

Senator Tillis' Written Questions for Senate Judiciary Intellectual Property Subcommittee Hearing "Are Reforms to Section 1201 Needed and Warranted?," September 16, 2020

Questions for Aaron Lowe

1. The Copyright Office did not propose altering the basic framework of section 1201 but made numerous recommendations to improve it. Do you agree with the Copyright Office's conclusion that the basic structure of section 1201 has worked well and should be retained? What has been the greatest success of section 1201? What has been the biggest downside?

Response: *The structure of Section 1201 has benefited the performance and distribution of copyrighted expressive work. However, the intention by Congress to not tie circumvention liability to infringing conduct has created issues in the vehicle aftermarket, permitting manufacturers to protect their non-copyrighted software in order to maximize profits. Thus, the only way forward is for our industry to continue to push of exemptions every three years when such uses by the manufacturers should not be protected in the first place. Notwithstanding some of the success that have been realized through DMCA, the law needs to be clarified to ensure competition in the repair industry.*

2. Fair use is not a defense to an act of circumvention in violation of section 1201, but the statute has mechanisms for allowing certain acts of circumvention, including several permanent exemptions. Do you think the statute currently has the right permanent exemptions – both in terms of the categories and their scope? Would you like to see any new permanent exemptions?

Response: *As we stated in our testimony: "Through the use of technological protection measures (TPM), manufacturers have attempted to prevent access to software by independents for the purpose of the legal development of replacement parts and the ability to undertake repairs. In some cases, the allegedly protected "software" is uncopyrightable data, not a copyrightable program. In others, the anticompetitive motive is even clearer, by assuring that every module must be tied to the vehicle's VIN number, so that no replacement part would function unless it was OEM produced part."*

Auto Care believes that the law should be amended to ensure that Section 1201 does not preclude the manufacture or trafficking in a technology, product, service, device or component with respect to its use to circumvent a TPM for the purposes of enabling diagnosis, maintenance, repair or replacement or lawful modification of a product where the function is controlled by embedded software. Such a provision would be narrow enough to permit only repairs but would preclude other uses that would constitute infringement under Section 1201.

3. How has the triennial rulemaking conducted by the Copyright Office and adopted by the Librarian of Congress benefited the public? How would a more streamlined process help?

Response: *While we continue believe that there should be some clarification to the actual law, we do believe that the triennial rulemaking that has been conducted by the Copyright Office to be a benefit to the public. The exemptions that have been granted the repair industry have been helpful in clarifying the fact that consumers and third-party repairers are exempt from the TPM circumvention prohibition for the purposes of vehicle repair. However, as we pointed out in our testimony:*

The current system requires the Association and other groups to apply for an exemption every three years. It is unlikely that the circumstances behind an exemption has changed in the three years following the granting of exemption by the Copyright Office, and often there is no opposition to the exemption petition. Still, under the current scenario, the copyright office must undertake the full rulemaking process. This is a tremendous waste of time and resources with no benefit to any stakeholders in the process.

The Association strongly encourages that the exemption process be revised such that exemptions be permanent subject to review every three years if they are challenged. Absent any challenge, the exemption remains in place without any action needed by the Copyright Office. If there is a challenge, then the challenging party must submit data that indicates what circumstances have changed that would force the copyright office to withdraw or modify the exemption.

4. Section 1201 does not permit third-party assistance for circumvention, even where circumvention is allowed. What are your thoughts on when third-party assistance should be permitted?

Response: *The independent repair facilities and their technicians depend on the availability of tools that are essential to diagnose and repair late model computer-controlled vehicles. Given the number of software routines in each car, the complexity of the software, and the robustness of technological measures, a single consumer would find it daunting to circumvent and repair every possible module in a motor vehicle without assistance. Similarly, it is unrealistic to expect that every independent repair shop would be able to perform these tasks for literally hundreds of makes and models of motor vehicles over their useful life unless tools that have effective functionality for all makes and models are available. The current prohibition on circumventing TPM's for the purposes of providing tools for consumers and shops places an extreme burden on competition which threatens to only get worse as vehicles become more sophisticated. We believe that it is critical that Congress address this issue in any legislative revisions to DMCA.*

5. Your testimony talked about a repair right for auto owners. How do you recommend we account for the fact that business models may be based on selling products at a lower price – even a loss – because the seller is counting on the consumer coming to them when they have servicing needs? Should we treat subscription service models differently than non-subscription models?

Response: *When vehicles first hit the market for consumers, the manufacturers were uninterested in actually maintaining those vehicles, and ceded the market to an independent repair industry that sprung up to provide services for owners. This business model benefitted consumers by ensuring a very competitive repair industry, thus keeping car ownership affordable. However, since the late 80's as computers become more prevalent, car companies began to realize considerably less profit from the first sale of the vehicle and much more substantial margins in the sale of parts for the service of vehicles they manufacture. This change has resulted in the increased use of technology and marketing practices intended to capture the service business that is performed for the most part by independently owned repair shops. The independent auto care industry has fought back and the passage of a right to repair ballot measure in Massachusetts by an overwhelming 86-14 percent margin demonstrates the desire by car owners to maintain that competitive balance in the aftermarket.*

While right to repair has been useful to preserving competition, it has not and cannot address the technological protection measures that are utilized by manufacturers to reduce competition. Such action is required by Congress through revisions to DMCA that we have recommended in our testimony.

Senator Grassley's Written Questions for Senate Judiciary Intellectual Property Subcommittee Hearing "Are Reforms to Section 1201 Needed and Warranted?," September 16, 2020

Questions for Aaron Lowe

1. Section 1201's prohibition on circumvention has several permanent exemptions set out in the statute. How well have these worked over the past 22 years? Do you believe that there should be fewer or more exemptions to Section 1201? What are they?

Response: As described below, Auto Care believes that the current permanent exemptions do not fully encompass the needs of the automotive aftermarket. The intention of Congress to not tie circumvention liability to infringing conduct has created issues in the vehicle aftermarket, permitting manufacturers to protect their non-copyrighted software in order to maximize profits. There appears to be support from both the Copyright Office and many stakeholders for an exemption covering repair, including for motor vehicles, both light and heavy duty. Congress therefore should consider adopting a specific exemption ensuring that the addition of a technological protection measure does not prevent car owners or their third-party repair shops from accessing software necessary to obtain needed repairs to their vehicles.

2. Does Section 1201 permit third-party assistance for circumvention where circumvention is allowed? Is the rule clear? What are your thoughts on whether and when third-party assistance should be permitted?

Response: The independent repair facilities and their technicians depend on the availability of tools that are essential to diagnose and repair late model computer-controlled vehicles. Given the number of software routines in each car, the complexity of the software, and the robustness of technological measures, a single consumer would find it daunting to circumvent and repair every possible module in a motor vehicle without assistance. Similarly, it is unrealistic to expect that every independent repair shop would be able to perform these tasks for literally hundreds of makes and models of motor vehicles over their useful life unless tools that have effective functionality for all makes and models are available. The current prohibition on circumventing TPM's for the purposes of providing tools for consumers and shops places an extreme burden on competition which threatens to only get worse as vehicles become more sophisticated. We believe that it is critical that Congress address this issue in any legislative revisions to DMCA.

3. In 2018, the Copyright Office streamlined the Section 1201 triennial rulemaking process. In your opinion, did the changes improve the process? Do you believe that other changes/improvements are still needed? Is legislation necessary?

Response: Yes, the 2018 actions by the Copyright Office definitely improved the process for obtaining exemptions. However, Congress should consider revising the rules to permit exemptions that are granted to be permanent unless challenged successfully during the triennial

process. The current system requires the Association and other groups to apply for an exemption every three years. It is unlikely that the circumstances behind an exemption has changed in the three years following the granting of exemption by the Copyright Office, and often there is no opposition to the exemption petition. Still, under the current scenario, the copyright office must undertake the full rulemaking process. This is a tremendous waste of time and resources with no benefit to any stakeholders in the process.

4. Do you believe that stakeholders are able to easily participate in the Section 1201 proceedings? How has the Copyright Office ensured that users and their positions are adequately represented at the proceedings? In what ways can the process be made less burdensome for rulemaking participants?

Response: *As stated above, the current exemption process is a burden especially on small organization that do not have the resources to pursue the exemption process every three years. The best way to make the process easier is to reduce the burden on participants to defend exemptions every three years.*

5. What is your understanding of how Section 1201 specifically handles TPM circumvention for repairs of vehicles, farm equipment, machinery, and other products? Do you think that it is adequate? In your opinion, should the way Section 1201 exemptions handle repairs be modified? If you believe Section 1201 exemptions should be modified with respect to the ability to repair products, how would you like to see them modified?

Response: *While Section 1201 was intended to protect expressive work, we have seen manufacturers attempt to use it to prevent access to software on motor vehicles and tractors. Through the use of technological protection measures (TPM), manufacturers have attempted prevent access to software by independents for the purpose of the legal development of replacement parts and the ability to undertake repairs. In some cases, the allegedly protected “software” is uncopyrightable data, not a copyrightable program. In others, the anticompetitive motive is even clearer, by assuring that every module must be tied to the vehicle’s VIN number, so that no replacement part would function unless it was OEM produced part.*

Section 1201 should explicitly permit the circumvention of software for legal repair of a vehicle. Specifically, the law should be amended to ensure that Section 1201 does not preclude the manufacture or trafficking in a technology, product, service, device or component with respect to its use to circumvent a TPM for the purposes of enabling diagnosis, maintenance, repair or replacement or lawful modification of a product where the function is controlled by embedded software. Such a provision would be narrow enough to permit only repairs but would preclude other uses that would constitute infringement under Section 1201.

**United States Senate Judiciary
Subcommittee on Intellectual Property**

“Are Reforms to Section 1201 Needed and Warranted?”

**Questions for the Record for Aaron Lowe
Regulatory and Government Affairs, Auto Care Association
Submitted by Senator Richard Blumenthal
October 7, 2020**

1. In creating Section 1201’s anti-circumvention measures, Congress recognized the need for exemptions. For example, Congress codified permanent exemptions to allow reverse engineering for the purposes of achieving interoperability of computer programs, and to allow for encryption research. Congress also acknowledged that the need for exemptions may evolve, and tasked the Library of Congress with granting temporary exemptions in accordance with the triennial rulemaking process proscribed in the statute.

- a. Has the triennial rulemaking process proven to be an effective mechanism for dealing with the new and developing impacts Section 1201 is having on consumers, particularly as it relates to the expansion of the Internet of Things?

Response: *The process has been effective in the sense that exemptions have been approved for the repair industry such that the need to circumvent TPM’s is permitted for purposes of legal repair and a further exemption was granted for third parties that provide repairs with authorization of the owner. However, those exemptions have been fairly specific and do not address the issues created by vehicle manufacturers use of TPMs in order to reduce competition in the repair industry. Further, the current process has not been able to address the need for third parties that provide tools or other assistance to repair shops, technicians and owners that need to circumvent TPM’s for lawful repair.*

- b. Is the rulemaking process accessible to those who have a need for an exemption? What hurdles might the current process pose to particular parties seeking an exemption, including consumers seeking to repair or otherwise legitimately use a product?

Response: *The problem with the current exemption process is that if an exemption is provided, then the party needs to apply for it again in three years. This is very burdensome on many organizations who might not have the resources to continuously pursue exemptions. As I stated in my testimony, one way to reduce the burden on many organizations, as well as the Copyright Office, is to make the exemptions granted during the process permanent unless there is a challenge after three years. The legislation*

should further require that group challenging the rules also demonstrate that there has been a change to the current situation surrounding the exemption; and that change justifies a reexamination of the exemption.

2. Once a company integrates copyrightable computer code into a product, Section 1201 can dramatically limit a consumer's ability to use it. Although the Copyright Office has granted exemptions to remedy the right to repair, many consumers remain unable to repair or otherwise edit products for purposes of fair use.

- a. Has Section 1201's limitations on the use of consumer products expanded beyond the scope of what Congress intended the law to protect when it was enacted?

Response: *Yes, while Section 1201 was intended to protect expressive work, we have seen manufacturers attempt to use the circumvention prohibition in order to prevent access to software on motor vehicles and tractors that is needed to perform legal repair. Specifically, through the use of technological protection measures (TPM), manufacturers have attempted to prevent access to software by independents for the purpose of the legal development of replacement parts and the ability to undertake repairs. In some cases, the allegedly protected "software" is uncopyrightable data, not a copyrightable program. In others, the anticompetitive motive is even clearer, by assuring that every module must be tied to the vehicle's VIN number, so that no replacement part would function unless it was OEM produced part.*

- b. What policy solutions might more appropriately balance interests in consumers' right to repair (or otherwise legitimately use a product that they have purchased) and the need to prevent copyright infringement? Would requiring a nexus between copyright infringement and liability under Section 1201 be a solution, and why or why not?

Response: *Tying circumvention to copyright infringement would help address the right of repair. Manufacturers have applied technological protection measures and sued or threatened suit under Section 1201 where the "protected" matter is non-copyrightable data or a business model. In those cases, the nexus to copyright infringement would provide a complete defense to the repair facility. But, because the defense likely involves issues of fact, the repair facility might need to spend many tens of thousands of dollars on discovery, summary judgment, or even trial and appeal. In the interim, the facility may either be subject to an injunction or may voluntarily stop providing repair*

services. The threat of having to fight two causes of action, with potential statutory damages liability for circumvention (up to \$2500 per repair) and infringement (up to \$150,000 per work), will cause many repair businesses to settle rather than fight or not offer these services at all.

- c. Is the solution to this problem simple enough to be remedied by a clear “fair use” exception to Section 1201? What downsides might come from this approach? If you oppose such an exception, how should fair use be addressed instead?

Response: *Section 1201 should explicitly permit the circumvention of software for legal repair of a vehicle. Specifically, the law should be amended to ensure that Section 1201 does not preclude the manufacture or trafficking in a technology, product, service, device or component with respect to its use to circumvent a TPM for the purposes of enabling diagnosis, maintenance, repair or replacement or lawful modification of a product where the function is controlled by embedded software. Such a provision would be narrow enough to permit only repairs but would preclude other uses that would constitute infringement under Section 1201.*