



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

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/1201/2018/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.

Petitioner: Organization for Transformative Works, a 501(c)(3) nonprofit.
Contact information: Rebecca Tushnet, rebecca.tushnet@gmail.com and legal@transformativeworks.org

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.

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 used device to an alternative wireless network (“unlocking”)
- Computer programs that operate smartphones, smart TVs, tablets, or other all-purpose mobile computing 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, and modification of the vehicle
- Computer programs that operate devices and machines primarily designed for use by individual consumers (including voting machines), motorized land vehicles, or medical devices designed for implantation in patients and corresponding personal monitoring systems, for purposes of good-faith security research
- Computer programs that operate 3D printers, to allow use of alternative feedstock
- 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)

Motion Pictures (*including television programs and videos*):

- For educational uses by college and university instructors and students
- For educational uses by K-12 instructors and students
- For educational uses in massive open online courses (“MOOCs”)
- For educational uses in digital and literacy programs offered by libraries, museums, and other nonprofits
- For multimedia e-books offering film analysis
- For uses in documentary films
- For uses in noncommercial videos

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 as 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 700,000 registered users and receives upwards of 115 million page views per week. The OTW has been involved in the Section 1201 rulemaking process for several 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 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).

The use of Blu-Ray and DVD footage is still considered the artistic standard in the community. See, e.g., *Vidding: The Ultimate Guide to Get Started As A Vidder*, <http://thedailyfandom.com/vidding-ultimate-guide/>, July 5, 2016. See also Samantha Close, *Popular Culture through the Eyes, Ears, and Fingertips of Fans*, 199, 204, in *Sampling Media*, ed. David Laderman & Laurel Westrup (2014) (“Some makers place great importance on the aesthetic quality of their samples.... Vidder Gravity asserts, ‘No matter how strong my vid idea is ... I can’t convince myself to use a source where half of it’s going to be DVD quality and half of it’s going to be 1970’s reruns from the 1980s from VHS.’ The authors of an *AnimeMusicVideo.org* technical quite succinctly discourage creators from sampling downloaded source because of quality, not legality, concerns: ‘Downloaded footage—No ... downloaded footage is almost always second grade ... YouTube—Just stab yourself in the face.’ Rather, they detail a multisoftware six-step process for ripping perfect footage from DVDs and Blu-ray discs.”); Louisa Ellen Stein, *Millennial Fandom: Television Audiences in the Transmedia Age 120-21* (2015) (discussing extensive use of video editing techniques in *Gossip Girl* fanvids as exemplary); *id.* at 159 (discussing value community places on skill and aesthetics).

Audiences may not understand the message without sufficient quality. One academic who uses fanvids in teaching, Lola Feist, has found that vid quality is very important for the classroom. When she showed a low-quality version, her students didn’t understand it, but when she showed it again with a higher quality version, then the students could understand. 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/exclusive-controversial-trump-aide-sebastian-g> (showing use of screenshot 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/court-allows-use-of-movie-clips-to-win-guilty-verdict.html>. Librarians and archivists discussed archiving vids as indicative of other audiovisual works worthy of preservation at the IASA (International Association of Sound and Audiovisual Archives) conference in Washington DC, September 25-29, 2016.

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

Remix is only becoming a more prominent part of artistic practice. See, e.g., MashUp: The Birth of Modern Culture, https://www.vanartgallery.bc.ca/the_exhibitions/exhibit_mashup.html (museum exhibit featuring six fanvids along with artists such as Pablo Picasso, Andy Warhol, and Barbara Kruger); Francesca Coppa, "Vidding: The Art of Flow," MashUp: The Birth of Modern Culture, Vancouver Art Gallery exhibition catalogue, Black Dog Press, 2016. p. 150 - 153. Ordinary citizens can now intervene in important cultural and political debates by using remix video. See, e.g., Mary Beth Quirk, Fairly Used: Why Schools Need To Teach Kids The Whole Truth About Copyright, Feb. 26, 2016, <https://consumerist.com/2016/02/26/fairly-used-why-schools-need-to-teach-kids-the-whole-truth-about-copyright/> (discussing media education programs that use video to teach students to analyze and critique media); Miles Surrey, Powerful Supercut Shows Why LGBTQ TV and Movie Fans Deserve Better, Mic.com, May 16, 2016, <https://mic.com/articles/143555/powerful-supercut-shows-why-lgbtq-tv-and-movie-fans-deserve-better> (discussing video that highlights the prevalence of the "tragic gay" trope in recent popular culture).

Remix remains vital for marginalized groups. For example, artist Dumbfoundead edits himself into iconic movie scenes to highlight the absence of Asian male protagonists in Hollywood films. Dumbfoundead – SAFE, <https://www.youtube.com/watch?v=mmvqb9Uzu8k>, May 26, 2016. On a similar theme but with a different technique, Dylan Marron creates "Every Single Word Spoken By a Person of Color" in various classic and current Hollywood films, cutting 120 minutes down often to less than a minute, creating powerful testimony about the invisibility and, especially, the voicelessness of people of color in popular film. See <https://www.youtube.com/user/dylanmarron/videos>. And Vidder Eruthros recently created Field Work, a remix of the Indiana Jones films that highlights the cultural imperialism and destructiveness of the titular hero. <https://eruthros.dreamwidth.org/342017.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 this practice continue to persist, and will continue for as long as this practice exists. 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 "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." Subsequent rounds have added more complexity to the exemption, increasing the word count by hundreds of words and decreasing its intelligibility to ordinary creators without substantively altering the exemption or increasing the protections provided to commercial content owners. 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, 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.

The Office has made clear its intent to simplify the exemption process in the name of greater public accessibility and transparency. This simplification should extend to the resulting 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 Blu-Ray, as recognized as appropriate in the previous rulemaking) 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 2018 – October 2021), 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/1201/2015>) 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 30, 2017