



Petition to Renew a Current Exemption Under 17 U.S.C. § 1201

8th Triennial Rulemaking

Please submit a separate petition for each current exemption for which renewal is sought.

NOTE: Use this form if you want to renew a current exemption without modification. If you are seeking to engage in activities not currently permitted by an existing exemption, including those that would require the expansion of a current exemption, you must submit a petition for a new exemption using the form available at <https://www.copyright.gov/1201/2021/new-petition.pdf>.

If you are seeking to expand a current exemption, we recommend that you submit both a petition to renew the current exemption without modification using this form, and, separately, a petition for a new exemption that identifies the current exemption, and addresses only those issues relevant to the proposed expansion of that exemption.

ITEM A. PETITIONERS AND CONTACT INFORMATION

Please identify the petitioners and provide a means to contact the petitioners and/or their representatives, if any. The “petitioner” is the individual or entity seeking renewal.

The Organization for Transformative Works is a 501(c)(3) nonprofit public interest organization dedicated to protecting and preserving noncommercial works created by fans based on existing works, including popular television shows, books, and movies (often described as “fanworks”). In this proceeding, the contact is Rebecca Tushnet, rtushnet@law.harvard.edu.

Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office website and use by Copyright Office staff for purposes of the rulemaking proceeding conducted pursuant to 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this application. Please keep this statement and refer to it if we communicate with you regarding this petition.

ITEM B. IDENTIFY WHICH CURRENT EXEMPTION PETITIONERS SEEK TO RENEW

Check the appropriate box below that corresponds with the current temporary exemption (see **37 C.F.R. § 201.40**) the petitioners seek to renew. Please check only one box. If renewal of more than one exemption is sought, a separate petition must be submitted for each one.

Motion Pictures (including television programs and videos):

- Excerpts for educational purposes by college and university or K-12 faculty and students
- Excerpts for educational purposes by faculty in massive open online courses (“MOOCs”)
- Excerpts for educational purposes in digital and literacy programs offered by libraries, museums, and other nonprofits
- Excerpts for use in nonfiction multimedia e-books
- Excerpts for use in documentary filmmaking or other films where use is in parody or for a biographical or historically significant nature
- Excerpts for use in noncommercial videos
- For the provision of captioning and/or audio description by disability services offices or similar units at educational institutions for students with disabilities

Literary Works:

- Literary works distributed electronically (*i.e.*, e-books), for use with assistive technologies for persons who are blind, visually impaired, or have print disabilities
- Literary works consisting of compilations of data generated by implanted medical devices and corresponding personal monitoring systems, to access personal data

Computer Programs and Video Games:

- Computer programs that operate cellphones, tablets, mobile hotspots, or wearable devices (*e.g.*, smartwatches), to allow connection of a new or used device to an alternative wireless network (“unlocking”)
- Computer programs that operate smartphones, tablets and other all-purpose mobile computing devices, smart TVs, or voice assistant devices to allow the device to interoperate with or to remove software applications (“jailbreaking”)
- Computer programs that control motorized land vehicles, including farm equipment, for purposes of diagnosis, repair, or modification of the vehicle, including to access diagnostic data
- Computer programs that control smartphones, home appliances, or home systems, for diagnosis, maintenance, or repair of the device or system
- Computer programs for purposes of good-faith security research
- Computer programs other than video games, for the preservation of computer programs and computer program-dependent materials by libraries, archives, and museums
- Video games for which outside server support has been discontinued, to allow individual play by gamers and preservation of games by libraries, archives, and museums (as well as necessary jailbreaking of console computer code for preservation uses only), and discontinued video games that never required server support, for preservation by libraries, archives, and museums
- Computer programs that operate 3D printers, to allow use of alternative feedstock

ITEM C. EXPLANATION OF NEED FOR RENEWAL

Provide a brief explanation summarizing the continuing need and justification for renewing the exemption. The Office anticipates that petitioners may provide a paragraph or two detailing this information, but there is no page limit. While it is permissible to attach supporting documentary evidence as exhibits to this petition, it is not necessary. Below is a hypothetical example of the kind of explanation that the Office would regard as sufficient to support renewal of the unlocking exemption. The Office notes, however, that explanations can take many forms and may differ significantly based on the individual making the declaration and the exemption at issue.

I volunteer for the OTW, a non-profit, public interest organization dedicated to protecting and preserving noncommercial works created by fans based on existing works, including popular television shows, books, and movies (often described as “fanworks”). The OTW’s nonprofit website hosting transformative noncommercial works, the Archive of Our Own (“AO3”), has over four million works from over a million registered users. Those millions of works received 1.12 billion page views per month before the coronavirus pandemic and our viewership has increased sharply since then.

The OTW has been involved in the Section 1201 rulemaking process for multiple cycles, and has specifically advocated in multiple proceedings for the noncommercial video exemption. Thus, the OTW is well aware of the issues involved with this exemption, and the historical need for it. Through my work and that of the OTW’s volunteer legal team, we have personal knowledge that this need continues to exist and I have no reason to believe that it will abate during the next triennial period. I have personally heard from a number of noncommercial remix artists (also known as “vidding” artists or “vidders”) that they have used the exemption and anticipate needing to use it in the future. The law remains clear that many such uses will be fair. See, e.g., *Equals Three, LLC v. Jukin Media, Inc.*, 139 F. Supp. 3d 1094 (C.D. Cal. 2015) (finding edited versions of video clips to be transformative where there was some commentary on them); *City of Inglewood v. Teixeira*, No. 15-cv-01815 (C.D. Cal. Aug. 20, 2015) (short clips and commentary were transformative fair use, on a motion to dismiss); *Nat’l Ctr. for Jewish Film v. Riverside Films LLC*, No. 5:12–CV–00044–ODW, 2012 WL 4052111, at *3 (C.D. Cal. Sept. 14, 2012) (finding that defendants’ use of footage was transformative where their voice-overs, editing, and overall production added something new to the underlying footage); *Fuentes v. Mega Media Holdings, Inc.*, No. 09 Civ. 22979, 2011 WL 2601356 (S.D. Fla. June 9, 2011), report and recommendation adopted by 2011 WL 2609550 (S.D. Fla. June 30, 2011) (editing and contextualizing video was fair use).

This statement of Francesca Coppa, Professor of English and Film Studies, Director of Women’s Studies, Muhlenberg College, and Founding Board Member, Organization for Transformative Works, further establishes the continuing need for the exemption:

For the last fifteen years, I have been researching and writing about vidding as an important form of grassroots filmmaking practiced predominantly by women. I have published field-establishing articles, have given many lectures and presentations on the subject, and have discussed the subject in magazines and for NPR, PBS, the BBC and similar venues. My monograph, *Vidding: A History*, will be coming out with the University of Michigan Press later this year. It discusses the nearly fifty-year history of the artform, situating it in the history of feminist and avant-garde filmmaking and tracing its artistic and technological developments.

Vidders have been making vids with DVD footage since the early aughts, and despite the plethora of new modes for watching television and movies, vidders continue to use ripped DVD and Blu-Ray footage and to buy discs expressly for this purpose. In my most recent round of interviews with current vidders (many of whom gather on Discord and other online platforms in rooms dedicated to vidding), I learned that footage ripped from DVDs and BluRay continues to be preferred because it is high quality enough to bear up under the transformations that vidders make to it—which now routinely include changes of color, speed, cropping and zooming, masking, animations and other cgi, and even explorations of the z-axis and 3D—while still being small enough to not choke the processes of software like Sony Vegas and Premiere. Files made from made from very high-definition or professional quality footage might, ideally, be preferable in terms of quality, but in reality these enormous files are too big to work with in the current home environment. The vidding community is global, pink-collared, and increasingly young; in my role as a film studies professor I meet many young women who vided in their teens and now want to study filmmaking at college. But vidders who watch television and film entirely online (or on their phones!) still purchase and rip discs for clips when they want to make something.

[End statement of Professor Coppa.]

ITEM C. EXPLANATION OF NEED FOR RENEWAL (CONT'D)

Circumvention technology may also be necessary to preserve streaming video that can be culturally or politically important, such as video of White House adviser Sebastian Gorka that was taken down by its source, but preserved by others. See, e.g., Lili Bayer, EXCLUSIVE: Controversial Trump Aide Sebastian Gorka Backed Violent Anti-Semitic Militia, *Forward*, Apr. 3, 2017, <http://forward.com/news/national/367937/exclusivecontroversialtrumpaidesebastiang> (showing use of screencapture to preserve video). The range of transformative uses for short clips keeps increasing: Even federal prosecutors have used short clips to enhance their arguments. See, e.g., Benjamin Weiser, A Robbery Based on a Movie? Yes, the Jury Can See Clips, *N.Y. Times*, Mar. 8, 2017, <https://www.nytimes.com/2017/03/08/nyregion/courtallowsuseofmovieclipstowinguiltyverdict.html>.

As was the case three years ago, most commercially produced DVDs and Blu-Ray discs are still protected by dual-function access and copy controls, and I am not aware of any likely anticipated changes to this industry practice. As a result, the harms from prohibiting circumvention of these technologies for purposes of noncommercial remix video continue to persist, and will continue for as long as industry practices continue to incorporate dual-function access and copy controls. Licensing remains both unavailable to noncommercial users and unsatisfactory as an alternative to free choice of which clips to use and what to say about them. Given that the fundamental conditions surrounding video remix have not changed and the fact that creators continue to make video remixes using DVD and Blu-Ray source, the exemption should be renewed.

Specifically, the exemption should be renewed using the relatively simple language defining the exempted class from the 2008 rulemaking, covering both DVDs and Blu-Ray (and streaming where necessary) “when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use.”

To be clear, we are not requesting an expansion of the existing exemption, but a more understandable restatement. The Office’s own shorthand for the exemption, “Excerpts for use in noncommercial videos,” makes clear what participants in this process already understand: this is an exemption for fair use of audiovisual works in noncommercial video.

Proceedings post-2008 have added more complexity to the exemption, increasing the word count by hundreds of words and decreasing its intelligibility to ordinary creators, but this complexity did not substantively alter the exemption or increase the protections provided to commercial content owners, and opponents have never submitted any evidence that any of the additional qualifications have an effect on the scope of the resulting exemption, much less on actual circumvention behavior. The entirety of the 2008 exemption, covering educational uses by professors and media studies students, documentaries, and noncommercial videos, was 94 words long. Those same three exemptions together took 500 words to describe in 2015 and then again in 2018, despite the fact that opponents didn’t oppose renewal of the existing exemptions. No legitimate copyright or paracopyright interest is served by such verbal proliferation and, as our previous comments have extensively documented. Nonetheless, the complexity of these provisions substantially increases the difficulty of communicating and implementing the exemptions in practice.

The Office has simplified the exemption process in the name of greater public accessibility and transparency. This simplification should extend to the exemptions themselves, as the Office has recognized. See Section 1201 Report, vii (describing Office’s commitment to “simplified regulatory language”); 151 (“[D]rafting the section 1201 regulatory language in plain language is a worthy goal, echoing efforts from the Legislative and Executive Branches to promote clear communication to the public”). Returning to the simple, functionally similar language of the initial remix exemption (with the addition of Blu-Ray) would clarify the exemption for ordinary users and further the Office’s stated policies.

ITEM D. DECLARATION AND SIGNATURE

The declaration is a sworn statement made under penalty of perjury, and must be signed by one of the petitioners named above.

I declare under penalty of perjury under the laws of the United States of America that the following is true and correct:

1. Based on my own personal knowledge and experience, I have a good faith belief that but for the above-selected exemption's continuation during the next triennial period (October 2021 – October 2024), technological measures controlling access to relevant copyrighted works are likely to diminish the ability of relevant users to make noninfringing uses of these works, and such users are likely to rely upon the above-selected exemption during the next triennial period.
2. To the best of my knowledge, there has not been any material change in the facts, law, or other circumstances set forth in the prior rulemaking record (available at <https://www.copyright.gov/1201/2018>) that originally demonstrated the need for the above-selected exemption, such that renewal of the exemption would not be justified.
3. To the best of my knowledge, the explanation provided in Item C above is true and correct, and supports the above statements.

Name/Organization:

If the petitioner is an entity, this declaration must be signed by an individual at the organization having appropriate personal knowledge.

Rebecca Tushnet, Organization for Transformative Works

Signature:

This declaration may be signed electronically (e.g., "/s/ John Smith").

/s/ Rebecca Tushnet

Date:

July 22, 2020