



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 12: Computer Programs — Repair**

#### **ITEM C. REPLY COMMENT**

Auto Care submits this brief reply to the opposition comments of the “Auto Innovators” (AI), and in support of the proposed exemption for circumvention of computer software in software-enabled products. Auto Care’s reply will focus on AI’s comments regarding circumvention of motorized land vehicles.

1. The Librarian should reject, on multiple grounds, AI’s argument that an exemption is unnecessary because parties to the Memorandum of Understanding can pay the manufacturers for access to repair tools. First, the Librarian has already rejected that argument when approving that exemption.

Second, the exemption applies to all members of the exempted class, not just to those who have signed the MOU. Anyone who wants to repair her own car – a quintessentially

noninfringing activity – has the right to circumvent without liability under Section 1201, and without any obligation to purchase the necessary tools from a specific vendor.

Third, AI does not have the right to insist that circumventions are exempt and repairs are non-infringing only where the circumvention and repair tools are purchased from the manufacturer. Class members have the right to develop their own tools, and whether the acquisition of tools from others violates Section 1201(b) is beyond the scope of the Librarian’s authority under Section 1201(a).<sup>1</sup>

Fourth, the MOU does not fully resolve the market’s need for access to tools. Repair facilities aggrieved by a manufacturer’s denial of circumvention and repair tools can invoke a dispute resolution process that will take more than a month to complete. In the interim, the consumer will have to go elsewhere (i.e., to the dealership) to get the repairs done timely. So the repair facility will have won an economically pyrrhic victory—the right to buy the tool without a customer to justify the purchase.

Notwithstanding the MOU, many manufacturers only offer these tools at prohibitively expensive prices, forcing car owners and independent shops to seek out tools sold by alternative vendors. Manufacturers also have made it increasingly difficult for third-party tools suppliers to do business by either impeding their ability to obtain the information needed to produce a compatible tool or increasing licensing fees to use that data. Failure to extend the exemption to third parties will continue to force consumers and independent shops to use manufacturers produced repair tools increasing the cost of repair to vehicle owners.

Ultimately, AI’s arguments demonstrate precisely why the exemption remains necessary. The exemption ensures that Section 1201 remains focused on the protection of copyrighted works, and is not abused to control parts and service markets. Yet, AI asserts that manufacturers can leverage the exemption into a new monopoly over the means to circumvent. If AI is correct, then the public has the right to circumvent only when they pay the manufacturers to do it. Heads or tails, the public loses. Neither monopoly should be permissible, and certainly not under the guise of Section 1201.

2. AI wrongly argues that third party assistance is outside the scope of the proceeding. The Librarian correctly interprets “persons who are *users* of a copyrighted work” in Section 1201(a)(1)(B) and (C) to include persons other than the owner or licensee. Accordingly, the express language of Section 1201 permits users to obtain third party assistance with circumvention.

3. While AI opposes third party assistance, as purportedly outside the scope of Section 1201, they ironically have no hesitation to use Section 1201 to enforce regulations having nothing to do with copyright. The manufacturers attempt to import into Section 1201 the

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<sup>1</sup> Notwithstanding, Auto Care would support a legislative provision authorizing the Register to also grant exemptions under Section 1201(b) as a necessary and appropriate adjunct to facilitate class members’ right to use the Section 1201(a) exemption. This would ensure that the Section 1201(a) exemption for circumvention services does not become either an empty promise, or an opportunity for manufacturers to monopolize both circumvention tools and repair parts.

panoply of environmental and safety regulations, as yet another iteration of their unfounded accusation that independent repair shops are somehow incapable of repairing vehicles as well as and better than dealerships.

Moreover, AI misinterprets the language of the exemption, and its turn of phrase (an “illegality” limitation) is, most charitably, a misnomer. The limiting language of the exemption applies where *circumvention* itself would violate other laws. It does not hinge upon the *purpose* or *result* of the circumvention, i.e., the repair or modification itself.

Section 1201 does not authorize the Copyright Office to enforce environmental or safety regulations. While Section 1201(a)(1)(C)(v) does permit the Copyright Office to consider other factors, that discretion cannot allow unbridled examination of subject areas beyond the Copyright Office’s knowledge and expertise. Rather, clause (v) must be interpreted, and limited, in light of the subjects of clauses (i)-(iv), all of which relate to the type of statutory and judicial public interest factors considered by courts when evaluating non-infringing uses. Environmental and safety regulations have no impact on the infringement inquiry, and should have no purchase under Section 1201.

Their cries of “illegality” amount to little more than sowing FUD<sup>2</sup>, and have no foundation in copyright law. The Librarian should thus reject manufacturers’ attempt to create, through Section 1201, additional threats of civil liability for possible violations of environmental or safety regulations, where the activity itself is non-infringing.

## **Conclusion**

Auto Care therefore urges the Librarian to reject the unfounded opposition arguments of the “Auto Innovators,” and to give its full consideration and support to the proposed exemption.

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<sup>2</sup> Fear, Uncertainty and Doubt, a tactic commonly employed by threatened incumbents to dissuade adoption of competitive products and services. *See* [https://en.wikipedia.org/wiki/Fear,\\_uncertainty,\\_and\\_doubt](https://en.wikipedia.org/wiki/Fear,_uncertainty,_and_doubt) (last visited March 9, 2021).