ , which the Joint Creators cite in favor of their argument of non-transformativeness, made it clear that the specific factual context of that case mattered to its finding on the first factor.⁸⁶ pertained to visual artworks competing in the same commercial market, did not directly engage with the technical and functional aspects of software, and did not grapple with the level of copying permitted under fair use for preservation or research purposes.⁸⁷ and are better guideposts for any transformativeness analysis of our exemption, given the similarity of factual context. As with , our proposed off-premises access of video games is not "geared towards the same consumer-oriented function" as recreational play, but rather "giv[es] researchers the ability to examine and understand" the underlying work⁸⁸ and "serve a research function."⁸⁹ These are different uses, with different purposes.⁹⁰

⁸⁴ at 10.

⁸⁵ , 756 F.3d 73, 84 (2d Cir. 2014) ("[A] secondary work 'can be transformative in function or purpose without altering or actually adding to the original work.'" (quoting

Like the relevant emulation technology in *_____*, remote emulation access to preserved video games also “does not supersede” the original technology⁹¹— in part because emulation technology will not provide the same recreational experience that original game technology does, and in part because it provides special affordances that support research, not recreation.⁹²

The first factor favors a finding of fair use.

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

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

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

⁹¹ *_____*, No. 21-12835, 2023 WL 3295671 at *7 (11th Cir. May 8, 2023).

⁹² *_____* at 10, 14 (emulation loses many features that recreational users would prefer to have while playing).

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

⁹⁴ *_____* at 220 (2d Cir. 2015); *_____*, 755 F.3d 87, 98 (2d Cir. 2014).

⁹⁵

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

As in _____, use of the entirety of the video game

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

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

With regard to the market for derivative works, Opponents do not argue with the Video Game History Foundation Game Availability Study's findings that the vast majority of games are never re-released, and that reissues are generally limited to a handful of well-known, popular games. Of course, it is unclear whether even non-

Proposed Exemption:

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I am writing in support of the proposed DMCA exemption expanding library access to out of print video games.

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

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

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

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

We then have an issue of emulation.

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

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

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

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



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