

Before the  
United States Copyright Office  
Library of Congress  
101 Independence Ave., S.E.  
Washington, D.C. 20559

***In the Matter of:***

Section 1201 Study,  
Request for Additional Comments

***Submitted by Sarah Bruno and Marc L.  
Fleischaker of Arent Fox, LLP, on behalf  
of:***

The Motor & Equipment Manufacturers  
Association (MEMA)  
1030 15<sup>th</sup> Street, NW  
Suite 500 East  
Washington, D.C. 20005

Docket No. 2015-8

**COMMENT ON SECTION 1201 STUDY BY THE U.S. COPYRIGHT OFFICE**

The Motor & Equipment Manufacturers Association (“MEMA”) submits the following comments in response to the United States Copyright Office’s Notice of Inquiry regarding its ongoing study of the anti-circumvention and anti-trafficking provisions of the Digital Millennium Copyright Act (“DMCA”), Section 1201 of Title 17 of the U.S. Code.

These comments address the following two topics raised by the Copyright Office: (i) the proposal for a new permanent exemption to the DMCA’s anti-circumvention provisions for computer programs that enable the operation of a machine or device; and (ii) whether third-party assistance falls outside the scope of the DMCA’s anti-trafficking provisions.

**I. Background**

MEMA is the trade association for motor vehicle and mobility suppliers and parts manufacturers and remanufacturers. Our members supply both the original equipment and

aftermarket segments of the light vehicle (car and truck) and commercial vehicle (on- and off-road) industries. Together, MEMA's members service, maintain and repair the more than 256 million vehicles on the road today. Suppliers are the largest employers of manufacturing jobs in the U.S., directly employing over 734,000 Americans with a total employment impact of 3.6 million jobs. MEMA represents vehicle suppliers through the following four divisions: Automotive Aftermarket Suppliers Association ("AASA"), Heavy Duty Manufacturers Association ("HDMA"), Motor & Equipment Remanufacturers Association ("MERA"), and Original Equipment Suppliers Association ("OESA").

Motor vehicle suppliers work closely with vehicle manufacturers to provide the cutting edge, innovative systems and components that consumers have come to expect. In order to meet regulatory requirements and consumer demand for safer, cleaner, and more connected vehicles, motor vehicle parts manufacturers and remanufacturers have increasingly taken on a significant role in the research, development, engineering, and manufacturing of the advanced technologies necessary to meet these ever-increasing goals. In fact, suppliers are responsible for two-thirds of the value of today's automobiles, and many vehicle technologies produced for new cars are manufactured by the same suppliers that make parts for the aftermarket. As vehicles continue to become more sophisticated, the number of sensors and software enabled devices will grow. As it stands, there are 60 to 100 sensors in the average vehicle today.

Most automotive aftermarket maintenance and repair work takes place in independent repair shops or at vehicle manufacturers' dealerships, with the latter often referred to as OE Service. There is also a significant "do-it-yourself" market, which comprises individuals who perform their own vehicle repair and maintenance. Since 1982, vehicles have been equipped with computers and electronics to control drivability and fuel efficiency, and aftermarket

manufacturers, remanufacturers and independent service repair outlets have demonstrated their ability to service and maintain these technologies. More and more, many vehicle components are connected and enabled by the software and programming that make them functional.

Remanufacturing is a growing segment of the aftermarket that utilizes standardized industrial processes by which previously worn or non-functional products are returned to the same-as-new, or better, condition and performance as the original components. Remanufacturing processes incorporate technical specifications (including engineering, quality and testing standards) to yield fully warranted products. Examples of remanufactured components in the motor vehicle parts industry include: electronic control units (black box and other electronic modules), brakes, steering and suspension components, engines, transmissions, alternators, starters, and turbochargers. Remanufacturing preserves the value of the original manufacturing – including energy costs and investments in capital and labor inputs – which recycling alone cannot do. As such, remanufactured parts are about thirty percent less expensive than comparable new parts.

In the U.S., the average age of light vehicles (passenger cars and pick-up trucks) is 11.5 years, and the owners of these vehicles often demand cost-effective solutions for their maintenance and repair needs. As such, the independent aftermarket (e.g. independent repair shops and local repair technicians) has about 70 percent of the service bay capacity to maintain and repair passenger vehicles. In contrast, new vehicle dealers only represent about 28 percent of the service bays. Therefore, consumers have come to rely on the independent aftermarket to provide both quality repair parts and related services.

## II. Comments

### (i) *Computer Program Exemption to the DMCA's Anti-Circumvention Provisions*

A new exemption, whether temporary or permanent, is not necessary in order for consumers to have their vehicles, including any software systems, lawfully serviced by independent technicians. Such automotive servicing is clearly a matter of fair use under Section 117. As such, consumers, independent automotive repair shops, and participants in the automotive aftermarket already have the right to circumvent technological protection measures (“TPM”s) for the purposes of diagnosis, maintenance, and repair of motor vehicles.

As Congress made clear when the DMCA was adopted, unlawful circumvention, as prohibited by Section 1201(a), occurs only “when a person *has not obtained authorized access* to a copy...of a work for which the copyright owner has put in place a technological measure that effectively controls access to his or her work.” H.R. Rep. 105-551, 18 (May 22, 1998) (emphasis added). In contrast, Section 1201(a) does not apply:

to the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under Title 17, *even if such actions involve circumvention of additional forms of technological protection measures*. In a fact situation where the access is authorized, the traditional defenses to copyright infringement, including fair use, would be fully applicable. So, an individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully. *Id.* (emphasis added).

As this statement makes clear, a consumer who has lawful access to copyrighted works, such as a car owner who owns or has a valid license to the computer software in his or her vehicle, has a right to inspect or service those works – or enlist a third party to do so on his or her behalf – even if doing so would require circumvention of certain TPMs.

There is sufficient legal precedent for the Copyright Office to assert, based on existing law, that circumvention of TPMs for the purpose of diagnosis, maintenance, and repair of a

motor vehicle system is protected by fair use. For example, in *Storage Technology Corp. v. Custom Hardware Engineering & Consulting, Inc.*, the U.S. Court of Appeals for the Federal Circuit recognized that an independent service company did not violate the DMCA’s anti-circumvention provisions when it circumvented a manufacturer’s encryption system on an automated data storage machine solely for the purposes of maintenance and repair. 421 F.3d 1307 (Fed. Cir. 2005); *see also Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1203-04 (Fed. Cir. 2004) (rejecting anti-circumvention claim when manufacturer failed to show that circumvention facilitated copyright infringement).

As the Copyright Office has noted, similar “safe harbors” have also been recognized under trademark and patent law. *See, e.g., Karl Storz Endoscopy-America, Inc. v. Fiber Tech Med., Inc.*, 4 F. App’x 128, 131-32 (4<sup>th</sup> Cir. 2001) (“[T]he Lanham Act does not apply in the narrow category of cases where a trademarked product is repaired, rebuilt or modified at the request of the product’s owner,” so long as “the owner is not, to the repairer’s knowledge, merely obtaining modifications or repairs for purposes of resale”); *Kendall Co. v. Progressive Med. Tech., Inc.*, 85 F.3d 1570, 1573-74 (Fed. Cir. 1996) (articulating “repair doctrine” under patent law and stating that, as a matter of law, sale of patented article grants implied license that includes right to repair).

Whether such computer code is even protectable by copyright is also a matter of dispute. Unlike the creative expressive works that copyright seeks to protect, the software at issue in the automotive aftermarket, in many cases, serves a purely functional purpose. This may explain why some manufacturers have had difficulty pleading copyright infringement when bringing DMCA anti-circumvention claims. *See, e.g., Ford Motor Co. v. Autel US Inc.*, No. 14-13760, 2016 WL 3569541, at \*3-4 (E.D. Mich. July 1, 2016) (dismissing Ford’s claim under 17 U.S.C.

§ 1201 when Ford failed to allege that computer code file was copyrighted). Thus, MEMA urges the Copyright Office to use its existing authority to clarify that fair use permits consumers, independent repair shops, manufacturers of replacement parts, and participants in the automotive aftermarket to circumvent TPMs for the purpose of diagnosis, maintenance, and repair.

If the Copyright Office believes it cannot act under its existing legal authority, MEMA believes that clarifications to the existing language of Section 1201 may be a preferable alternative to the adoption of a broad, permanent exemption to 1201(a). Such a clarification would go a long way toward reducing the potentially anti-competitive effects of Section 1201, while allowing copyright owners to maintain some control over access to their works. In contrast, a broad exemption, such as allowing anyone to circumvent TPMs “on behalf of” a car owner, could lead to strained statutory interpretations and potentially even a proliferation of anti-circumvention tools in the marketplace. A simple clarification of Section 1201 would merely reaffirm consumers’ existing rights under the principles of fair use and help ensure that only lawful copyright owners, or their agents, are permitted to circumvent TPMs.

Currently, Section 1201(c)(1) does state that the defense of fair use is not affected by the other provisions of Section 1201. Congress likely believed that this nod to fair use would help maintain a proper balance between copyright owners and consumers, but it has clearly not been sufficient to prevent Section 1201 from being used for anti-competitive purposes. The Copyright Office could restore this important balance by amending 1201(c)(1) to incorporate the statements Congress made upon enactment of the DMCA, namely that Section 1201 does not apply to “subsequent actions of a person once he or she has obtained authorized access to a work.”

Balancing the tension between copyright owners’ legitimate concerns about unauthorized use of their works, with the equally legitimate concerns about the potentially anti-competitive

effect of the DMCA’s anti-circumvention provisions should guide any further study or reconsideration of Section 1201. If the Copyright Office believes it cannot act under its existing authority, then adding clarifying language to Section 1201 regarding the role of fair use in anti-circumvention analysis would address many of the concerns raised by the Copyright Office and interested parties.

***(ii) Applicability of DMCA’s Anti-Trafficking Provisions to Third-Party Assistance***

As with the DMCA’s anti-circumvention provisions, MEMA believes that existing law provides a safe harbor for the diagnosis, maintenance, and repair of vehicle components, sensors, or modules using software, but that relatively minor clarifications of the DMCA’s anti-trafficking provisions could help alleviate the concerns of copyright owners and consumers. As noted above, whether TPMs may be lawfully circumvented depends on whether circumvention is done at the direction of a lawful possessor of the work. If the work is possessed lawfully, then fair use permits that user or his or her agent to circumvent the TPM. Similarly, if a service provider circumvents a TPM at the direction of the copyright owner, then that service provider does not “traffic” in anti-circumvention services within the meaning of Section 1201.

For a technology, product, service, device, component, or part thereof to be prohibited under subsection (a)(2) of Section 1201, one of three conditions must be met. It must: (1) be primarily designed or produced for the purpose of circumventing a technological measure that controls access to a protected work; (2) have only a limited commercially significant purpose or use other than to circumvent a technological measure; or (3) be marketed by the person who manufactures it, imports it, offers it to the public, provides it or otherwise traffics in it, or by another person acting in concert with that person with that person’s knowledge, for use in circumventing a technological measure that effectively controls access to a copyrighted work. 17

U.S.C. § 1201(a)(2). Under the statute, unlawful “circumvent[ion of] a technological measure” can only occur in the absence of authority from the work’s lawful possessor. § 1201(a)(3)(A). Thus, for example, an automotive technician or service provider who circumvents a TPM could not be liable for unlawful trafficking in an anti-circumvention service so long as he or she did so at the direction of the car owner who owned or had a valid license to the copyrighted work.

A proper assessment of the scope of the anti-trafficking provisions of Section 1201 must therefore begin with an assessment of whether the copyrighted work is lawfully in the possession of its owner. If a work is possessed lawfully and its possessor instructs a service provider to circumvent a TPM, there is no unlawful circumvention and the service provider is therefore not “trafficking” in anti-circumvention services.

The DMCA’s legislative history materials also make it clear that Congress’ primary concern in enacting Section 1201(a)(2) was with flagrant infringers, not with service providers operating legitimate businesses. For example, in House Report No. 105-551(II) Congress noted that “it is very important to emphasize” that Section 1201(a)(2)” is intended to outlaw products or services “*that are expressly intended to facilitate circumvention of technological protection measures for purposes of gaining access to a work. This provision is not aimed at products that are capable of commercially significant noninfringing uses...used by businesses and consumers for perfectly legitimate purposes.*” H.R. Rep. 105-551, 38 (July 22, 1998) (emphasis added). Although this passage refers to products rather than services, the scope of Congress’ concern is clear.

Accordingly, whether third-party assistance, such as automotive servicing, falls outside the scope of the anti-trafficking provisions depends on the status of the copyright possessor. If the possessor has the work lawfully, the third-party’s assistance is outside the scope of the anti-

trafficking provisions. If the possessor does not have the work lawfully, then the third-party's assistance could be deemed as falling within the scope of the provisions.

### **III. Conclusion**

MEMA appreciates the Copyright Office's important efforts to ensure that the DMCA's anti-circumvention provisions continue to reflect current realities in the marketplace. With its thousands of members in the automotive aftermarket industry, MEMA is acutely aware of the need to carefully balance the rights of copyright owners with those of consumers and independent businesses. With this in mind, MEMA respectfully urges the Copyright Office to clarify the importance of fair use in applying Section 1201. Doing so would alleviate concerns regarding the sometimes anti-competitive effects of Section 1201 while allowing copyright owners to maintain greater control over their works than a general exemption would allow for.

Dated: October 27, 2016

Respectfully submitted,

By   
\_\_\_\_\_  
Sarah Bruno  
Marc L. Fleischaker  
Dan Jasnow  
ARENT FOX LLP  
1717 K Street, N.W.  
Washington, D.C. 20006  
(202) 857-8967 (telephone)  
(202) 857-6395 (facsimile)  
*Attorneys for MEMA*