



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

8th Triennial Rulemaking

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/1201/2021/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.

Item 1: Petitioner and Contact Information

This petition is submitted by Paul Hurdlow, Senior Vice President and General Counsel for FloSports, Inc., on behalf of FloSports, Inc.. Parties interested in contacting the petitioner should contact Paul Hurdlow at paul.hurdlow@flosports.tv or Wesley Sullivan at wesley.sullivan@flosports.tv.

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.

Item 2: Brief Overview of proposed Exemption

This petition proposes an exemption for circumvention of technology used in the digital storage of audiovisual works originating as a livestream of sports and other competitive events. The circumvention measure would enable a livestreaming service to provide individual viewers, via a virtual digital video recorder (“vDVR”), with access to a recording on a server for fair use purposes. Users obtaining access to the copyrighted works would be authenticated users of such a livestream service. Current technological barriers to circumvention (“Technological Prevention Measures” or “TPM”) are the livestreaming technologies used, which are intended to result in only ephemeral recordings.

Item 3: Copyrighted Works Sought to be Accessed

This petition is for audiovisual recordings of musical performances as identified in 17 U.S.C. §102(a)(6) and 17 U.S.C. §106(a)(5), both as defined in 17 U.S.C. §101. This class incorporates any and all works for which audiovisual recordings may be made and used as fair use. This includes individual school performances.

Item 4: Technological Prevention Measure

Access to live stream audiovisual works is controlled by HTTP Live Streaming (“HLS”), a live-video streaming technique that enables high quality streaming of media content over the internet from web servers. HLS breaks up a digital broadcast into tiny HTTP sized packets of visual and audio data and distributes the data packets, along with embedded instructions on how to re-arrange such packets, to a viewer’s computer for a seamless live stream broadcast. Such distribution results in only an ephemeral copy in addition to the live broadcast. However, in order to enable the viewer’s fair use in choosing to view the broadcast at a later time, or retaining the broadcast for educational purposes, copies of the audio and video data files must be stored on a longer-term basis and synchronized for later replay by the viewer. The cost and practical difficulty of obtaining synchronization licenses, combined with the cost and technical challenges of creating individualized audio and visual stored files for each viewer seeking to access the stored files, effectively control viewers access to the material for fair use purposes.

Item 5: Noninfringing Uses

This petition proposes an exemption to allow for the circumvention of live stream technology by the recording of audiovisual works for the purpose of fair use. By using vDVR as the circumvention measure of the TPM in question, an end user would be able to record a live broadcast by capturing the ephemeral copy of a livestream and keeping it as a manifest file. The end user would then have access to the manifest file for viewing at the user’s convenience. Such an individualized recording of any portion of the event the user chooses, for time-shifted personal viewing only, is certainly fair use. The circumvention method of the TPM as described above will result in recordings which may only be accessed by authenticated individuals and would not be publicly displayed, thus rendering said recordings fair use.

Section 107 of the Copyright Act provides that fair use of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not infringement of copyright.” Whether a use is considered a fair use is determined by examining the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted

ITEM B. DESCRIPTION OF PROPOSED NEW EXEMPTION (CONT'D)

work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work.

The use proposed by this petition facilitates such a use as Section 107 was written to protect. Individual recordings of audiovisual performances, historically, had been used by directors of the groups in such recordings to instruct, teach, and otherwise educate the participants in the recordings on what went right, what went wrong, and how each could improve. Generally, the individual performances in the audiovisual streams this petition considers are a very small percentage of the entire copyrighted work (e.g., all individual performances combined for an entire copyrighted broadcast). Further, there is no current market for educational recordings at the moment. Granting this exemption, or the performance of such a recording, would not adversely affect the market for the copyrighted recordings.

Item 6: Adverse Effects

The inability to circumvent HLS TPMs and make recordings limits both students' and teachers' ability to participate in the highest quality instruction, analysis, review, and criticism. There exists no alternative, and a lack of a circumvention of this TPM puts severe restraints on the educational ability of teachers and the quality of education students receive.

When directors, teachers, or students are unable to circumvent the particular TPMs in this case, the ephemeral recording ceases to exist. There is no possibility to critique, no possibility to further educate, and no possibility to instruct on improvement. Although screen capture technology does exist, it is insufficient for these educational purposes. Educators are well aware that they may be performing copyright infringement, and shy away from setting what they deem as a poor example for students. Further, the nature and timing of the performance is essential here. No educator can screen capture a live performance of his or her group that is broadcast as they perform – the director is likely busy watching the students live and ushering them through the performance process.

HLS is likely just the beginning of TPM steps any broadcaster may take to protect the livestream and prevent access to fair use recordings. In the next three years, a broadcaster is highly likely to develop more thorough antipiracy technology, encryption, or other defenses against screen recording and other measures to prevent access to fair use recordings. This exemption is ripe for consideration, and educational institutions across the country need it to provide the best and only educational opportunity and experience possible to performers of audiovisual works.

Since this Committee's last report in 2018, the following companies have joined the livestreaming market: ESPN+ (2018), Disney + (2020), AppleTV + (2020), Qibli (2020), YouTube TV (national launch in 2020), and Peacock (2020). Persistent rumors state that Amazon is considering adding live TV to its Prime service. The combined market cap of only the preceding companies is \$4.1 trillion. Such an investment in the marketplace of livestreaming is certain to see additional measures to protect livestreaming over the next three years. 17 U.S.C. §1201(b) asks a petitioner to consider the need for an exemption over the next three years. Given the rapid pace at which the TPM considered here may change, a vDVR exemption is the best, and only way to ensure access to fair use recordings is protected while technology advances over the next three years.