



## **Comments of the Software Preservation Network in re Proposed Changes to Access to Electronic Works**

**[Docket No. 2023-3]**

Oct 30, 2023

Thank you for considering these reply comments, filed on behalf of the Software Preservation Network (SPN). We write in support of the proposed changes, and in response to critical comments filed by several content industry organizations.

The Software Preservation Network (SPN) is a coordinated, distributed effort to ensure long term access to software through community engagement, infrastructure support and knowledge generation. SPN believes that software should be curated and preserved because it is both a necessary tool for accessing digital information and a cultural artifact with intrinsic value due to its role in our lives. Software is information and it is critical information infrastructure. Our growing network includes colleagues from design firms, public libraries, history of computing museums, research data archives, university libraries and the open source software community. Individual participants range in role and perspective, including legal scholar-practitioners, digital preservation specialists, metadata specialists, data curators, digital conservators, knowledge managers, archivists, software developers and data journalists. In addition to the financial support of its institutional members, SPN has led projects funded by the Alfred P. Sloan Foundation, the Andrew W. Mellon Foundation, and the Institute for Museum and Library Services.

The Copyright Office's proposal regarding the availability of electronic deposit copies for inclusion in the Library of Congress is a vital step to ensuring the continuing relevance of the Library's collection in the digital age. As more and more works are published only in electronic formats, and available to the public only in licensed and streamed access models, it is becoming impossible, both practically and legally, for libraries to collect and preserve books, music, software, and other works for the benefit of future generations.

The Library of Congress is the only library in the United States with a statutory right to acquire and own copies that may otherwise be available only subject to a license.<sup>1</sup>

The Library has this power thanks to the provisions at issue in this rulemaking, which were designed with exactly that purpose in mind: to facilitate the creation and maintenance of a great national library. The Library should continue to play this essential function, ensuring that each new chapter of our cultural history is collected, preserved, and available to the American people long after its copyrights expire.

Content industry groups filed two sets of comments raising concerns about the proposed rule. These concerns are not serious and should not be taken seriously. There is no appreciable risk of piracy at the locked down terminals in the Library of Congress, nor has the Library proposed to do anything with these deposit copies that is in any way more threatening to copyright holders' interests than it has done for centuries with its print collections. Indeed, electronic copies are *less accessible* than print copies under current Library rules. It would be easier for a rogue congressional staffer to photocopy a paper book than to abscond with a digital one.

At the same time, if the content industries' concerns are taken seriously, and the Library abandons its role as a collector and preserver, consigning itself instead to the role of *licensee*, it could lead to a digital dark age in our national Library. We could see the definitive record of cultural history subjected to the same treatment that consumers have grown accustomed to, with works disappearing and reappearing in the Library's collection at the whim of algorithms, corporate mergers, and billionaire buyouts. For the portion of cultural products that is only available in licensed and streamed electronic formats, this could eventually mean a digital dark age for the nation, as the last leased copy blinks out of existence.

When even the Library of Congress cannot own creative works, cultural preservation will be entirely at the whims of the market. History tells us that we cannot rely on the marketplace to ensure the long-term survival of creative works. Studies published by the Library show that 90% of pre-World

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<sup>1</sup> 17 USC § 704 ("Upon their deposit in the Copyright Office under sections 407 and 408, all copies, phonorecords, and identifying material, including those deposited in connection with claims that have been refused registration, are the property of the United States Government.")

War II sound recordings are commercially unavailable,<sup>2</sup> and 86% of the earliest silent films have disappeared from the world entirely.<sup>3</sup> When the master copies of creative works are in the hands of companies whose sole obligation is to their shareholders, they may be taped over, burned, or thrown into the ocean once they seem to lose their commercial value.

This threat of disappearance is not a quaint early-20th Century analog phenomenon. SPN recently co-sponsored a study of the market availability of video games and found a similar situation: Only 13 percent of historical video games published in the United States is currently in release.<sup>4</sup> The study looked at several game ecosystems and time periods, ranging from 1961 to 2009, and the low numbers are consistent, dropping below 3 percent for games released before 1985. In one stark finding, the study saw the availability of games from the Game Boy family drop from 12% to 6% overnight when Nintendo closed its Virtual Console storefronts for the Wii U and 3DS platforms in March 2023.

The erosion of ownership rights and the startling fragility of digital media are not problems unique to libraries, but they go to the heart of what libraries do: collect and preserve culture in the public interest. The proposed revisions to the electronic deposit rules are far from a complete solution to this problem, but they offer at least a glimmer of hope that the law has enabled one institution to continue the mission of collecting and preserving culture even as the marketplace threatens to close the doors on ownership, at least partially, for the rest of us.

Respectfully submitted,

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<sup>2</sup> Tim Brooks, *Survey of Reissues of U.S. Recordings*, (Washington, D.C.: Council on Library and Information Resources and The Library of Congress, August 2005), 13,

[https://www.clir.org/wp-content/uploads/sites/6/pub133\\_57d70f6ed2bf1.pdf](https://www.clir.org/wp-content/uploads/sites/6/pub133_57d70f6ed2bf1.pdf). As the report notes, commercial unavailability is nearly tantamount to disappearance for media stored in formats destined to become obsolete, a trait that digital works and sound recordings share.

<sup>3</sup> David Pierce, *The Survival of American Silent Feature Films: 1912–1929* (Washington, D.C.: Council on Library and Information Resources and The Library of Congress, September 2013), 21, <https://www.clir.org/wp-content/uploads/sites/6/pub158.pdf>.

<sup>4</sup> Phil Salvador. (2023). *Survey of the Video Game Reissue Market in the United States* (1.1). Zenodo. <https://doi.org/10.5281/zenodo.8161056>.