

# Academics want to preserve video games. The game industry is fighting them in court.



By [Noah Smith](#)

January 12, 2022 at 4:34 p.m. EST



For decades, champions of the video game industry have touted gaming’s cultural impact as the equal of literature, film and music. Traditionally, the classic works from those mediums have been preserved for study by future generations, and amid gaming’s global rise in relevance, a group of video game scholars and advocates is pushing to preserve the game industry’s historic titles and legacy in a similar fashion. In the process, though, the would-be preservationists have found a number of challenges that include, ironically, legal opposition from video game companies and the Entertainment Software Association (ESA), a trade organization that lobbies on behalf of game publishers.

A [2018 report by the Association of Research Libraries](#) found that archivists are “frustrated and deeply concerned” regarding copyright policies related to software, and they charge the current legal environment of “imperiling the future of digital memory.” The obstacles archivists face range from legal restrictions around intellectual property to the technological challenges of obtaining or re-creating versions of the various consoles, computers and servers required to play various titles published over the years. Not only must the games be preserved, they also need to be playable, a quandary akin to needing a record player to listen to a rare vinyl album.

However, the legal hurdle — chiefly, bringing court cases against multibillion-dollar companies and their trade organization — remains the biggest for preservationists seeking access to games for academic research.

“Game history is part of general culture as well as intellectual and media history,” said Henry Lowood, curator for film and media collections as well as science and technology collections in the Stanford University Libraries. Lowood is one of the academics pushing for increased access to games for the purposes of study. “It’s not possible to include a full history of any of those topics without including games from the 1970s forward.”

## Saving games

There are two separate but related legal considerations in the game preservation debate. The first is reckoning the access of academics with technological protection measures. These legal rights are designed to protect companies, ranging from video game publishers to manufacturers of lawn care machinery, to incentivize innovation by allowing them to capitalize on their work. Those protections exist regardless of whether a game is protected by copyright law. The second consideration concerns the standard copyright protections afforded to the rights holders of a game.

Game makers have argued that enabling the access sought by the academics would economically harm their companies. The ESA has argued that even old games still hold value since they can be rereleased or remastered, noting as an example that thousands of older games are currently available on Microsoft's Xbox marketplace for digital download. The ESA's legal opponents have argued that such a stance allows the game industry to gatekeep which titles are made available or preserved, effectively limiting the study of gaming's history.

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*Henry Lowood*

"Do we really want to erase that from history?" Lowood asked. "It's a medium you can put alongside film and literature. It has that kind of impact. ... Companies arguing for restrictions don't see the cultural valuations of games. It's a knee-jerk reaction to copying and protecting rights. ... We're interested to support the research and to teach courses on games."

The ESA declined to make anyone available for interviews by The Washington Post. The organization's attorney declined to comment.

In U.S. copyright law, exemptions exist for specific use cases, such as academic research, that would otherwise appear to violate the technical protections granted by law. Proposals for exemptions are reviewed every three years by the U.S. Copyright Office. In 2018, academics scored a legal victory that granted them an exemption to preserve games that are no longer commercially available. In 2021, a push for remote access to preserved games for academics failed.

In its court battles, the ESA has stated that increasing such access would "risk the possibility of substantial market harm" for publishers. In a 2018 Copyright Office filing related to expanding exemptions to existing copyright laws, the ESA said older games are "regularly reintroduced or reimagined" by way of reissued, remastered or remade versions for modern gaming platforms. It also took issue with allowing researchers to essentially relaunch online multiplayer modes for games that publishers no longer support and argued that existing laws are sufficient for researchers' needs.

Lawyers in the intellectual property field noted the necessity of existing legal protections for the industry's business model.

"One of the goals of copyright law is to incentivize companies to invest the necessary resources in video games," said Wai L. Choy, an attorney and partner at Proskauer Rose LLP who focuses on intellectual property cases. "Maintaining copyright protections is necessary to create viable businesses."

## **Gaming's memory**

The Library of Congress, which maintains an archive of over 170 million texts, photographs, films, sound recordings and other items, has received copyright applications for video games since the late 1970s, though applicants need only send in video recordings of gameplay for their archives, not the playable game itself.

David Gibson, an archivist for the Library of Congress, said there “are a lot of gaps in the collection” when it comes to gaming, “including the entire 1980s and most of the ’90s” during a presentation about that collection in 2019. The collection currently has about 7,000 games on 27 different platforms at the National Audio-Visual Conservation Center in Culpeper, Virginia. Video games make up a small fraction of the library’s moving image archive, which stands at over 1.5 million items, according to Gibson.

Gibson wrote in 2012 that “video games represent one of the most difficult challenges for digital preservationists,” noting they are made for a “diverse array of hardware and software platforms, rife with rights issues.” He also wrote that they are “expressive creative works objects which one hopes to attend to the highest levels of artifactual qualities.”

While video game publishers preserve many of their works within their own companies, the preservation process is particularly challenging for lesser-known games, including some significant to underrepresented communities.

## **Video games represent one of the most difficult challenges for digital preservationists.**

### ***David Gibson***

The Nintendo Game Boy game “Great Greed” is a role-playing game from 1992 about saving the environment that also contains an early instance of same-sex marriage in video games. At the end of the game, the male protagonist can choose to marry any one of several characters, including another male character. Adrienne Shaw, an associate professor at Temple University and founder of the LGBTQ Game Archive, points to “Great Greed” as an example of a game that could fade from memory absent preservation efforts.

“It’s a really cool early moment of queer representation in games that’s almost lost to history in a lot of ways,” Shaw said in an interview with The Post. “We just can’t get the games that easily.”

Shaw said her project is largely reliant on fans posting walk-throughs and reviews as a proxy for actually allowing curious gamers to experience the title, as they could with an important book or film.

“The LGBTQ Game Archive is a database, and not an archive, in large part because of legal ramifications,” she said.

In hopes of resolving the legal challenges around game preservation, a group led by Kendra Albert, an attorney and instructor at Harvard Law School’s Cyberlaw Clinic, took up that legal fight. Albert has argued to the U.S. Copyright Office that libraries and research institutions should be allowed to provide off-premises access to games for researchers. That request was argued against by the ESA, Motion Picture Association (formerly known as the MPAA) and the Alliance for Recorded Music. After the initial victory for older titles no longer on the market in 2018, expanded access was denied by the Copyright Office in October 2021.

“I think it’s a really significant limitation for researchers,” said Albert, who also filed arguments on behalf of the Software Preservation Network and the Library Copyright Alliance. “There are whole groups of people who can’t [travel to video game-holding research institutions], especially folks in non-Western countries.”

Other attorneys familiar with the issues around preservation believe the requests by video game researchers in 2018 and 2021 may have been too broad. Joseph Petersen, an attorney and partner at Kilpatrick Townsend & Stockton LLP, prevailed on behalf of a consortium of universities in a 2012 case against the Authors Guild that allowed the

universities to make scanned copies of books searchable via Google Books. In reference to this argument, Petersen said video game researchers should “really articulate all the rules that would apply to make sure they’re only allowed for users to do academic research.”

“Had the ask been more narrow, there could be have been a different outcome,” he said.

## Platform problems

As the legal battle continues to unfold, researchers are also grappling with the changing nature of games. The hardware on which titles are played changes alongside the games themselves, necessitating researchers to find all manner of adapters, old consoles, accessories, working cartridges or CDs, and spare parts. This is one of the reasons many archivists would like the ESA and video game companies to be open to emulators, which can simulate both game systems and games. The archivists say this would be especially beneficial for older titles, allowing a similar gameplay experience to the original console.

“It’s not the same as the original, but it’s close enough,” Shaw said.

However, there’s an additional legal hurdle around the use of emulators that centers on access to a game’s source code so that it can remain playable even as the platform technology changes. For example, preservationists could hypothetically port the Nintendo Entertainment System (NES) game “Super Mario Bros.” onto an Internet browser so academics can play, reference or study the game without access to an NES console. However, doing so would materially change the product, infringing on the ownership of its digital rights.

This is a key consideration in copyright law surrounding video games as opposed to books, which require no significant alterations — they remain composed of the same words on a page, even if it’s a digital page — for readers to study them decades or even centuries after they were published.

“Archivists and preservationists move games files from media at-risk to media that is less at-risk, and that’s where we end up in section 1201 [of copyright law] land,” Albert said, citing the law that prohibits the circumvention of technological measures used by copyright owners to protect access to their works. “Digital preservation is incredibly hard. [Section] 1201 takes this fundamentally difficult thing and makes it legally risky and uncertain.”

Multiplayer titles, which include some of today’s biggest and most popular games like “Fortnite” or “Roblox,” present an additional challenge. Access to online servers is required to play such games, which can be costly — one reason the publishers previously operating them for their games inevitably opt to shut them down. Usually this point coincides with when the publisher can no longer generate additional revenue from the game’s remaining players.

“Games are no longer a stable object,” said Lowood, the curator with Stanford University Libraries, adding that the constantly changing versions of a single game, as well as the online aspect of them, make it harder for him and his colleagues to achieve their goals. “We want to archive the behavior of player and what people do with games.”

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*Kendra Albert*

Microsoft’s vice president of gaming, Phil Spencer, [told Axios in November](#) he hopes the gaming industry is able to agree on a legal, commercial path for emulators, both to enable customer access to a wider range of games and as a

means of preservation.

“I love it in music. I love it in movies and TV, and there’s positive reasons for gaming to want to follow,” Spencer said at the time.

Albert hopes Spencer’s position marks a shift in the industry regarding institutional preservation, but remains skeptical.

“I think that it’s ironic to hear Microsoft championing emulation as a strategy, when large software companies repeatedly have promoted legal positions that have increased the legal risk in emulation-based preservation strategies, especially by fans,” Albert said.

## The next stage

The ESA argued in its victorious 2021 case that the access proposed by academics and researchers “would greatly expand the scope of who would be eligible to perform circumvention” and would amount to an “online arcade.”

In response, Lowood said his library is always looking for a “middle ground” so as to respect intellectual property rights while providing access to games for academics. He added that the current legal environment hampers work in his field. “Blanket solutions really gum up the works,” he said.

With the next rulemaking set for 2024, Albert signaled a hope for archivists to gain more exemptions and pointed to nebulous standards of fair use for research libraries around video games that have been well established for other forms of media.

“We don’t want to be in a position to figure out what libraries are going to do,” Albert said. “I want libraries to decide what’s fair use because that’s what they do all the time. [Currently, access is] only for games that are not for sale. Fair use is not supposed to work like that. ... I want libraries and archives to do the kinds of things they’ve always been doing.”

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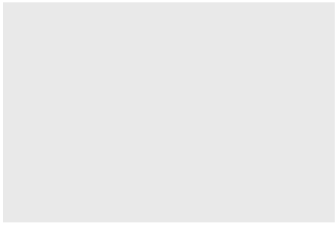
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