



Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

This is a Word document that allows users to type into the spaces below. The comment may be single-spaced but should be in at least 12-point type. The italicized instructions on this template may be deleted.

Please submit a separate comment for each proposed class.

NOTE: This form must be used in all three rounds of comments by all commenters not submitting short-form comments directly through Regulations.gov, whether the commenter is supporting, opposing, or merely providing pertinent information about a proposed exemption.

When commenting on a proposed expansion to an existing exemption, you should focus your comments only on those issues relevant to the proposed expansion.

[] Check here if multimedia evidence is being provided in connection with this comment.

ITEM A. COMMENTER INFORMATION

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ITEM B. PROPOSED CLASS ADDRESSED

Class 5: Computer Programs--Repair

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 under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

ITEM C. OVERVIEW

We thank the Copyright Office for the opportunity to reply to Opponents' comments on Class 5.

Notably, Opponents do not dispute the factual basis of our petition. They assert, instead, that Class 5 as drawn is too broad to perform a meaningful fair use analysis.¹ This ignores the plain reality that this Office has both set class-scoping standards and performed fair use analyses for similarly wide classes. In the 2018 and 2021 Recommendations, the Office outlined its criteria for defining an exemption class. These include whether “sufficient commonalities exist for the proposed uses”²; whether “users of such works are similarly affected by the prohibition on circumvention”³; and whether there is commonality among device types.⁴ In short, a class must show that (1) users are similarly situated regarding the need for circumvention; (2) the uses covered by the proposal are similar; and (3) the devices themselves share sufficient commonalities. As demonstrated in our long form comment, the proposed Class 5 fulfills all three elements.

If anything, the commercial and industrial uses of the equipment at issue here gives this class more (and more important) points of similarity than the consumer devices exempted in 2021. A Taylor soft serve machine and a skid-steer loader are both used in tightly regulated industries with strict safety protocols for workers and products alike; utilize arrays of environmental and safety sensors to guide operations; return complex diagnostic codes when prompted; and require extensive occupational training to use in the first instance. Meanwhile, a smart thermostat and a child's portable podcast player are only alike insofar as they are sold on Amazon, and currently

¹ Joint Creators opposition comments at 4 (“Because this proposal is abstract and undefined, and the proposed class is unduly broad, expanding the existing exemption for repair of consumer devices to include industrial and commercial equipment would be inappropriate.”).

² U.S. Copyright Office, Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 194 (2021) (“2021 Recommendation”).

³ 2018 Recommendation at 289.

⁴ 2021 Recommendation at 194.

exist within my own home. Yet while the latter are (correctly) grouped as part of a class for the purposes of repair exemptions, opponents insist that the former are too wildly divergent to be considered by this office.

The Register, in establishing the 2021 software-enabled consumer devices exemption, cited the 2016 Software Study to list five discrete features that defined the class as a whole:

(1) “they are consumer-grade”; (2) the “software within the product is often specifically created for a particular product to control that product’s basic operations”; (3) the software may be “ancillary to the non-software (e.g., mechanical or electrical) components of the product”; (4) the software “may be distributed along with the product itself without payment of a separate charge or fee”; and (5) the software may not be “readily copied, thus presenting somewhat diminished concerns about widespread infringement.”⁵

With the exception of the first factor, this description fits Class 5 neatly. The software contained in the devices is typically designed to control the product’s basic operations; the software is often ancillary to the product’s non-software components; the software may be distributed as a bundle with the equipment itself; and the software is not readily or easily copied. There is as great a range of variation among salient features of software-enabled consumer devices as there is within this proposed class.

Setting aside disagreements of scope, opponents muddy the waters by mischaracterizing the petition itself. Associated Equipment Distributors conflates the actual petition (an exemption to circumvent TPMs on *malfunctioning equipment* for the purposes of repair) with an imagined bogeyman (an exemption circumventing TPMs on *repair tools* for the purposes of using them without authorization).⁶ Philips insists that the proposed class could, under a strained reading, sweep in medical devices despite their already being covered by an existing exemption. To the extent that it would bring additional clarity and peace of mind, we welcome language explicitly excluding medical devices.

⁵ 2021 Recommendation at 197, citing Software-Enabled Consumer Products 9 (2016), <https://www.copyright.gov/policy/software/software-full-report.pdf>.

⁶ Philips opposition comments at 5 (“the proposed class would cover ... use of software for its intended purpose of servicing or repairing commercial and industrial systems”).

Opponents’ remaining arguments are inapposite. Apparently not content to object to the class at hand, opponents seek to relitigate the Office’s prior findings that repair is a fair use⁷; that commercial repair services are lawful users⁸; and that hypothetical safety concerns should not override the core copyright analysis.⁹ These objections not worth addressing, particularly as they run up against the shared consensus of the Copyright Office, NTIA,¹⁰ Department of Justice and Federal Trade Commission.¹¹

In short, we believe Opponents’ arguments are insufficient, and should not bar consideration of the class.

DOCUMENTARY EVIDENCE

N/A

⁷ Philips opposition comments at 6 (asserting that *Warhol* “confirms that non-transformative, commercial use of copyrighted software ... cannot constitute fair use.”). Cf 2021 Recommendation at 202 (“The Register agrees with proponents that diagnosis, maintenance, and repair of software-enabled consumer devices are likely to be fair uses where the purpose is to restore device functionality.”).

⁸ Philips opposition comments at 5 (“users of commercial and industrial systems would circumvent access controls for commercial motivations”). Cf 2018 Recommendation at 224 (expanding the existing repair exemption to allow for third-party commercial repair, in light of “a plausible argument that some forms of third-party assistance involving circumvention will not rise to the level of a prohibited ‘service’ in all instances.”).

⁹ Associated Equipment Distributors opposition comments at 1 (arguing that the Office should consider “the significant environmental and safety consequences of faulty repairs and maintenance”). Cf. 2021 Recommendation at 218 (noting that the Office “will generally decline to consider health, safety, and environmental concerns as part of the triennial proceeding.”).

¹⁰ 2021 NTIA Letter at 76 (recommending “expansion of the current exemption to include circumvention of TPMs for the diagnosis, maintenance, and repair of all software-enabled devices, machines, and systems” as well as “permit[ting] these activities to be carried out with the assistance of third parties.”).

¹¹ Comment of the United States Department of Justice and Federal Trade Commission, available at https://www.ftc.gov/system/files/ftc_gov/pdf/ATR-FTC-JointComment.pdf.