

UNITED STATES COPYRIGHT OFFICE



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

*Reply Comment*

**ITEM A. COMMENTER INFORMATION**

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**ITEM B. PROPOSED CLASS ADDRESSED**

Proposed Class 7: Computer Programs – Repair

**ITEM C. REPLY COMMENT**

eBay Inc. addresses this Reply Comment solely to the subject of motorized vehicles, as defined in the Sixth Round exemption pertaining to them, which the Register considers as renewed in this NPRM.<sup>1</sup> eBay disagrees with the assertion of Auto Alliance, in its Opposition to the Class 7 “new” exemption, that consumers are not entitled to expert assistance in installing items they lawfully acquired and intend to use for a lawful, exempt purpose.<sup>2</sup> eBay agrees with the Register’s suggestion that expert assistance for an exempt purpose is within the rights of a “user” under the Digital Millennium Copyright Act framework.<sup>3</sup>

eBay provides a leading marketplace for devices that lawfully enhance the performance and reliability of motorized vehicles. Such devices and their software do not circumvent any technical protection measure (TPM). TPMs nevertheless may prevent the connection of these devices to vehicles’ circuitry, thus blocking their lawful use. eBay buyers therefore may require

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<sup>1</sup> U.S. Copyright Office, 37 CFR Part 201 [Docket No. 2017-10], Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, Oct. 26, 2017 (“NPRM”).

<sup>2</sup> Opposition of Auto Alliance at 9.

<sup>3</sup> Section 1201 of Title 17, A Report of the Register of Copyrights, June 2017 (“Policy Study”) at 61 - 62; *see also* NPRM at 42 - 43.

expert assistance to install such products. To protect consumer choice, eBay therefore submits this reply comment.

### **Consumers Need Expert Assistance to Reprogram Auto Parts For Their Individual Vehicles**

Many eBay sellers offer devices and software that allow an automobile enthusiast to adjust his or her vehicle's software in order to enhance its performance. For example, a vehicle owner may wish to increase the vehicle's power. Prior to electronic controls in automobiles, a local mechanic could have done so with aftermarket parts or by changing tuning variables in the carburetor. Now, however, such adjustments must be made in software the vehicle owner owns or is fully entitled to use.<sup>4</sup>

The vast majority of these products are designed for a single vehicle (*i.e.*, not a particular model but instead an individual vehicle designated by a unique vehicle identification number ["VIN"]). They are chosen by the buyer, after examining eBay's marketplace, as the best fit for that individual's preferences and plans for the vehicle in which that person has invested significant funds, effort, and care.<sup>5</sup> Buyers can install the products themselves. But many buyers need expert assistance to program the modules for the buyer's specific vehicles (a process called "reflashing"). Without an exemption to protect such independent, expert assistance, the manufacturer could use anticircumvention law and TPMs to take full control of the market for such adjustments and related products. Such an anticompetitive result would do nothing to protect automakers' legitimate intellectual property rights.

### **The Auto Industry Memorandum of Understanding Does Not Address The Market Served By eBay's Sellers.**

The Auto Alliance bases its Opposition substantially on the assertion that the need for the requested DMCA exemption is obviated by a memorandum of understanding among certain auto-industry members. But, as the Auto Alliance concedes, the memorandum only covers diagnostics and repair – not modification for performance enhancement. The requested exemption therefore is needed to enable independent, expert assistance – and fair competition with automakers – in the recalibration of original software, and other work, to improve cars' performance.

### **An Expert Helping A Consumer For A Lawful Purpose Has All The Rights Of A Lawful User**

eBay agrees with the Register's suggestion, in its 2017 Policy Study and in this NPRM, that the statute may be beneficially interpreted as providing for "users" – not just "owners" – to be the beneficiary of its exemptions – thus including necessary expert assistance within the exempted

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<sup>4</sup> These products enable adjustment in compliance with applicable laws, including those pertaining to emissions.

<sup>5</sup> After housing, transportation is the largest monthly expenditure by newly formed households. Brian Stoffel, "Here's The Average American's Annual Budget After College," *Money*, Feb. 9, 2016, <http://time.com/money/4214521/average-americans-annual-budget-college-grad/>.

conduct.<sup>6</sup> Auto Alliance insists that this cannot be correct because an expert, rendering such aid, performs a “service.” But, as the Register points out, Section 1201(a)(1) focuses throughout on the rights and expectations of the lawfully exempt “user.”

Auto Alliance next insists that no “service” can be involved because it would render the assistance “commercial” in nature. This impermissibly conflates the *intent* of a lawful user with the intent of others who might seek commercial benefit from selling circumvention measures. Nothing in Section 1201(a)(1) denies the benefit of an exemption to a user who acts with a lawful intent.<sup>7</sup> It has been noted, in discussions of the Sixth Round results sponsored by the Copyright Office, that users who have benefited from past exemptions have included nonprofit *commercial* institutions that have drawn on experts and expert tools in order to make use of exemptions.<sup>8</sup> Where experts are performe involved, the issue is whether the intent is to implement an exemption for the purpose granted – not whether the user works for a “commercial” entity.

### **Recalibrating Software That Already Resides On A Specific Vehicle Owned By The User Does Not Threaten Intellectual Property Rights In That Software.**

The concerns expressed by Auto Alliance about plenary access to vehicle software do not apply in the case of the vehicle and user-specific products sought by eBay buyers and offered by eBay sellers. Where a recalibration is specific to and applies only to a single vehicle and is performed by or at the direction of the owner, it does not involve copying the software beyond its functional residence on the single vehicle. To the extent a device may involve copying or modifying the software itself, it does not compete with the original software, which was purchased (or licensed) along with the vehicle. When performed at the direction of the user, the installation of such a device is clearly authorized by law.<sup>9</sup>

As to the Auto Alliance’s additional concerns respecting possible violation of non-intellectual property statutes, eBay agrees with those who have argued that to the extent a user modification may encounter law other than copyright or the DMCA, it is the province of responsible federal,

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<sup>6</sup> N.3, *supra*.

<sup>7</sup> The Copyright Office has recognized that the fabrication of necessary tools may be entailed as necessary to enjoy the beneficiary of the exemption. “To the extent the law prohibits the development of such software, many users would be unable to engage in activities expressly permitted by the relevant exemption, unless they rely on circumvention programs produced unlawfully. The Office accordingly agrees that exemption beneficiaries should be able to make necessary tools solely for their own use in carrying out exempted circumventions. \*\*\* [T]here are strong reasons to conclude that Congress did not intend to apply the manufacturing bar to exemption beneficiaries from producing their own circumvention tools for personal use.” Policy Study at 53 - 55.

<sup>8</sup> *See, e.g.*, Copyright Office Roundtable discussion transcript, May 20, 2016, at 34 – 38 (Butler).

<sup>9</sup> 17 U.S.C. § 117(a). Alternatively (if the Register concludes that the vehicle software is only licensed) it is clearly a fair use of the software for which the consumer has already paid, and wishes to enjoy more conveniently on the “premises” of the vehicle. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

state, and local agencies to address any such circumstance – not the Librarian of Congress.<sup>10</sup> Moreover, as noted above, proper installation of the products as offered does not entail violation of applicable laws.

### **Conclusion**

eBay endorses the Register’s insight that (a) users who are entitled to exemptions often need specific expert assistance in order to enjoy the exemption, and (b) providing such assistance directly to a user, at the user’s specific request, may be one of the “uses” addressed by Section 1201(a)(1). Where such is the case, the expert assistance rendered does not infringe copyright and the supplier, in providing a replacement part or enhancement accessory that pertains to a single VIN number only, is not “trafficking” in infringing circumvention devices. Consumers’ need for such devices is in no way affected or displaced by the memorandum of understanding among certain auto manufacturers and repair entities. The Librarian should not be dissuaded from addressing this need out of concern that other federal, state, or local officials will not implement the laws that pertain to misuse of devices or vehicles.

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<sup>10</sup> *See, e.g.*, December Comments of Electronic Frontier Foundation at 13; U.S. Copyright Office Docket No. 2015-8 Section 1201 Study: Notice of Inquiry and Request for Public Comment, Comments of the Consumer Technology Association, March 3, 2016 at 6 - 7.