



Petition for New Exemption Under 17 U.S.C. § 1201

Please submit a separate petition for each proposed exemption.

Note: Use this form if you are seeking to engage in activities not currently permitted by an existing exemption. If you are seeking to engage in activities that are permitted by a current exemption, instead of submitting this form, you may submit a petition to renew that exemption using the form available at <https://www.copyright.gov/1201/2018/renewal-petition.pdf>.

If you are seeking to expand a current exemption, we recommend that you submit both a petition to renew the current exemption, and, separately, a petition for a new exemption using this form 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 proposing the exemption.

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*Some CTA auto manufacturer member companies do not endorse this position.

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. DESCRIPTION OF PROPOSED NEW EXEMPTION

Provide a brief statement explaining the nature of the proposed new or expanded exemption. The information that would be most helpful to the Office includes the following, to the extent relevant: (1) the types of copyrighted works that need to be accessed; (2) the physical media or devices on which the works are stored or the services through which the works are accessed; (3) the purposes for which the works need to be accessed; (4) the types of users who want access; and (5) the barriers that currently exist or which are likely to exist in the near future preventing these users from obtaining access to the relevant copyrighted works.

Petitioners need not propose precise regulatory language or fully define the contours of an exemption class. Rather, a short, plain statement describing the nature of the activities the petitioners wish to engage in will be sufficient, as proponents will have the opportunity to further refine or expound upon their initial petitions during later phases of the rulemaking. The Office anticipates that in many cases petitioners will be able to adequately describe in plain terms the relevant information in a few sentences, or even a single sentence, as with the examples below.

Examples:

A proposed exemption for owners of 3D printers to circumvent technological protection measures on firmware or software in 3D printers to run the printers' operating systems to allow use of non-manufacturer-approved feedstock.

A proposed exemption for computer programs in tractors that use lockout codes to prevent farmers from repairing broken tractor parts.

A proposed expansion of the current exemption for motion pictures (including television programs and videos) for uses in documentary films. The expansion sought is to cover lawfully obtained copies of motion pictures contained on Blu-ray discs.

A proposed exemption for diagnosis, repair, and modification of computer programs that control the operation of land vehicles, (1) to allow owners of vehicles to obtain the benefits from the exemption recognized in the previous triennial review, and (2) free of any constraint in time or scope based on external, non-copyright factors, as were imposed in the previously granted exemption.

Petitioners believe, and have argued in comments to the Copyright Office, that the letter from the Department of Commerce's NTIA gave more appropriate scope to real-world solutions by recommending assistance "by or at the request" of the vehicle owner. The NTIA recommended an exemption for:

Computer programs embedded in motorized land vehicles or agricultural machinery, when circumvention is initiated by or at the request of the owner of the vehicle or machinery, in order to make repairs or modifications to the vehicle or machinery. This exemption does not obviate the need to comply with other applicable laws and regulations, such as those relating to vehicle safety or environmental protection

The Register's own recommendation, adopted by the Librarian, did not accept the "at the request of" language proposed by the NTIA. It also included a one-year delay before taking effect, thus denying to users much of the beneficial period—during which time apparently no objections or comments from other agencies were received. Moreover, it artificially excluded "telematics or entertainment systems" on a speculative basis not supported in copyright law.

Since the last round, no factor or incident has emerged to justify a repeat of the one-year exclusion. The Office itself, in its Report, has also recognized the problems posed by constraining the definition of "user" only to the owner of the vehicle, and has suggested that a broader conception – similar to that of the NTIA – may be justifiable based on current authority, without influencing any

court to excuse “trafficking” conduct (for which the Librarian does not have the authority to grant any exemption that would constrain a court).¹

Based on these factors, Petitioners believe a lawful and justified new exemption would read:

Computer programs that control or facilitate the functioning of a motorized land vehicle, including personal automobiles, commercial motor vehicles, light/medium/heavy duty trucks, and agricultural and construction machinery, for purposes of lawful analysis, testing, diagnosis and repair, or aftermarket personalization, improvement, or other lawful modification. These also include programs that modify the code or data stored in the vehicle and data compilations used in controlling or analyzing the vehicle’s functions. The exemption allows circumvention for these purposes undertaken by or on behalf of the lawful owner or lessee of the vehicle, or of a computer that stores, or other vehicle part that is embedded with, the computer program or data compilation. The exemption further allows circumvention in the development or manufacture of replacement parts for vehicles, as well as the provision of tools to enable such circumvention for the aforementioned purposes, where such circumvention or provision of tools is the most practical means to enable vehicle owners and those acting at their direction to repair or lawfully modify their vehicles and thereby benefit from the exemption.

An exemption that extends only to the act of circumvention will not be widely available to all members of the class. Extending the exemption to servicers who act on behalf of class members partially ameliorates this disparity of access, but does not fully resolve it. To provide effective service to vehicle owners, servicers must be able to circumvent technological measures and repair software in dozens, if not hundreds, of vehicle makes and models. The complexity and cost involved may prove prohibitive for servicers, whose employees typically are expert in auto mechanics rather than cryptography or coding. The resulting expense of individualized circumvention and software analysis and repair would make the exemption impractical, thus driving consumers back to the OEM dealership and effectively nullifying the purpose and benefit of the exemption.

The rational solution to this dilemma is to permit companies with expertise in software development to develop and make circumvention and repair solutions available to servicers and consumers. This provides obvious benefits to the market and the public. Vehicle repair software will be of consistently high quality and reliability. And the costs of circumvention and software repair can be spread among the many thousands of servicers that acquire the solution, rather than be shouldered by each individual consumer. Moreover, a right to distribute these software solutions creates no undue risks to copyright owners. Because the circumvention tools will be specialized for particular types of automobile software, the tools themselves would only enable competition for repair of embedded software without creating general risks of circumvention or infringement for non-specialized computer software or expressive copyrightable works.

Petitioners also believe the present exclusion of “telematics or entertainment systems” cannot be justified by either copyright law precedent or the needs of the repair market. Since *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), it has been the law that providing the

¹ Comments of Auto Care Association, *In the Matter of Section 1201 Study: Notice and Request for Public Comment*, Dkt. No. 2015-8 at 7-8 (March 3, 2016).

ability to receive copied content – which is all that circumvention of access to an entertainment system would do – is not itself an infringement of copyright. Hence circumvention for this lawful purpose must itself be lawful. Moreover, telematics systems increasingly are being designed by vehicle manufacturers as the means to access the embedded software that controls the parts and operation of the vehicle. Without the ability to access the telematics system, it may not be feasible for independent repair businesses to repair motorized vehicles and, thereby, to fulfill the purposes of the exemption for the vehicle owner.
